

To be Argued by:
LISA T. SOFFERIN, ATTY.
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STATE OF NEW YORK
Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

— 0 —

KENNETH GORDON, JOHN MANLEY, MICHAEL EATON,
MATTHEW BLACKWELL, SHAUN BABCOCK, RICHARD STOTZ,
THOMAS CARLSEN, ROBERT HAMMOND, WILLIAM STORTZ,
LEE STROCK, DAVID GEORGE, JOHN CONKLIN, DAVID YOUNG,
AS TRUSTEES OF THE TRUSTEES OF PRESBYTERIAN SOCIETY OF
CAYUGA CREEK d/b/a LANCASTER PRESBYTERIAN CHURCH and
THE TRUSTEES OF THE PRESBYTERIAN
SOCIETY OF CAYUGA CREEK,

Plaintiffs-Appellants,

vs.

THE PRESBYTERY OF WESTERN NEW YORK
and PRESBYTERIAN CHURCH (U.S.A), a Corporation,
Defendants-Respondents.

Erie County Index No.: I 2008-006996.

BRIEF FOR PLAINTIFFS-APPELLANTS

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I.
PRELIMINARY STATEMENT

This Appeal presents to this Court two primary issues: whether a Presbyterian Church incorporated prior to 1828 may become bound by the Trust Clause of the Constitution of the Presbyterian Church (U.S.A.) by any means other than strict compliance with Religious Corporations Law §24 which requires either reincorporation after 1828 or the passage and filing of a resolution specifically agreeing to be bound, and, if so, what language and circumstances may constitute an agreement, express or implied, to be bound by the Trust Clause of Constitution.

II.
QUESTIONS PRESENTED

Question: Did the court below err, as a matter of law, when it declared that Appellants hold their property in trust for Respondents pursuant to an express trust?

Answer: Yes, the court below erred.

Question: Did the court below err, as a matter of law, when it declared that Appellants hold their property in trust for Respondents pursuant to an implied trust?

Answer: Yes, the court below erred.

III.
PROCEDURAL HISTORY

Plaintiffs/Appellants Kenneth Gordon, John Manley, Michael Eaton, Matthew Blackwell, Shaun Babcock, Richard Stotz, Thomas Carlsen, Robert Hammond, William Stortz, Lee Strock, David George, John Conklin, David Young, As Trustees of the Trustees of the Presbyterian Society of Cayuga Creek d/b/a Lancaster Presbyterian Church and The Trustees of the Presbyterian Society of Cayuga Creek (hereinafter collectively "LPC") commenced this action on June 16, 2008 seeking a declaration that LPC holds title to all of its real and personal property free from any trust, estate or other interest of Defendants/Respondents Presbyterian Church U.S.A. ("PCUSA") or The

Presbytery of Western New York, which is the local representative for PCUSA in Western New York (“the Presbytery”) (R.69). Upon the application of the LPC, the court below granted a Temporary Restraining Order on June 17, 2008 pending disposition of an Order to Show Cause pursuant to which LPC sought an injunction against Respondents’ interference with LPC’s right to exclusive ownership and control of its real and personal property (R.27). The Restraining Order was extended upon the stipulation of the parties, following which all parties served Motions for Summary Judgment seeking a declaration as to whether the LPC held its property in trust in favor of the PCUSA (R.20, 31, 33, 37, 251, 329).

After the Motions were argued and submitted on August 14, 2008, the Court of Appeals issued its Decision in Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 870 N.Y.S.2d 814 (2008) (“Harnish”) following which this Court issued its Decision in First Presbyterian Church of Oakfield v. Presbytery of Genesee Valley, 56A.D.3d 1188, 866 N.Y.S.2d 900 (4th Dept. 2008), *leave to appeal denied*, 59 A.D. 3d 1108, 873 N.Y.S. 2d (2009), *motion to Court of Appeals for leave to appeal pending* (“Oakfield”) (R. 9-10). The court below heard further argument on the Motions on December 4, 2008, announcing its prepared decision on the record on that same date (R.7). The court below, by the Honorable John M. Curran, determined that under Harnish, a trust existed in LPC’s property in favor of the PCUSA, thereby denying the Motion of LPC and granting the Motions of the PCUSA and Presbytery (R. 7).

In its Oral Decision, as reflected in the December 4, 2008 Transcript, the court below determined that the Religious Corporations Law was a neutral or non-dispositive factor, that the date of Lancaster’s incorporation was irrelevant, that certain text in a “Lancaster Affirmation” and a 2005 Church Information Form prepared by LPC collectively expressed the intent of LPC to create an express trust in favor of the PCUSA, and, further, that the failure of LPC to affirmatively object to

the PCUSA trust clause evidenced LPC's intention to form an implied trust in the LPC property in favor of the PCUSA (R. -10). These findings and determinations are contrary to the holding of the Court of Appeals in First Presbyterian Church of Schenectady v. United Presbyterian Church of the United States, 62 N.Y.2d 110, 476 N.Y.S.2d 86 (1984) ("Schenectady"), not mandated by the Decision of the Court of Appeals in Harnish or this Court's Decision in Oakfield, and are otherwise unsupported by the Record.

The Order granting and denying the respective Motions was signed on December 18, 2008 and entered in the Erie County Clerk's Office on January 8, 2009 (R. 4). A timely Notice of Appeal was filed by LPC on February 3, 2009 (R. 2).

IV. FACTS

LPC was incorporated as a Presbyterian church by a Certificate of Incorporation dated December 29, 1821, and filed in 1822, pursuant to "an ACT to provide for the Incorporation of Religious Societies", passed by the New York State Legislature on or about April 5, 1813 (R. 111, 191, 200). Although LPC was incorporated under the name "The Trustees of the Presbyterian Society of Cayuga Creek" it assumed the name "Lancaster Presbyterian Church" by filing an assumed name certificate pursuant to Business Law §130 on February 12, 2003 (R. 89, 192, 203). LPC has never reincorporated (R.191, 248).

LPC acquired the real property in issue in this action during the course of several real estate transactions, dating back to as early as 1832 (R. 192-196). The deeds give LPC full and unencumbered title to the real property parcels (R. 91-109, 208-09). The deeds lack any reference to PCUSA or the Presbytery, and fail to grant any interest to either (R. 91-109). The deeds lack any express trust clause which confers a trust to either the PCUSA or Presbytery (R. 91-109). LPC executed mortgages on the real property in 1998 and 2002 in the collective sum of \$880,000.00 (R.

195-96, 210-236). The mortgage agreements do not grant any rights in favor of Respondents (R. 210-236.) With the exception of granting the mortgagees security interests in the real property, LPC has not conveyed any estate, trust or other interest in the real property to any person or entity (R. 136).

LPC also owns a certain amount of personal property assets (R. 196-97, 237). These assets include, but are not limited to, bank accounts and investments held by or in the name of the LPC (R. 196-97, 237). LPC has not conveyed any estate, trust or other interest in the personal property to Respondents (R. 197). None of the personal property at issue herein is held in the name of Respondents or otherwise recognizes Respondents as having any interest (R. 197).

On or about 1981, PCUSA unilaterally adopted the following provision as Section G8.0201 of the PCUSA Constitution (referred to herein as the "Trust Clause"):

"All property held by or for a particular church, presbytery, a synod, the General Assembly or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)(R. 32).

LPC never signed a document by which it expressly accepted or agreed to be bound by the Trust Clause (R.128). It did issue a document in 1998 styled the "Lancaster Affirmation" (R. 271, 279-83). The stated purpose of the Lancaster Affirmation was to object to the direction of the National Church, and to state what LPC "believe[d] to be at stake in the Church" (R. 279). As is relevant to this Appeal, the Lancaster Affirmation includes the following two sentences:

"We, the undersigned, do declare and affirm our loyalty and love for our denomination as it is constituted in the Book of Confessions and Book of Order. We receive and adopt its tenets and historical principles of church government . . ." (R. 280-283)

At all times, and more particularly during the period of 1981 to June 15, 2008, the LPC was a participating member church of the PCUSA. It is undisputed that LPC participated in proceedings of the PCUSA, sought out the consent of the Presbytery for the mortgage commitments on the real property as mandated by Religious Corporations Law §12(5a), filed annual church reports, accepted money from the Presbytery, installed its officers in accordance with the PCUSA Constitution and utilized the PCUSA's policies and procedures to call a new pastor to lead its congregation (R. 272-75.) In connection with the LPC's search for a new pastor in 2005, the LPC completed a Church Information Form for the PCUSA which included information on the size of the congregation and demographics of its community. This Form also contains the same two sentences contained in the Lancaster Affirmation, cited above (R. 285-286).

LPC was affiliated with the PCUSA until June 15, 2008, when, by a majority vote at a duly called meeting of the congregation, the LPC disaffiliated from the PCUSA (R. 238-40, 245). The vote in favor of disaffiliation was unanimous (R. 240).

V.

**LPC ESTABLISHED THAT ITS PROPERTY IS NOT SUBJECT
TO AN EXPRESS TRUST IN FAVOR OF THE PCUSA**

The starting point of any religious property dispute in New York is the seminal Schenectady case. In Schenectady, the Court of Appeals recited the factors a court must look at to determine whether a trust in real property exists in favor of a larger governing body. The Court of Appeals stated that "the focus is on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." Schenectady, 62 N.Y.2d 110 at 122, 476 N.Y.S.2d at 93. In sum, the courts are to look to: 1) the deeds; 2) the terms of incorporation of the local church; 3) state statutes and 4) the constitution of the National Church.

These factors were recently re-confirmed by the Court of Appeals in Harnish. Each of these issues are separately analyzed below.

A. The Deeds

The deeds to the real property at issue in this litigation do not contain any language which would give Respondents any interest in LPC's property. The plain language of the deeds indicates that LPC holds title free and clear of any interest of Respondents.

B. Articles of Incorporation

The Articles of Incorporation filed by LPC in 1822 fail to recognize any right of Respondents in LPC's property. Further, the subsequent Certificate of Assumed Name filed pursuant to General Business Law § 130 does not recognize the authority or property rights of Respondents. However, the inquiry does not end here. Although the court below held that the date of incorporation of LPC was irrelevant, as will be discussed in Section C., below, the date of LPC's incorporation, 1822, and the failure of LPC to reincorporate, is of primary significance to the analysis.

C. Statutes

While the inquiry in other church property cases focuses on the constitution of the National Church, the focus in this case is on the statutes, and more specifically, Religious Corporation Law §24 and 69.3 which govern the holding of church property by a Presbyterian Church. Religious Corporations Law §24 provides that provisions of the RCL do not apply to **any** church incorporated under any general or special law **prior to January 1, 1828** "if such provision is *inconsistent with or in derogation of* any of the rights and privileges of such corporation *as they existed under the law* by or pursuant to which such corporation was formed." (emphasis added). RCL Section 69.3, which deals specifically with Presbyterian churches, states that, "the trustees of an incorporated church to which this article is applicable shall have the custody and control of all the temporalities and

property belonging to the corporation and of the revenues from such property and shall administer the same in accordance with the constitution of the Presbyterian Church (U.S.A.) . . .” To see that Section 69.3 is inconsistent with and/or in derogation of the rights of LPC, this Court need only look to Schenectady which also addressed a church incorporated prior to 1828. In holding that Section 69.3 of the RCL did not apply to the local church because it was inconsistent with the law in 1803, the Schenectady court cited to First Presbyterian Church of Buffalo, 106 N.Y. 251, 12 N.E. 626 (1887). In First Presbyterian Church of Buffalo, the Court of Appeals dealt with the change in the RCL after the legislature passed the Acts of 1875 and 1876. For the first time, those Acts imposed a requirement that the transfer of property of the local church be in accordance with the rules of the denomination, and also required approval of any land transfer by the presbytery itself. With regard to the changes in law resulting from the Acts of 1875 and 1876, the Court stated:

“Before those amendments were made, it had been settled that a religious corporation held its temporalities **wholly free from the domination of any ecclesiastical authority, and by a tenure so independent that it could change its creed and denominational character without losing its hold upon its property**. Doubtless, the acts 1875 and 1876 were intended to restrain in some degree that sort of diversion of church property from one sect to another, for the provision is that the trustees shall hold and administer it according to the rules and usages of the denomination to which the church members of the corporation belong, and shall not divert it to the support of some other disconnected institution.” Id. at 254, 12 N.E. at 627 (emphasis added)

Thus, Schenectady established that the duty on the trustees of the local church to administer property in accordance with the “laws of the denomination” did not arise until after the Acts of 1875 and 1876. *See also, Application of Presbytery of Albany*, 63 Misc.2d 791, 312 N.Y.S.2d 505 (3rd Dept. 1970) (“[i]t has been the law of this State since 1875 that the temporalities of a religious corporation should be administered in accordance with the rules and usages of the denomination to which the church members of the corporation belong”).

Religious Corporation Law §24 makes clear that in order for RCL§69.3 to apply to a pre-1828 church, the local church must take very specific steps to express its intention to be bound to statutes and church rules that could effectively result in a conveyance of the local church property to the PCUSA . Specifically, §24 provides that such church shall **only** be subject to the PCUSA Constitution if the local church “**shall**, by resolution, determine that the provisions of this chapter [including §69.3]. . . **shall** apply”; the resolution “**shall** be submitted . . .” and ratified . . . and published” and the trustees “**shall** cause a certificate setting forth a copy of such resolution . . .to be filed” (emphasis added). The Legislature provided for very specific acts of the pre-1828 local church in order to ensure that it was a knowing and purposeful conveyance of property rights by the local church to the National Church. The language of this statute “leaves no room for the suggestion that it is directive; it is clearly mandatory.” Radimak v Nassar, 119 A.D.2d 978, 500 N.Y.S.2d 991 (4th Dept. 1986).

The Schenectady Court found that RCL §69.3 would work a trust in favor of the National Church even before the Trust Clause was incorporated into the PCUSA Constitution but for §24 of the RCL. At 62 N.Y. 2d, on pages 122-123, the Court of Appeals in Schenectady recited that:

“ . . . State law provides that property disputes involving the Presbyterian Church are controlled by subdivision 3 of §69 of the Religious Corporation Law. It requires that trustees of the local church govern the property in accordance with the constitution of the UPUSA (citations omitted). However, these provisions of the Religious Corporations Law are not applicable to churches incorporated prior to 1828 if the statute is inconsistent with the law as it existed at the time of incorporation, unless the church reincorporates after 1828 or the trustees determine by resolution that the provisions of the Religious Corporation Law shall apply (Religious Corporations Law, §24). The exception governs this case inasmuch as the law in 1803, the date of incorporation, is inconsistent with section 69 (see *Matter of First Presbyt. Soc.*, 106 N.Y. 251, 254), there was no reincorporation by plaintiff church subsequent to 1828 and the trustees never resolved to make the statute applicable. “Indeed, the fact that the plaintiff church, acting through its trustees, chose not to bring itself within the scope of section 69, relying instead upon prior law giving it undisputed ownership, is evidence that ownership rests with plaintiffs”. (Emphasis added.)

At 62 N.Y.2d, page 125, the Schenectady Court went on to state that “[T]he trustees of First Church failed to pass a resolution bringing the church within the statutory trust provision of Section 69 of the New York State Religious Corporation Law . . .” Thus, the Schenectady Court found that RCL§69 was “a statutory trust provision” but that it was negated by §24 because of the failure of the local church to pass the appropriate resolution. The Schnectady Court further found that these facts evidenced that the local church intended not to create a trust in favor of the National Church.

Based upon the foregoing, the current version of RCL§69, is in conflict with the RCL as it existed in 1822 when LPC was incorporated. Pursuant to RCL §24 and the abovementioned case law, the current RCL not only does not apply to LPC but it is presumed by statute that absent the statutorily mandated acts, LPC does not hold its property in trust and did not intend to be bound by the Trust Clause.

It is therefore asserted by LPC that the conclusion of the court below, at page 6 of the Oral Decision, that the RCL is a “neutral factor” and that the date of incorporation is a non-factor, are irreconcilable with, and contrary to, the plain language of the statute and the holding in Schenectady. This misapprehension of the law by the court below was not simply harmless. Because the court below determined that the statutes were irrelevant to the inquiry, the court below found an express trust under the Trust Clause despite the fact that §24 excludes a pre-1828 church from the reach of the Trust Clause. The Trust Clause adopted in 1981 is a portion of the PCUSA Constitution which is less favorable than when LPC incorporated in 1822. The lack of intent found by the Schenectady Court based on the failure of the local church to follow the specific procedures within Section 24 distinguishes this case from Harnish, in a most material way.

D. The PCUSA Constitution

In an effort to avoid the prohibitions of Religious Corporation Law §24, Respondents asserted below that Religious Corporation Law §69.3 is just one, and not the only, way to seize LPC's property. Respondents argued below that, notwithstanding the exemption provided by §24, a trust in favor of the PCUSA can still be found under the Trust Clause because the LPC manifested its intent to adopt the Trust Clause by reason of the "Lancaster Affirmation" and the 2005 Church Information Form as well as participation by the LPC in routine and customary activities of the Presbytery and PCUSA. The court below agreed and declared that the RCL § 24 was irrelevant to this analysis and that the property of the LPC was held for the benefit of the PCUSA under an express trust.

The PCUSA Constitution is comprised of, *inter alia*, the Book of Order (R. 258). The Trust Clause was unilaterally added by the PCUSA to the Book of Order in 1981. In Jones v. Wolf, 443 U.S. 595, 99S. Ct.3020 (1979) the Supreme Court suggested that the inclusion of a trust clause in a religious organization constitution might assist in the resolution of property disputes; however, it in no way suggested that the unilateral adoption of a trust clause by a National Church, standing alone, could ever work to deprive a local church of its property. Indeed, the Supreme Court stated that the trust clause must be in a "legally cognizable form." It was in response to Jones v. Wolf that the PCUSA incorporated the Trust Clause into its Constitution. Harnish is the first expression by the New York Court of Appeals as to what constitutes a manifestation of intent to be bound by a trust clause adopted by a National Church. Harnish decided that a the National Church "may" impose an express trust upon the property of a local church when the local church "expressly agrees" to be bound by a trust clause written into the National Church constitution.

In Harnish, an express trust was found based on three facts: 1) the existence of a written instrument by which the church agreed to be bound by the Trust Clause; 2) incorporation of the church under the Religious Corporations Law; and 3) the failure of the local church to object to the trust clause. The written instrument which was deemed sufficient in Harnish is best understood by reference to the Record on Appeal in Harnish, portions of which are attached to this Brief in the Appendix and more specifically, pages 173-5 of the Harnish Record which is part of the Affidavit of Rev. Jack McKelvey, Bishop of the Episcopal Diocese of Rochester and pages 218, 229-30, 281 and 313 are relevant pages of the Affidavit of Stephen T. Lane of the Diocese and specific pages of Exhibits to his Affidavit. Judicial notice is respectfully requested. See, Persing v Coughlin, 214 A.D.2d 145, 149, 632 N.Y.S.2d 366, 368 (4th Dept. 1995) (wherein this Court took judicial notice of documents in the appendix to appellant's brief noting "an appellate court may, in its discretion, take judicial notice for the first time on appeal of a fact which was not brought to the attention of the trial court, and may do so even for purposes of reversing the judgment"); Cooper v. Morin, 91 Misc.2d 302, 313, 398 N.Y.S.2d 36, 49 (N.Y. Sup. 1977) ("Judicial notice may be taken by any court at any stage of the litigation, even on appeal."), *judgment aff'd and modified* at 64 A.D.2d 130, 499 N.Y.S.2d (4th Dept. 1978), *modified on other grounds* at 49 N.Y.2d 69, 424 N.Y.S.2d 168 (1979).

Beginning with Paragraph 7 of the Affidavit of Rev. McKelvey on page 174 of the Harnish Record, he recites the requirement that the parish must agree to abide by and conform to the constitution, canons and canonical and legal enactments of the Diocese as a condition precedent for admission of a parish to the Diocese. On pages 218 and 229-30 of the Harnish Record, the Stephen T. Lane Affirmation similarly recites the requirement for admission as a parish, *i.e.*, the agreement to abide by and conform with the Constitution, etc. That requirement is Canon 10, §1(d) at Harnish Record page 281. That Canon specifically relates to the application to become a parish and

subdivision (d) indicates that the application shall be accompanied by a copy of a resolution adopted by the vestry of the parish. The resolution of the local Episcopal church which accompanied the application for admission is at page 313 of the Harnish Record. This written instrument, signed by the local church in Harnish and completed at the time the Church applied to the regional Diocese in 1947 to be recognized as a parish, states that the church agrees “to abide by and conform to the Constitution and Canons in force . . . and to conform to all the canonical and legal enactments thereof. (Emphasis added.)”.

Although the factual distinctions between Harnish and this case are apparent from the Opinion in Harnish without reference to the precise pages of the Record on Appeal in Harnish, and are well known to this Court by reason of its own decision in Harnish, it is nevertheless respectfully requested that this Court take judicial notice of the Record in Harnish in order to fully appreciate the differences between the quality of the proof which was before the Court of Appeals (and this Court) in Harnish which resulted in a finding of an express trust and the absence of competent proof which was before the court below in this case.

The resolution of the local church in Harnish was crystal clear that the parish agreed to be bound by all of the Constitution and the enactments of the Diocese, both those currently on the books and those to be adopted in the future, without any exceptions at all. That resolution stands by itself. It is not part of another document prepared by the local church for any other purpose. It was specifically prepared as a recitation of adoption of the Constitution, etc. and was a *sine qua non* to admission as a parish. It was expressed by the local church in a manner for which there could be but one intent - that is to be bound by the Constitution, Canons, and legal enactments, current and in the future. In contrast, adoption of the PCUSA Constitution was never a condition of LPC’s continued membership in the PCUSA. There was no requirement by the PCUSA that LPC adopt the resolution

required by RCL §24 and it did not. Indeed, RCL §24 makes clear that adopting the resolution is in the sole discretion of the pre-1828 local church. Under the rule of Schnectady, the failure of LPC to adopt a resolution or reincorporate as required by RCL § 24 establishes the intent of LPC not to be bound by the Trust Clause or to create a trust in favor of the PCUSA.

Since there is no agreement between the LPC and Respondents similar to the Harnish resolution, Respondents relied upon a document styled the “Lancaster Affirmation” appended to an August 1, 1998 letter from the LPC to the Presbytery as proof of LPC’s manifestation of intent to be bound by the Trust Clause (R. 271, 278-283). At page 7-8 of the December 4, 2008 Transcript of Oral Decision (R. 13-14) the court below found sufficient manifestation of assent by reason of the following two sentences contained within the Lancaster Affirmation:

“We, the undersigned, do declare and affirm our loyalty and love for our denomination as it is constituted in the Book of Confessions and Book of Order. We receive and adopt its tenets and historical principles of church government.”

Reliance on the Lancaster Affirmation fails for two reasons. First, the July 1998 cover letter to the Lancaster Affirmation, as well as the Affirmation itself, each make clear the Lancaster Affirmation is a religious document relating to ecclesiastical and spiritual matters (R. 279-83). The expressed and sole purpose of the Lancaster Affirmation is to make public the objections of the LPC to departures of the PCUSA and the Presbytery from historical and traditional beliefs of the Presbyterian Church (R. 279-83). Such statements simply cannot be translated into a written agreement to be bound by the Trust Clause adopted by PCUSA. This document should not be subject to any secular interpretation or application at all.

Second, even if this Court extracts a secular meaning from the Lancaster Affirmation, this document falls far short of an agreement to be bound by the Trust Clause. To “affirm our loyalty and love for [the Presbyterian] denomination” is nothing more than expressing a commitment to the faith

which the Schenectady Court made clear, at page 125 of the Opinion, was an insufficient basis upon which to find the requisite manifestation of intent to create a trust. In Schenectady, like here, the PCUSA predecessor in-interest argued for a trust upon the property of the local church based upon: the local church complying with the Constitution, the local church acknowledging it was under the guidance and control of the presbytery; the local church endorsing the National Church government and discipline; the local church agreeing it was an integral part of the National Church, and the local church having never claimed to be anything but fully Presbyterian. (See relevant portions of the Record on Appeal in Schnectady at R.344-345). Notwithstanding these facts, the Schenectady Court rejected the efforts of the PCUSA predecessor- in-interest to impose a trust because being and acting like a member of the National Presbyterian Church is not enough to result in a trust on local church property.

The next sentence of the cited text from the Lancaster Affirmation recites LPC's adoption of two specific categories: "tenets" and "historical principles of church government". To adopt the tenets and historical principles of church government is not akin to an expression of intent to be bound by the totality of the Book of Order, or Trust Clause specifically, so as to deprive LPC of its property and otherwise does not overcome the effect of the presumed lack of intent under RCL Section 24, as recognized by Schenectady. Tenets, by definition, are doctrines of belief which, of course, have absolutely nothing to do with property rights. The reference to "historic principles of church government" is a reference to a very specific portion of the Book of Order, paragraph at G-1.0400 (R. 263). That paragraph, by its terms, has no relevance to property issues. That section shows no intent by LPC to adopt or affirm the entirety of the Book of Order or the Trust Clause contained therein. To accept this phrase as a manifestation of intent would be contrary to In re First Presbyterian Church of Buffalo, 106 N.Y. 251, 12 N.E. 626 (1887) setting forth the historic

principles of church government as they relate to property ownership by the Presbyterian Church and holding that prior to statutory amendments in 1875:

“it had been settled that a religious corporation held its temporalities wholly free from the denomination of any ecclesiastical authority and by a tenure so independent that it could change its creed and denominational character without losing its hold upon its property.” 106 N.Y. at 254.

The meaning of the phrase “historic principles of church government” is ambiguous, at best. As such, the second sentence, like the first sentence, of the cited text in the Lancaster Affirmation does not evidence any intent of LPC to be bound by the Trust Clause. Therefore, even if this Court determines that there is a secular meaning to the Lancaster Affirmation (which the LPC rejects), Respondents failed to come forward with any evidence that the word “tenets” includes property matters or what the phrase “historic principles of church government” means. Nor did Respondents come forward with any evidence that LPC intended to adopt the Trust Clause when it included these two sentences in the Lancaster Affirmation.

While the Harnish resolution had as its sole purpose the acceptance as a parish into the Episcopal Church, the Lancaster Affirmation was a voluntary writing objecting to doctrinal issues and, in a few words within the document, recites words expressing LPC’s commitment to the Presbyterian faith. The nature and quality of the proof submitted by Respondents in this case is far less compelling than Harnish and insufficient to result in a loss of LPC’s property. As such, even if this Court did not reverse the Order and enter judgment in favor of LPC, at the very least it should reverse the Order and remand on the ground of issues of fact.

The second document relied upon by the court below to find an express trust is the 2005 Church Information Form submitted by LPC in connection with its search for a new pastor which sets forth information on the congregation, demographics of the community and contains the same two sentences cited above (R. 284-289). For the same reasons discussed above, the two purportedly

“relevant” sentences in the Form do not satisfy the requirements for establishing an intent to create a trust.

The Lancaster Affirmation and the 2005 Church Information Form are the sole documents upon which the court below denied LPC’s Motion and granted Respondents’ Motions. Neither of these documents evidence the intent required to create a trust. If the PCUSA sought to have the LPC convey property rights to the PCUSA, the PCUSA should have secured the signature of the LPC in a “legally cognizable form” satisfying §24 of the RCL.

The second fact upon which the Harnish Court relied to find an express trust was the incorporation of the local church in 1927 under the Religious Corporations Law (“RCL”). The Court of Appeals made specific reference to RCL§ 42-a applicable only to Episcopal churches which expressly recognizes a “trust in which all real and personal property is held for the Protestant Episcopal Church . . .” However, pursuant to RCL §24, before Section 69.3 can be applicable to a Presbyterian church which incorporated prior to 1828 (as is the LPC), the local church must undertake very deliberate steps to express its intention to be bound to statutes and church rules that could result in a conveyance of the local church property to the PCUSA. Thus, Harnish cannot apply to a Presbyterian church where the governing statute dictates conditions precedent to the applicability of a trust clause (in this case a statute which had no relevance to the church in Harnish and therefore was not considered by the Court of Appeals).

The third fact which the Harnish Court determined, by implication, supported the finding of an express trust, was the failure of the local church to protest the applicability of the trust clause or attempt to remove itself from the reach of the Dennis Canons for over 20 years. In an effort to find a parallel in this case, the court below held that the failure of the LPC to affirmatively object to the Trust Clause was a supporting factor. However, there was no reason for the LPC to object to the

Trust Clause or try to remove itself from the reach of the Trust Clause. Long before the Trust Clause existed, RCL§24 exempted the LPC from the reach of the Constitution of the PCUSA insofar as it concerns property rights. The silence of the LPC is overcome in this case by RCL §24. There is simply no requirement on the part of a pre-1828 Presbyterian church to protest because the statutes provide the only means of acceptance of a trust clause. **The rejection is self-executing under the statutes.** Furthermore, Respondents never came forward with any facts that LPC's silence was inconsistent with any affirmative act of Respondents relative to the creation of a trust, such as words spoken to LPC or notices sent to LPC specifically advising the LPC of the applicability of the Trust Clause to LPC's property for which an affirmative response by the LPC would be required.

Based on the foregoing, the court below erred when it declared an express trust under the authority of Harnish. It is the position of LPC that Harnish compels the contrary result.

Neither is this Court's Decision in Oakfield dispositive. In Oakfield, this Court affirmed the decision of the court below for the reasons stated by Justice Noonan. The Decision of Justice Noonan is found in the Record at page 181. Justice Noonan held that the incorporation of the local church after 1828 coupled with the active participation of the Oakfield church in the process of adopting the Trust Clause along with the failure of the Oakfield church to opt out of the Trust Clause during an available 8-year period affirmatively evidenced the intent of the local church to be bound by the Trust Clause, distinguishing the Oakfield church from the local church in Schenectady. In the instant case, the Trust Clause was unilaterally adopted by the PCUSA. There was no active participation by the LPC in the process of adopting the Trust Clause and LPC did not need to opt out of the Trust Clause by reason of RCL §24 which statutorily exempts the LPC as a pre-1828 church from the reach of the Trust Clause.

In affirming the Decision of Justice Noonan by reference to Harnish, this Court implicitly recognized the distinctions which Justice Noonan articulated between Schenectady, on the one hand, and the Oakfield church on the other, *i.e.*, that a pre-1828 church which has not jumped through the hoops required by RCL §24, which has not engaged in conduct akin to affirmatively adopting the trust clause (as opposed to adopting or reaffirming other portions of the Constitution which are spiritual and ecclesiastical in nature) and which has done nothing more than act as a participating member church of the National Church is not subject to an express or implied trust on its property. By affirming the Decision of Justice Noonan, this Court recognized that more than simply being and acting like a Presbyterian church is required to impose trust upon church property. Thus, this instant case is distinguishable from both Harnish and Oakfield.

It should also be noted that the Court of Appeals in Harnish, and this Court in Oakfield, did not need to address the implications of encumbrances on the local church real property in analyzing the intent of the local church. This is a further distinguishing factor between the Harnish and Oakfield and this case. Nothing in Harnish or Oakfield suggest that in analyzing the intent of the local church the trial court is to ignore the fact that the local church encumbered its real property with mortgages in excess of \$800,000 or that the disaffiliated local church may be burdened with the mortgage debt if a trust in its property is recognized in favor of the National Church. These facts are essential to the determination as to whether the conduct of the local church evidences its intent to be bound by a Trust Clause. The conduct of the LPC in encumbering its property with mortgages which it is obligated to satisfy from its assets, whether they be personal property or real property assets, is wholly inconsistent with an intent to create a trust in favor of another in those very same assets. So, too, is it inconsistent to find a trust in the same property which is subject to security interest which allows the mortgagee to foreclose upon when title is transferred to the PCUSA

pursuant to the Order of the court below and/or when LPC is unable to service the mortgage debt because it has been stripped of its assets in accordance with such Order.

For all of the foregoing reasons, it was error for the court below to conclude that the LPC holds its property pursuant to an express trust in favor of the PCUSA.

VI.
LPC ESTABLISHED THAT ITS PROPERTY IS NOT SUBJECT
TO AN IMPLIED TRUST IN FAVOR OF THE PCUSA

Because the court below found the statutes irrelevant the court below concluded that the failure of LPC to affirmatively object to the PCUSA Trust Clause evidenced the intent of LPC to hold its property for the PCUSA pursuant to an implied trust. (See Transcript at 9-10, R. 15-16). As previously discussed herein, since the absence of compliance with Section 24 establishes a lack of intent to create a trust under the rule of Schenectady, and there was no other notice to LPC that the Trust Clause was applicable to its property, an implied trust in this case cannot be based upon the failure of LPC to object to the Trust Clause, as a matter of law.

Nor do any of the other factors, either collectively or independently, provide support for an implied trust. The Court of Appeals made clear, on page 10 of its Decision in Harnish, that it decided the case solely on the issue of whether there was an express trust in favor of the National Episcopal Church, stating: “We need not consider the existence of an implied trust.” Thus, the Harnish case does not affect the law applicable to implied trusts as announced by the Court of Appeals nearly 25 years ago in Schenectady. Like the PCUSA predecessor-in-interest in Schenectady, the Respondents herein seek to impress a trust by relying on acts of the LPC by which it avowed its support of the PCUSA, followed the basic historical tenets of the Presbyterian Church and operated as a Presbyterian Church. The Schenectady Court rejected the efforts of the PCUSA predecessor in-interest to impose an implied trust based on the acts of the local church. The Court

determined that the structure and polity of the Presbyterian church could not support the imposition of an implied trust. The Schenectady Court rejected the efforts of the PCUSA predecessor- interest to impose an implied trust because there was no evidence that the local church intended to create a trust (as is the case here), the local church had no notice that the National Church intended to impose a trust upon its property (as is the case here because the property is subject to a statutory exemption and there was no showing by Respondents that the PCUSA gave notice to LPC that it intended to impose the Trust Clause on LPC's property) and the local church failed to pass a resolution to bring the local church within the trust provision (just as a resolution and additional statutory mandates of §24 are wholly lacking here). This Court should conclude, as the Court of Appeals did in Schenectady, that being and acting like a Presbyterian church is not enough to bring about a trust. To hold otherwise would also run afoul of New York statutory and common law applicable to the creation of trusts and conveyances of property, including the statute of frauds.

The statute of frauds, General Obligations Law §5-703 subd. 1, precludes the finding of an implied trust in favor of the PCUSA. That section requires that any "interest in real property . . . or trust or power, over or concerning real property . . . cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person [to be charged]. There is no deed or conveyance subscribed by the LPC. There is no trust by operation of law, as is made clear by §24. While it is the position of the LPC that RCL §24 precludes any recognition of a trust at all, Respondents attempt to get around the clear mandate of §24 and the statute of frauds by seeking to impose a trust "by act" based on certain acts of the LPC. However, as set forth above the acts which the Respondents rely upon, are nothing more than acts carried out as part of LPC's membership in the PCUSA. They are not acts which create a trust in

favor of the PCUSA. As such, the court below erred in declaring that the property of the LPC was subject to an implied trust.

VII.
RESPONDENTS FAILED TO CARRY THEIR BURDEN
FOR SUMMARY JUDGMENT IN THEIR FAVOR

LPC asserts that under any interpretation and application of the facts, there is no proof of a manifestation of LPC's intent to hold its property in trust thus warranting a reversal of the Order and granting summary judgment in favor of the LPC. However, to the extent this Court affirms that portion of the Order denying summary judgment in LPC's favor, this Court should nevertheless also reverse that portion of the Order which grants summary judgment in favor of Respondents because Respondents never established below that the dispositive pieces of evidence on which summary judgment was granted Respondents, i.e., the Lancaster Affirmation or Church Information Form, are only susceptible of one meaning and can only be construed as an expression of assent by LPC to be bound by the Trust Clause.

On Respondents' own Motions for Summary Judgment, they had the initial burden of proof to establish entitlement to summary judgment in their favor, by establishing the requisite intent of LPC to be bound by the Trust Clause. Respondents did not meet their burden. Rak v. County Fair, Inc., 38 A.D.3d 1240, 1242, 831 N.Y.S.2d 794, 795 (4th Dept. 2007). Where the proponent of summary judgment fails to tender sufficient evidence to "eliminate any material issues of fact from the case" such failure "requires the denial of the motion **regardless of the sufficiency of the opposing papers**". Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317-18 (1985) (emphasis added). On their Motions, the Respondents failed to come forward with any evidence that the phrase "to declare and affirm our loyalty and love for our

denomination . . .” as included in the Lancaster Affirmation and 2005 Church Information Form was intended as an expression by LPC of assent to the Trust Clause.

On their own Motions, the Respondents failed to come forward with any evidence that the phrase “adopt the tenets and historical principles of church government” as included in the Lancaster Affirmation and Church Information Form were intended as expressions of assent by LPC to be bound by the Trust Clause and that such phrase is not susceptible of any other meaning. While the term “tenets” is defined as “doctrines of belief” and therefore such phrase weighs in favor of LPC as having no relevance to a manifestation of intent at all, to the extent this Court determines that such phrase could be construed as secular and relevant, that phrase is susceptible of more than one meaning and cannot be construed, as a matter of law, as an objective manifestation of assent to the Trust Clause. Similarly, Respondents failed to come forward with any evidence that by LPC affirming the “historic principles of church government” LPC intended that phrase to mean it assented to the Trust Clause. This phrase, which is taken directly from the Book Of Order and which has nothing to do with property rights in the Book of Order, cannot be construed as an objective manifestation of assent by LPC to the Trust Clause, in light of the historic principles of church government as they relate to property rights, as explained by the Court of Appeals in In re First Presbyterian Church of Buffalo, 106 N.Y. 251, 12 N.E. 626 (1887). In such case, the Court of Appeals specifically recognized that historically a local Presbyterian church held its property free and clear of any claim by the National Presbyterian Church. As such, the phrase is susceptible of more than one meaning, including a meaning favorable to LPC, that being that it holds its property free and clear of any claim of the PCUSA in accordance with historic principles.

Where a claim turns on the meaning of a writing, it is the burden of the moving party to establish that the meaning which the moving party ascribes to the document is the only meaning that

flows from the words used. Stone Travel Agency, Inc. v. Lambrou, 176 A.D.2d 1170, 1171, 575 N.Y.S.2d 609, 611 (3rd Dept. 1991). Where a writing is susceptible of more than one meaning, the meaning of the writing is not suitable for summary judgment. Jellinick v Joseph J. Naples & Assoc., 296 A.D. 75, 77, 744 N.Y.S.2d 610, 613-14 (4th Dept. 2002) (genuine issues of material fact as to the intent of the parties expressed in writing precluded grant of summary judgment).

Having failed to come forward with any proof that the text of the Lancaster Affirmation or the Church Information Form which contains the same language have any relevance at all to the intent of LPC to be bound by the Trust Clause, all that remains in the Record to support Respondents own Motions is: a) conduct of LPC wherein LPC acted like a Presbyterian Church; and b) the failure of LPC to affirmatively object to the Trust Clause.

As previously stated, the conduct of LPC in being and acting like a Presbyterian Church is fully addressed by Schenectady, wherein the Court of Appeals made it clear that such conduct is insufficient to establish that the local church agreed to hold its property in trust for the National Church. The failure of LPC to affirmatively object to the Trust Clause is justified by RCL sections 24 and 69.3, along with Schenectady, which collectively make the Trust Clause inapplicable to LPC as a pre-1828 church which has not reincorporated or adopted the trust clause by a “resolution” and filed. Even assuming, *arguendo*, the conduct of LPC in acting like a Presbyterian Church coupled with the failure of LPC to affirmatively object to the Trust Clause have some arguable evidentiary relevance, even the Harnish court recognized that more is required. There must be a writing in “legally cognizable form”. That writing is either completely lacking in this case thus warranting summary judgment in favor of LPC or the writing, i.e., the Lancaster Affirmation and Church Information Form are ambiguous at best as to their meaning and cannot support summary judgment in favor of Respondents.

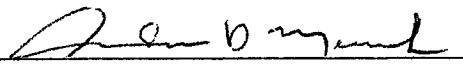
There is simply nothing in Harnish which even remotely suggests that Respondents' burden on summary judgment to establish the requisite intent of LPC should be relaxed. Neither does Harnish stand for the proposition that the issue of LPC's intent is necessarily a matter for summary disposition. As in all summary judgment motions, it is the burden of the moving party to eliminate all triable issues of material fact. As in all summary judgment motions, disputed facts are to be viewed in a light most favorable to the opposing party. Therefore, even assuming this Court affirms that part of the Order which denies summary judgment in favor of LPC, this Court should nevertheless conclude that summary judgment should have been denied Respondents as a result of their failure of proof on the material issue of LPC's intent to be bound by the Trust Clause.

VIII CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court vacate the Order of the court below and grant summary judgment in favor of LPC. Alternatively, it is respectfully requested that this Court vacate the Order of the court below and deny the Motions of all parties on the ground that material questions of fact exist as to whether LPC intended to create a trust in its real and personal property in favor of the PCUSA.

DATED: April 20, 2009

BROWN & KELLY, LLP

By: 
Andrew D. Merrick, Esq.
Lisa T. Sofferin, Atty.
Attorneys for Plaintiffs/Appellants
Lancaster Presbyterian Church, *et al.*
1500 Liberty Building
Buffalo, New York 14202
(716) 854-2620

APPENDIX A

Monroe County Clerk's Index No. 2006-2669

Court of Appeals
of the
State of New York

The Episcopal Diocese of Rochester, and The Rt. Reverend Jack M. McKelvey,
the 7th Bishop of the Diocese of Rochester,

Plaintiffs-Respondents,

– against –

The Rev. David Harnish, former Rector of All Saints Protestant Episcopal Church; Horace (Bud) Roberts and Frances Miller, former Wardens of All Saints Protestant Episcopal Church, Al Bagdonas, Nancy Fox, Sue Hemphill, Tim Kearney, Hilda McLeod, Jason O'Neil, and Gerald Quenell, former vestrymen of All Saints Protestant Episcopal Church, and All Saints Protestant Episcopal Church, Inc.,

Defendants-Appellants.

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MAR 17 2008

Docket No. CA 06-03056
(Action No. 1)

NEW YORK STATE
COURT OF APPEALS

(Caption continued on reverse.)

RECORD ON APPEAL

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HARTER SECREST & EMERY LLP
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All Saints Anglican Church, formerly known as
All Saints Protestant Episcopal Church,

Petitioner,

– against –

Episcopal Diocese of Rochester, and the Rt. Reverend Jack M. McKelvey
in his capacity as the Bishop of the Diocese of Rochester

Respondents.

Docket No. CA 06-03055
(Action No. 2)

AFFIDAVIT OF THE RT. REV. JACK M. MCKELVEY VERIFIED MAY 17, 2006 IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE CPLR ARTICLE 78 PETITION OF ALL SAINTS ANGLICAN CHURCH, FORMERLY ALL SAINTS[173-183]

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THE EPISCOPAL DIOCESE OF ROCHESTER AND THE RT.
REV. JACK M. MCKELVEY, THE 7TH BISHOP OF THE
EPISCOPAL DIOCESE OF ROCHESTER

INDEX No. 2006-2669

PLAINTIFFS,

-AGAINST-

THE REV. DAVID HARNISH, FORMER RECTOR OF ALL SAINTS PROTESTANT EPISCOPAL CHURCH; HORACE (BUD) ROBERTS AND FRANCES MILLER, FORMER WARDENS OF ALL SAINTS PROTESTANT EPISCOPAL CHURCH, AL BAGDONAS, NANCY FOX, SUE HEMPHILL, TIM KEARNEY, HILDA MCLEOD, JASON O'NEIL, AND GERALD QUENELL, FORMER MEMBERS OF THE VESTRY OF ALL SAINTS PROTESTANT EPISCOPAL CHURCH, AND ALL SAINTS PROTESTANT EPISCOPAL CHURCH, INC.

**AFFIDAVIT OF RT.
REVEREND JACK M.
MCKELVEY
IN SUPPORT OF SUMMARY
JUDGMENT AND IN
OPPOSITION TO ARTICLE 78
PETITION**

DEFENDANTS,

ALL SAINTS ANGLICAN CHURCH, FORMERLY KNOWN AS ALL SAINTS PROTESTANT EPISCOPAL CHURCH,

PETITIONER,

-AGAINST-

EPISCOPAL DIOCESE OF ROCHESTER, AND RT.
REVEREND JACK M. MCKELVEY IN HIS CAPACITY AS
THE BISHOP OF THE DIOCESE OF ROCHESTER,

INDEX No. 2006-003235

RESPONDENTS,

State of New York)
County of Monroe) ss.:

The Rt. Reverend Jack M. McKelvey, being duly sworn, deposes and says:

1. I am the 7th Bishop of the Episcopal Diocese of Rochester, and make this affidavit based upon my personal knowledge of the facts set forth herein, or my knowledge derived from the books and records of the Episcopal Diocese of Rochester.

2. I submit this affidavit in support of the motion for summary judgment brought by plaintiffs The Episcopal Diocese of Rochester et al. in the plenary action commenced on March 6, 2006. This affidavit also supports the answer of respondents Episcopal Diocese of Rochester et al. in seeking dismissal of a related Article 78 proceeding subsequently commenced by All Saints Anglican Church.

**THE RELATIONSHIP BETWEEN THE EPISCOPAL DIOCESE
AND ALL SAINTS PROTESTANT EPISCOPAL CHURCH**

3. All Saints Protestant Episcopal Church was incorporated under the Religious Corporations Law on November 3, 1927. A copy of the "Certificate of Incorporation of All Saints Protestant Episcopal Church pursuant to Article III of the Religious Corporations Law" is annexed to the Verified Answer of defendants Harnish, et al. at Exhibit A.

4. The congregation of All Saints Protestant Episcopal Church was originally organized as an Episcopal Mission in union with the Episcopal Diocese of Western New York, headquartered in Buffalo.

5. The Episcopal Diocese of Rochester was incorporated under the New York Religious Corporations Law on November 15, 1931, succeeding to the Episcopal Diocese of Western New York in the geographic area between Lake Ontario on the north and the Pennsylvania border on the south, and roughly between Seneca Lake on the east and the Genesee River on the west..

6. In 1947, the Mission known as All Saints Protestant Episcopal Church sought to become an Episcopal parish within the Diocese of Rochester, by applying for acceptance as a parish in spiritual union of the Episcopal Diocese of Rochester.

7. A fundamental requirement for admission of any parish to the Episcopal Diocese of Rochester was then, and remains today, that such parish "agrees to abide by and conform to the

Constitution and Canons in force in the Episcopal Diocese of Rochester and to conform to all the canonical and legal enactments thereof." This requirement is set forth in Rochester Canon 10.1(d); formerly 1947 Rochester Canon 2.1.4, copies of which are annexed to the Lane Affidavit as Exhibits M and N. Similarly, conformity to the Constitution and Canons of the Episcopal Church in the United States of America is required by such parish.

8. All Saints Protestant Episcopal Church complied with this Canon by Resolution adopted at a regular meeting of its Rector, Wardens and Vestrymen on March 17, 1947, obligating the new parish "to abide by and conform" to the Diocesan Constitution, all Diocesan Canons and all its canonical and legal enactments. A copy of this Resolution appears as Exhibit O to the Lane Affidavit.

9. Based upon All Saints Protestant Episcopal Church's compliance with Diocesan rules and this commitment, the Bishop of the Episcopal Diocese of Rochester supported the petition of All Saints for admission as a parish into union with the Episcopal Diocese, certifying that All Saints had relinquished the grant previously made by the Diocese toward the minister's stipend, had accepted an annual apportionment of \$600 to be paid to the Diocese, and had otherwise complied with the requirements of the Canons. In April 1947, the Diocese and Convention of the Episcopal Diocese of Rochester and its Bishop accepted All Saints Protestant Episcopal Church as an Episcopal parish in union with the Diocese.

10. As such, All Saints Protestant Episcopal Church became one of more than 50 parishes in the Rochester Diocese.

11. Both the Episcopal Diocese and the parish known as All Saints Protestant Episcopal Church were always subject to the Constitution and Canons of the Episcopal Church in the

**AFFIDAVIT OF THE REV. CANON STEPHEN T. LANE VERIFIED MAY 17, 2006 IN
SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO THE CPLR ARTICLE 78 PETITION OF ALL SAINTS [218-231]**

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THE EPISCOPAL DIOCESE OF ROCHESTER AND THE RT.
REV. JACK M. MCKELVEY, THE 7TH BISHOP OF THE
EPISCOPAL DIOCESE OF ROCHESTER

PLAINTIFFS,

INDEX NO. 2006-2669

-AGAINST-

THE REV. DAVID HARNISH, FORMER RECTOR OF ALL
SAINTS PROTESTANT EPISCOPAL CHURCH; HORACE
(BUD) ROBERTS AND FRANCES MILLER, FORMER WAR-
DENS OF ALL SAINTS PROTESTANT EPISCOPAL
CHURCH, AL BAGDONAS, NANCY FOX, SUE HEMPHILL,
TIM KEARNEY, HILDA MCLEOD, JASON O'NEIL, AND
GERALD QUENELL, FORMER MEMBERS OF THE VESTRY
OF ALL SAINTS PROTESTANT EPISCOPAL CHURCH, AND
ALL SAINTS PROTESTANT EPISCOPAL CHURCH, INC.

AFFIDAVIT OF
REV. CANON STEPHEN T. LANE
IN SUPPORT OF SUMMARY
JUDGMENT AND IN OPPOSITION
TO ARTICLE 78 PETITION

DEFENDANTS,

ALL SAINTS ANGLICAN CHURCH, FORMERLY KNOWN
AS ALL SAINTS PROTESTANT EPISCOPAL CHURCH,

PETITIONER,

-AGAINST-

EPISCOPAL DIOCESE OF ROCHESTER, AND RT. REVER-
END JACK M. MCKELVEY IN HIS CAPACITY AS THE
BISHOP OF THE DIOCESE OF ROCHESTER,

INDEX NO. 2006-003235

RESPONDENTS,

State of New York)
County of Monroe) SS:

The Rev. Canon Stephen T. Lane, being duly sworn, deposes and states:

- I am an individual residing at 147 Yarmouth Road, Rochester, New York 14607. I make this Affidavit based upon my own knowledge, and upon my review of documents and records from the archives of the Episcopal Diocese of Rochester which are annexed hereto.

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the purpose of this quitclaim deed may have been to deal with the provision in the original deed of conveyance which instructed the parties receiving title "to reconvey the said premises to the proper Episcopal authorities entitled by Law to accept the same." This provision might have been read as requiring that title be placed in the Episcopal Diocese, which would have been inconsistent with common practice. A copy of the quitclaim deed is annexed hereto as Exhibit M.

32. The second lot, lot 81, was bequeathed, along with other personal property, by the Last Will and Testament of Walter S. Colt, dated March 30, 1927, to "All Saints Protestant Episcopal Mission or Church or its incorporated successor, to whom I give and bequeath the same after my brother's death. This fund so bequeather (*sic*) shall constitute a permanent fund to be known as the Sarah A. Colt Memorial fund for the used (*sic*) and benefit of said All Saints Protestant Episcopal Mission or Church or its incorporated successor, the principal to be by its (*sic*) properly invested and the income applied to the used (*sic*) of said Church." A copy of the pertinent portion of the Last Will and Testament of Walter S. Colt is annexed hereto as Exhibit N.

33. While All Saints Protestant Episcopal Church was originally organized as a mission, in 1947 it sought to become an Episcopal parish in union with the diocese in which it was then located, the Episcopal Diocese of Rochester. It was and remains a requirement of such admission that the parish "agrees to abide by and conform to the Constitution and Canons in force within this Diocese, and to all the canonical and legal enactments thereof." Rochester Canon 10.1(d); formerly 1947 Rochester Canon 2.1.4. Copies of Rochester Canon 10 and 1947 Rochester Canon 2 are annexed hereto as Exhibits E and O.

34. All Saints Protestant Episcopal Church complied with this Canon by Resolution adopted at a regular meeting of its Rector, Wardens and Vestrymen on March 17, 1947:

All Saints Protestant Episcopal Church agrees to abide by and conform to the constitution and Canons in force in the Episcopal Diocese of Rochester and to conform to all the canonical and legal enactments thereof.

A copy of this Resolution is annexed hereto as Exhibit P.

35. By letter dated April 1, 1947 to the Diocesan Convention, the Rt. Rev. Bartel H. Reinheimer, then Bishop of the Episcopal Diocese of Rochester, supported the petition of All Saints Protestant Episcopal Church for admission as a parish into union with the Episcopal Diocese, certifying that All Saints Protestant Episcopal Church had been duly incorporated as a protestant Episcopal mission, that it had relinquished the grant made by the Episcopal Diocese towards the minister's stipend, that it accepted its obligation to pay an annual apportionment of \$600.00, and that it had been "duly and satisfactorily established in compliance with the requirements of the Canons." A copy of this letter dated April 1, 1947 is annexed hereto as Exhibit Q.

36. Accordingly, in April, 1947, by vote of the Diocesan Convention of the Episcopal Diocese of Rochester and order of the Bishop, All Saints Protestant Episcopal Church was accepted as a parish in union with the Episcopal Diocese of Rochester.

37. On November 19, 2005, the Diocesan Convention of the Episcopal Diocese of Rochester rendered an ecclesiastical determination, approving Resolution I, which dissolved All Saints Protestant Episcopal Church, Town of Irondequoit, as a parish of the Episcopal Diocese. That Resolution provided, in pertinent part, that the Convention:

declare that the parish known as All Saints' Protestant Episcopal Church, Rochester, NY, Town of Irondequoit, is extinct, its vestry dissolved, and its real property and tangible and intangible assets transferred to the Trustees of the Episcopal Diocese of Rochester.

38. By a second resolution, Resolution J, the Convention requested the Bishop and Diocesan Council to establish a Ministry Study Committee to review the possibilities for the estab-

lishment of an Episcopal mission congregation in Irondequoit or other appropriate community of the Episcopal Diocese, thereby seeking to ensure the pastoral care of remaining members of the Protestant Episcopal community in Irondequoit.

39. These actions by the Convention were legislative in nature. As the Diocesan Convention has sole power to create a new parish within its boundaries, it likewise has an implicit power to dissolve a parish within its boundaries. When it became clear to the Diocesan Convention that All Saints parish would no longer support the mission and work of the Rochester Diocese, as required to maintain that union, the Diocesan Convention dissolved the union and hence, dissolved the parish.

40. With respect to the dissolution of a parish, the Diocesan Convention is the highest authority within the Church, as this is a legislative act with no right of appeal. Thus, as an ecclesiastical matter, the parish of All Saints Protestant Episcopal Church no longer exists as a parish in communion with the Diocese of Rochester and the national Church.

Stephen T. Lane

Stephen T. Lane

Sworn to before me this
17th day of May, 2006

Dorothy J. Connelly

Notary Public
DOROTHY J. CONNELLY
Notary Public, State of New York
Qualified in Livingston County
Commission Expires February 2, 2007

