VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	**Case Nos.:** CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5363,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

THE EPISCOPAL CHURCH'S AND THE DIOCESE'S RESPONSIVE BRIEF REGARDING TWO+ ACRES PARCEL

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I. *Ex Parte* orders do not convey title to church property.

The Falls Church's ("TFC's") argument, that *ex parte* church property orders can convey title, contradicts clear statutory and case law. *See, e.g.*, Va. Code § 55-2; *Allen v. Paul*, 65 Va. 332 (1874) (discussed in our Opening Brief at 20). The dearth of legal support for its position is apparent: there are only three statutory citations and one case citation in Section I of its Brief.

TFC's claim (at 4) that an 1842 statute (Ex. A) conferred legal title upon the appointment of church trustees is meritless. First, it ignores controlling law on the effect of trustee appointment and other *ex parte* church property orders. *Allen v. Paul*, 65 Va. 332 (1874), held that such orders do not establish ownership of church property. *Id.* at 343-44 (order appointing church trustees "does not vest in them the legal title to the property in controversy 'for the time being,' or for a single instant"). The fact that there are multiple *ex parte* orders is irrelevant, as is their age. A claim of ownership founded on them is a legal nullity.

Second, the 1842 Act shows the need for precisely what TFC lacks. For § 3 (which TFC cites for the proposition that title "shall thereupon become exclusively vested" in the appointed trustees) to apply, there had to be a conveyance to the trustees. *See* 1842 Va. Acts ch. 102, § 3 (Ex. A) ("And be it further enacted, That *where such conveyance or devise has heretofore been made to a trustee or trustees*, or where such conveyance or devise shall hereafter be made ..."). It is undisputed that there is no conveyance or devise to TFC's trustees. TFC's argument that the statute obviates the need for such a conveyance fails on the statute's own terms.

Third, the first order appointing TFC trustees is from 1851 (*see* TFC Ex. 62), and by that time the law had changed. Chapter 77, § 9 of the 1849 Va. Code (Ex. B) provided:

> The circuit court ... may on application of the proper authorities of such congregation ... appoint trustees either where there were or are none, or in place of former trustees, and change those so appointed, whenever it may seem to the

> court proper, *to effect or promote the purpose of the conveyance, devise or dedication*; and the legal title to such land shall *for that purpose* be vested in the said trustees for the time being and their successors. [emphases added]

This, not the 1842 act, was operative when TFC trustees were first appointed in 1851. Applicable law thus provided that legal title was only vested in church trustees to effect or promote the purpose of the actual deed. There is no evidence that transferring the property from Christ Church, Alexandria (the entity that was the legal successor, according to historical fact and law) to TFC would have done that. Moreover, the 1849 Code provision is clearly a precursor to the Virginia Supreme Court cases on the effect of trustee appointment orders, given that the statute provides that such orders vest legal title only in accordance with the actual, governing document of conveyance. Again, TFC's attempt to avoid the Deed fails.

Fourth, the 1849 Code also contained the precursor to what is now Va. Code § 55-2. *See* Va. Code ch. 116, § 1 (1849) (Ex. B) ("No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will ..."). Therefore, for the entire period for which TFC relies on *ex parte* orders for its claim of title, Virginia law has always required conveyances to be by deed or will, not by *ex parte* order.

II. There is no binding admission that TFC's trustees own the Property.

TFC wrongly suggests that the Court may find that we have conceded that TFC's trustees own the Property through a memorandum of *lis pendens* and excerpts of pleadings and discovery.

TFC's ignorance of Virginia law is displayed by its reference to a memorandum of *lis pendens* as an "action" and a "suit" that "the Diocese brought." TFC Brief at 2, 11. A memorandum of *lis pendens* does not commence a civil action, Rule 3:2(a), or seek *any* judicial relief. Like a deed, it is merely a part of the land records. Its only function is to give notice to potential purchasers of litigation affecting property (see our Opening Brief at 23-25). Nor is it

required or possible for such a notice to summarize all aspects of the referenced litigation.

TFC also contends that the Episcopal Church and the Diocese have admitted in pleadings that TFC's trustees hold legal title to the two acre parcel at issue. *See* TFC Brief at 12. Two referenced pleadings are complaints in the declaratory judgment actions, *not* pleadings in TFC's 57-9 action, and both are explicitly "on information and belief," not unqualified statements.[1] In the 57-9 action, the Diocese's Answer to TFC's 57-9 Petition explicitly *denied*, in paragraph 2,

> that the current Trustees of The Falls Church properly own or hold legal title to any properties currently possessed by The Falls Church, for the reasons stated in ¶ 8 of this Answer. The Diocese denies that the current Trustees of The Falls Church own or hold legal title to any properties in trust for the congregation of The Falls Church.

Paragraph 8 of the Answer reiterated that denial, explained that any title TFC's trustees may have had was as an Episcopal entity, and denied the remaining allegations for lack of information:

> The Diocese denies that the current Trustees of The Falls Church properly own or hold legal title currently possessed by The Falls Church. The Diocese avers that, as shown by the language of the deeds summarized and referred to in ¶ 8, a number of the properties referred therein were conveyed to "Trustees of the **Episcopal** Church known and designated as the 'Falls Church,'" to "Trustees of the Falls Church **Episcopal** Church," or to "Trustees of the Falls Church **(Episcopal)**" .... a majority of the congregation of The Falls Church has purportedly "determined to sever ties with [The Episcopal Church] and the Diocese." Thus, according to the allegations of the petitioner, whose actions are unlawfully controlled by individuals purporting to have severed ties with The Episcopal Church and the Diocese, The Falls Church is no longer an Episcopal Church and therefore would have no claims to the properties identified in ¶ 8. The Diocese lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of ¶ 8.

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[1] *See, e.g., Walsh v. Walsh*, 177 Va. 174, 190, 12 S.E.2d 757, 762 (1941) (distinguishing between "an allegation of fact" and "an allegation based on information and belief," and holding the latter "is not to be taken as true on a hearing on the bill and answer"). We have since learned more information bearing on the ownership of the Property and have supplemented our position accordingly. And even if the statements were unqualified, they, like all statements in a complaint, are *allegations* that may be correct or incorrect, not *admissions*.

To suggest that either paragraph constitutes an admission that decides the current dispute over the Property is to ignore the language of those two paragraphs entirely.[2]

Similarly, the Diocese *denied* TFC's Request for Admission No. 10, which stated: "Falls Church real property is currently titled in the names of Trustees for Falls Church." TFC Ex. 10 at 5. TFC quotes the Diocese's explanation following the denial.[3] It is true that the explanation has since been proven incorrect (and later discovery responses provide supplemental information). But TFC's failure to quote the actual response ("Denied," TFC Ex. 10 at 5) and to include the denial preceding the explanation in the quoted "relevant part," TFC Brief at 12, risks misleading the Court. In sum, the various "admissions" advanced by TFC are not binding or dispositive.

III. There is no evidence that the vestry of The Falls Church became the successor to the Vestry of Truro parish in 1836.

TFC argues that "[i]n 1836, the vestry of The Falls Church became the successor to the vestry of Truro Parish for purposes of the property conveyed by the 1746 parcel [*sic*]." TFC Brief at 13. TFC explains that because it "was admitted to the Diocese pursuant to Canon 12," it "became 'a distinct Parish'" and therefore the legal successor and owner of the Property. *Id.* Indeed, TFC analogizes that "act of the Diocese's Annual Convention" to the act of the General Assembly that divided Truro Parish and allocated the Property to Fairfax Parish. *Id.* at 14.

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[2] The Episcopal Church did "admi[t] and ave[r] that trustees for The Falls Church hold legal title to the real property currently possessed by The Falls Church," but it offered an explanation that plainly limits the admission: that TFC held title as an Episcopal entity and "subject to the Constitutions and Canons of the Episcopal Church and the Diocese." TFC Ex. 4 ¶ 2. The same qualification appeared in the Episcopal Church's response to TFC's request for admission. *See* TFC Ex. 11 at 4. And even if the Church's admission were both unqualified and binding, it would not bind the Diocese, a separate party that *denied* TFC's title allegations.

[3] Both sides have repeatedly posed and answered discovery seeking explanations of denials of requests for admissions. Sometimes the explanation is printed immediately following the denial. The placement of the explanation does not and cannot transform a denial into an admission.

TFC's new position, that a Diocesan canon and an "act of the Diocese's Annual Convention" had the legal effect of making TFC the legal successor and giving it legal title, will surprise anyone following this litigation. The CANA Congregations have argued repeatedly that the national and Diocesan canons are legally ineffective and unenforceable in regard to property. Indeed, they have argued specifically that the national and Diocesan canons were of no legal effect in Virginia prior to 1867.[4] We appreciate TFC's belated recognition that the Episcopal Church's and the Diocese's Canons and actions have legal effect, but TFC's gloss on the result of Canon XII and the Diocese's acceptance of TFC's petition in 1836 is incorrect.

A. TFC's argument contradicts the unrebutted historical evidence.

TFC had no historical expert of its own and offered no historical evidence for anything prior to 1845. Accordingly, it must and does attempt to support its argument about events in 1836 by quoting selectively from Dr. Bond's testimony. Counsel's spin is entirely inconsistent with and misstates that unrebutted testimony, however.

Based on many historical facts and sources (*see* TEC-Diocese Opening Brief at 9-12), Dr. Bond's opinion was that Christ Church, Alexandria was the successor to the Vestry of Fairfax

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[4] *E.g.*, CANA Congregations' Responsive Brief Pursuant to the Court's July 16, 2008, Order (filed Aug. 4, 2008) at 14 ("As of 1867, the only statutorily authorized means of conveying property to churches in Virginia was a *deed*, and only a *congregation* could receive such a conveyance"); *id.* at 15 ("ECUSA and the Diocese are thus confusing the question whether associational rules may constitute a contract in general and the question whether, prior to 1867, such rules could create enforceable property rights. They could not"); CANA Congregations' Opening Brief Pursuant to July 16, 2008, Order (filed July 28, 2008) at 10 ("When the division statute was adopted, Virginia courts 'look[ed] to the deed alone' ... *the rules of voluntary associations such as ECUSA or the Diocese were not legally relevant to property ownership*") (second emphasis added). Because the Congregations prevailed based on these assertions, they are estopped from contradicting them now. *See, e.g., Bentley Funding Group, L.L.C. v. SK&R Group*, L.L.C., 269 Va. 315, 325-27, 609 S.E.2d 49, 53-55 (2005).

Parish, which was the successor to the Vestry of Truro parish by operation of law. Tr. (Oct. 20, 2008) at 50-54, 73, 82. He also opined that there is *no reason or evidence* "to conclude that the Falls Church is a successor to the vestry of Fairfax [parish]." *Id.* at 128.

Regarding events in 1836, Dr. Bond explained that the Diocese's convention admitted TFC as "a separate and distinct Church from the Parish Church of Fairfax Parish," which was Christ Church, Alexandria. Tr. (Oct. 20, 2008) at 88-89, 127-28; TEC-Diocese Ex. 75 at internal p.13 (Bates no. EOV0042585). TFC did *not* become part of the Diocese as a new parish. *Id.* It petitioned to be and was admitted as a "separate church." *Id.* The testimony and later records (TFC's parochial reports) reflect that.[5] It is certainly true that, by virtue of the 1836 petition, TFC sought and received the permission of the Diocese to "elec[t] its own vestry" and "t[ake] over the management of its own affairs." Tr. (Oct. 20, 2008) at 106.[6] But Dr. Bond's testimony about events in 1836 contradicts, rather than supports, TFC's claims to the Property.

In support of its attempt to cobble together a "distinct parish" theory (TFC Brief at 14,

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[5] TFC's parochial report in 1837 did not show a connection to Fairfax Parish or that a new parish had formed. *See* TEC-Diocese Ex. 76 at internal p.26 (Bates no. EOV0042594). *Accord* TEC-Diocese Ex. 77 at internal p.35 (Bates no. EOV0042601) (1838 report). *See also* Tr. (Oct. 20, 2008) at 81, 107 (TFC did not become part of the Diocese as a continuation, successor, or member of Fairfax parish; instead, it became a new church and entered as a new institution).

[6] The Diocese's permission necessarily included the permission of Christ Church, Alexandria too. Fairfax and other parishes had agreed in 1787 to be governed by the Diocese, committing the "doctrines, discipline, and worship," the "rules and regulations" of the Church and its "good government" to the Diocesan convention. *E.g.*, Tr. (Oct. 20, 2008) at 60-62; TEC-Diocese Ex. 112 at internal p.23 (Bates no. EDV0045058) (an ordinance of the 1787 convention "FOR REGULATING THE APPOINTMENT OF VESTRIES AND TRUSTEES AND FOR OTHER PURPOSES"). Vestrymen were required to "subscribe ... to be conformable to the doctrine, discipline, and worship of the Protestant Episcopal Church." *Id.* at 22. The Diocesan convention defined and delegated property powers and responsibilities to the vestries, including that they "shall hold and enjoy all glebes, lands, churches, books, plate, and other property, now belonging or hereafter accruing to the said church, as trustees for the benefit of the society." *Id.* at 22-23.

18), TFC directly misstates Dr. Bond's testimony. The phrase "distinct parish" is part of Canon XII, which Dr. Bond read. His testimony, however, was that in 1836 TFC was a new church, not part of Fairfax Parish or a new parish. *See* Tr. (Oct. 20, 2008) at 106 ("they don't call themselves a parish. They call themselves a church"); *id.* at 81, 107. TEC-Diocese Ex. 75 (at internal p.13), the only and undisputed evidence from 1836, corroborates his testimony.

TFC also argues that it is a successor to the Vestry of Truro parish because TFC's vestry is the "governing body 'closest to the people,'" and TFC has used and managed the Property, thereby supposedly allowing the Court just to analogize TFC's vestry to the Vestry of Truro parish and conclude that TFC is the successor for the purpose of the Deed. TFC Brief at 14-15. Dr. Bond's unrebutted expert testimony established that colonial vestries were decidedly different from individual church vestries later. Tr. (Oct. 20, 2008) at 42-43. TFC advances an analogy that the evidence showed to be inaccurate historically.

None of the evidence of TFC's use of the Property decades later establishes TFC's ownership, as outlined in our Opening Brief at 5, 8, 14-17. Nor has TFC provided historical evidence that rebuts Dr. Bond's testimony and shows TFC to be the successor under the Deed. Nor has TFC presented a properly pled and supported adverse possession claim. *See* TEC-Diocese Opening Brief at 14-16. Nor would an adverse possession claim be proper in TFC's § 57-9 action.[7] TFC's claims and arguments simply are not consistent with the historical facts.

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[7] Even if TFC could prevail on an adverse possession claim, which it cannot, it would be inappropriate, inconsistent, and unjust to allow TFC to assert non-57-9 claims in its 57-9 action when the Episcopal Church and the Diocese have not been permitted to assert our claims. If § 57-9(A) is "conclusive," standing on its own and mooting all other claims, as this Court has held, *see* Five Questions Letter Opinion (June 27, 2008) at 11, a litigant must satisfy all of the requirements of § 57-9(A) upon invoking the statute. That litigant cannot be permitted to bootstrap a lesser claim into the "conclusive" effect of § 57-9.

B. *Mason v. Muncaster* does not support TFC's position.

TFC asserts that *Mason v. Muncaster*, 22 U.S. (9 Wheat.) 445 (1824), does not contradict its legally insufficient and historically unsupported theories to have become the successor at some later date. TFC bases that argument on three points, all of which are demonstrably wrong:

First, TFC erroneously claims that *Mason v. Muncaster* was decided under District of Columbia law. TFC Brief at 16. The Court, however, did not cite District of Columbia law at all; but it cited Virginia law throughout the opinion. *See, e.g.*, 22 U.S. at 455 n.13, 456, 459, 460, 466-67, 467. TFC's only support for its argument is a "[Local Law.]" label that precedes the case heading in the U.S. Reports. (A copy of the case from that reporter is attached as Ex. C.) That notation is not part of the opinion of the Court and thus not proper citation material. Moreover, TFC plainly did not even attempt to determine the meaning of the heading. It is in fact a case type category applied by the reporter, *not* an indication that the Court was applying D.C. law. The Table of Cases to Volume 22 of the U.S. Reports (attached as Ex. D) shows that the heading "Local Law" was one of many such headings, including "Chancery. Mortgage," "Constitutional Law," "Prize," and "Surety." And other cases that did not involve either Virginia or D.C. have the same heading. *See, e.g.*, Ex. E (the first pages of *Kirk v. Smith*, 22 U.S. 241 (1824), and *Danforth v. Wear*, 22 U.S. 673 (1824), which concerned Pennsylvania and North Carolina law, respectively). TFC's argument about the law applied is utterly baseless.

TFC also claims that *Mason v. Muncaster* concerns only the parish's glebe lands and (again based on a distortion of both *Mason* and Dr. Bond's testimony) that "the vestry of Fairfax Parish had a different successor for purposes of the glebe lands there (the Christ Church-Alexandria vestry) than it had for purposes of the two-acre parcel here (the TFC vestry)." TFC Brief at 18. Nothing in *Mason* or Dr. Bond's testimony says anything of the sort. *Mason*'s

successor holding is unqualified, and it directly contradicts TFC's parcel-based succession argument. *See* 22 U.S. at 456 ("the Vestry of the Episcopal Church of Alexandria is the regular Vestry in succession of the parish of Fairfax"); *id.* at 469 ("the Vestry of the church in Alexandria is, in succession, the regular Vestry of the parish of Fairfax"). Indeed, the appellant argued, *inter alia*, that if "there was another church in the parish, or other parishioners who were not represented by [the Christ Church vestry], the decree [in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815)] would have been different." *Id.* at 448. The *Mason* Court rejected that argument. It was fully aware of The Falls Church and the fact that Fairfax Parish spanned part of Virginia as well as part of the District of Columbia. *See id.* at 456-57. It considered and found no evidence that persons in Fairfax were not eligible to vote for and represented by the Christ Church vestry. *Id.* at 461. *See also id.* at 468-69 ("the individual parishioners residing out of Alexandria county, were no more necessary to be made parties to the bill praying a sale of the glebe, than the individuals residing within the county. Both were represented in the only way known to the laws, by the Vestry duly appointed to manage parochial concerns"). And it rejected the argument that the Christ Church vestry was distinct, *id.* at 458-61, or that there could be more than one vestry. Rather, "the Vestry of the parish of Fairfax ... both by the former laws of Virginia and the canons of the Episcopal Church, they, in connexion with the Minister, have the care and management of ***all*** *the temporalities of the parish* within the scope of their authority," *id.* at 456 (emphasis added), and Christ Church's vestry was the successor to that entity. *Id.* at 456, 469.

Nor does the lower court's opinion in *Mason v. Muncaster*, 16 Fed. Cas. 1048 (1821), support TFC's position. The lower court found that the Falls Church congregation had "ceased to exist," after which the Christ Church congregation "constituted the whole Protestant Episcopal Church in the Parish." *Id.* at 1050; *see also id.* at 1051. The vestries chosen by Christ Church

since 1803, according to the lower court, "have uniformly held and claimed to hold the glebe, and the church, and ***all*** *the church-property belonging to the Protestant Episcopal Church in that parish.*" *Id.* (emphasis added). Indeed, the court stated that "there is no evidence to satisfy us that the Alexandria congregation abandoned the parish of Fairfax, or any of their parochial rights, or ever formed themselves into a separate religious society." *Id.* The "complainant's solicitor" also argued that the Christ Church vestry "could not avow themselves to be the vestry of the whole parish of Fairfax without confessing themselves to be guilty of sacrilege in suffering the building commonly called the Falls Church to go to ruin." *Id.* at 1051. The court rejected that argument, because "it cannot be called sacrilege to suffer a useless building to go to decay," *id.*, and concluded that the law did not hold a vestry responsible for waste when it chose not to maintain a building for which there was no congregation (a "useless church"). *Id.* at 1051-52. *See also* Tr. (Oct. 20, 2008) at 126-27 (there were many buildings where Episcopal congregations ceased to exist, and vestries did not maintain buildings where there was no congregation).[8]

IV. TFC has not filed, pled, or proved a claim for adverse possession.

TFC may regret that it has never filed a quiet title or adverse possession action in regard to the Property. But having failed to assert its supposed rights for over one hundred years, TFC cannot now escape that failure by trying to turn its 57-9 action into an adverse possession action.

First, TFC knew that § 57-9(A) required that its trustees hold a valid title, yet it failed to act to meet that requirement. *See* Constitutionality Letter Opinion (June 27, 2008) at 48:

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[8] The lower court supports our position in another respect. It specifically noted the Diocese's 1787 rules for regulating vestries, property, and trustees, *see* n.6, *supra*, which it stated were recognized by Virginia law. 16 Fed. Cas. at 1049-50. The Diocese had a "preexistent right" to make those rules, a right unaffected by the repeal of the acts of 1786 and 1788. *Id.* at 1050.

> For 141 years, the Commonwealth of Virginia has had a statute available to congregations experiencing divisions for the purpose of resolving church property disputes. 57-9(A) did not parachute into this dispute from a clear blue sky. Its existence cannot have been a surprise to any party to this litigation, each of whom is charged with knowledge of its contents and, more significantly, its import.

Second, an attempt to bootstrap adverse possession into a 57-9 action would be improper. *See* n.7, *supra*. TFC pled that it had legal title by operation of the Deed. TFC Petition for Approval of Report of Congregational Determination (filed Dec. 18, 2006) ¶ 8 ("TFC's 57-9 Petition"). It did not, and therefore its 57-9 claim must fail.[9]

Third, TFC's 57-9 action does not support such a claim. TFC's 57-9 Petition fails to allege the elements of adverse possession, and it has never sought to amend that Petition. "[A] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings ... A court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed." *Jenkins v. Bay House Assoc., L.P.*, 266 Va. 39, 43, S.E.2d 510, 512 (2003). An adverse possession ruling would not only ignore the pleadings, it also would ignore that there has been no discovery into the claim of adverse possession and no trial on such a claim. The proper place to decide such a claim might be in the declaratory judgment action, although there too TFC has failed to plead adverse possession. In sum, any adverse possession claim is not properly before the Court and the Court cannot award relief based upon this theory of ownership.[10]

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[9] The evidence has shown that ¶ 9 of TFC's 57-9 Petition ("the [TFC] Trustees and their predecessors have held legal title to portions of the Property since 1746") was also wrong.

[10] This Court has refused to allow us to amend our 57-9 Answers to assert a statutory defense that had substantially similar elements as a constitutional defense. *See* Letter Opinion (May 12, 2008) (regarding Va. Code § 57-2.02). It should not act inconsistently by allowing TFC to assert additional claims – and ones with substantially different elements and evidence than § 57-9(A).

Even if TFC's 57-9 action could encompass a claim for adverse possession, TFC has not proved one. In Virginia, a claimant seeking to establish title to real property by adverse possession must prove, by clear and convincing evidence, actual, hostile, exclusive, visible, and continuous possession, under a claim of right for the statutory period of 15 years. *Kim v. Douval Corp.*, 259 Va. 752, 756, 529 S.E.2d 92, 95 (2000). "All presumptions ... favor the holder of the legal title." *Calhoun v. Woods*, 246 Va. 41, 44, 431 S.E.2d 285, 287 (1993). TFC has failed to present clear and convincing evidence of the hostility and the statutory 15 year period elements.

"Hostile" possession is that which is under "a claim of right and adverse to the right of the true owner." *Douval Corp.*, 259 Va. at 757, 529 S.E.2d at 95 (quoting *Grappo v. Blanks*, 241 Va. 58, 62, 400 S.E.2d 168, 171 (1991)). Yet, "where the original entry on another's land was by agreement or permission, possession *regardless of its duration* presumptively continues as it began, in the absence of an explicit disclaimer." *Id.* at 757, 529 S.E.2d at 95 (emphasis added). In other words, "permission negates hostile possession." *Quatannens v. Tyrrell*, 268 Va. 360, 372, 601 S.E.2d 616, 622 (2004). Here, TFC – by its own evidence, and now, by its own argument – fails the hostility element. By its 1836 petition to the Diocese, TFC applied for and received the permission of the Diocese to use the Property, to elect its own vestry, and to "t[ake] over the management of its own affairs." *See* TFC Brief at 13-18.[11] TFC seeks to establish hostility by claiming that its improvements to the Property were hostile, citing its additions in the 1950s and case law where a neighbor built on another neighbor's property. *See Quatannens*, 268

[11] TFC claims that it obtained the right to manage and use the Property (and, indeed, title to it) by petition to and permission from the Diocese, but then argues (for purposes of adverse possession) that its permission was required to use the Property and that only the latter matters with respect to the elements of adverse possession. That makes no sense at all and ignores the evidence (from 1836 into the 1990s) that TFC repeatedly sought the Diocese's permission.

Va. 360, 601 S.E.2d 616. Unlike a neighbor building on another's land, TFC's actions in regard to the property – *e.g.*, encumbrances and consolidation of the parcels – have not shown hostility. Instead, they were pursued according to canonical requirements and after receiving additional Diocesan permission (or confirmation from the Diocese that no further approval was needed). Tr. (Oct. 15, 2008) at 82 (TFC's own witness); TEC-Diocese Exs. 79-80 (1958 encumbrance), 83-86 (1991 encumbrance); TFC Exs. 55B (same), 57 (consolidation). The evidence utterly fails to show hostility with respect to the Diocese, and it boggles the mind to maintain (as TFC now does) that actions taken by TFC, a "constituent part" of a hierarchical church, Tr. (Oct. 15, 2008) at 80 (Deiss), with the approval of the hierarchical church, should be considered hostile or adverse to another constituent part of the same hierarchical church (Christ Church).

Citing *Mary Moody Northen, Inc. v. Bailey*, 244 Va. 118, 122, 418 S.E.2d 882, 885 (1992), TFC asserts (at 20-21) that unchallenged occupancy itself establishes adverse possession. That misstates the case, however. In *Bailey*, the father of the children claiming adverse possession had lived in a cabin on the land of a charitable foundation for 36 years. The parties agreed that Bailey had lived on the land continuously with the legal title holder's knowledge. The Court nonetheless reversed the trial court and entered judgment for the landowner, stating:

> This is not simply a case of unchallenged occupancy which is open and notorious to all, including the legal title holder. Where, as here, the legal title holder is operating on the assumption that one living on its land is doing so with its permission, and does not interfere with that occupancy, it would be manifestly unjust to allow that occupancy to ripen into an ownership interest through the silence or inaction of the occupant. The presumptions are in favor of the legal title holder and, although they may be overcome, the claimant must produce evidence which will overcome them. The necessity of conveying hostile intent or claim of ownership is particularly important in a case of this sort.

244 Va. at 122-23, 418 S.E.2d at 885. Indeed, the Court held the exact opposite of what TFC maintains – that one seeking to prove adverse possession must overcome the presumptions in

favor of the legal title holder and present evidence that shows hostility. TFC failed to do so.[12]

TFC also fails to establish by clear and convincing evidence that its supposedly hostile use has extended for the statutory fifteen year period, as discussed in our Opening Brief at 14-16.

V. The doctrine of laches is inapplicable.

The doctrine of laches does not apply for several reasons. First, equity follows the law in applying a statute of limitations; and if a legal demand is not barred by statute, neither is it barred in equity. *Klackner v. Willis*, 15 Va. Cir. 67, 71 (Spotsylvania 1988). But statutes of limitations apply to causes of action, not to existing conditions such as ownership of land. Ownership continues unless and until it is conveyed by deed or will, a legal succession arises, or a party pleads and proves ownership by adverse possession. TFC has shown none of these.

Second, laches ordinarily cannot be set up as a bar to legal title to land. *See Klackner*, 15 Va. Cir. at 71. Nor does Virginia law support using laches, an equitable affirmative defense, as an alternative theory of recovery by a complainant. *Id.* at 74. Here, TFC seeks to use the equitable doctrine as a sword to bar the legal title holders.

Third, while laches is a case-specific doctrine without rigid rules, before it can be invoked, there must be "acquiescence in the adverse claim." *Camp Mfg. Co. v. Green*, 129 Va. 360, 373, 106 S.E. 394, 399 (1921). "Lapse of time, standing alone, does not give rise to laches." *Klackner*, 15 Va. Cir. at 71. Here, there was no adversity or hostility in TFC's use of the Property until December 2006, when it voted to disaffiliate. We filed suit only weeks later. There has been no delay or acquiescence in TFC's newly-minted adverse claim.

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[12] TFC tries in effect to eliminate the hostile element of adverse possession by collapsing it into three other elements ("exclusive, visible, and without permission"). TFC Brief at 19. Under the

(footnote continued)

Finally, TFC's assertion that laches applies because TFC would be prejudiced by the assertion of a claim of ownership by Christ Church (TFC Brief at 23) misunderstands the operation of the doctrine. Courts of equity have "refused to give its aid to stale demands where the party has slept upon his rights and acquiesced in *adverse use* thereof to the prejudice of another for a great length of time." *Puckett v. Jessee*, 195 Va. 919, 930, 81 S.E.2d 425, 430 (1954) (emphasis added). Courts have viewed whether churches were part of the same ecclesiastical structure as a key fact in assessing adversity. *Puckett* involved distinct Baptist congregations, the Spring City Missionary Baptists and the Primitive Baptists. *Id.* at 929-30, 81 S.E.2d at 430.[13] The Court relied on a Colorado case involving a claim by members of a Greek Catholic Church that a prior conveyance to the Russian Orthodox Church was illegal and void. *Id.* at 931, 81 S.E.2d at 431 (citing *Greek Catholic Church v. Roizdestvensky*, 184 P. 295 (Colo. 1919)). It stated that the Colorado court held that "the delay in instituting the proceedings to recover the church property *from a denomination other than that in which the church was organized*, until after the debts had been paid and valuable improvements placed upon the property prevented a recovery." *Id.* (emphasis added). By contrast, TFC was a "constituent part" of a hierarchical church, its use of the Property was consistent with denominational rules, and the improvements that it made were not for an adverse use or another denomination. TFC has not been prejudiced in a manner that would allow the application of the doctrine of laches.

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facts, where it cannot be denied – and, indeed, TFC elsewhere proclaims – that TFC received and maintained possession of the premises by permission, that premise simply does not apply.

[13] The Court held that it was inequitable to enjoin the Spring City Missionary Baptists from using property deeded by the Primitive Baptists 13 years earlier. The Primitive Baptists had reserved a license to use the property one Sunday per month and sought to enjoin the Missionary Baptists' use as crowding the reserved use. *Puckett*, 195 Va. at 920-21, 81 S.E.2d at 425-26.

Respectfully submitted,

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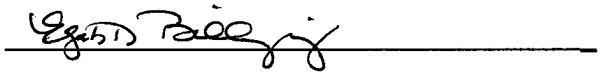

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ACTS

OF THE

GENERAL ASSEMBLY

OF

VIRGINIA,

PASSED AT THE SESSION COMMENCING 6TH DECEMBER 1841, AND ENDING 26TH MARCH 1842,

IN THE

SIXTY-SIXTH YEAR OF THE COMMONWEALTH.

RICHMOND:

SAMUEL SHEPHERD—PRINTER TO COMMONWEALTH.

1842.

CHAP. 102.—An ACT concerning conveyances or devises of places of public worship.

[Passed February 3, 1842.]

Trustees how to hold property conveyed or devised to religious congregations.

1. *Be it enacted by the general assembly*, That where any lot, or part of a lot, tract or parcel of land has been heretofore conveyed or devised, or shall hereafter be conveyed or devised, to one or more trustees for the use and benefit of any religious congregation, as and for a place of public worship, the same, and all buildings, and other improvements thereupon, shall be held by such trustee or trustees, (and their successors) for the purposes of the trust, and not otherwise.

Trust not to be frustrated for want of trustees.

2. *And be it further enacted*, That where any conveyance or devise shall hereafter be made of such property for the use and benefit, and purpose aforesaid, the same shall not be void or frustrated by reason of the want of trustees to take and hold the same in trust; but trustees may be appointed in the manner hereinafter directed.

Circuit courts authorized to appoint trustees.

3. *And be it further enacted*, That where such conveyance or devise has heretofore been made to a trustee or trustees, or where such conveyance or devise shall hereafter be made, whether by the intervention of trustees or not, the circuit superior court of law and chancery of the county or corporation where such property is or may be situate, shall, on application of the attorney for the commonwealth on behalf of the authorized authorities of any such religious congregation, have full power and authority to appoint trustees originally where there were none, or to substitute others from time to time, in cases of death, refusal or neglect to act, removal from the county or corporation, or other inability to execute the trust beneficially and conveniently; and the legal title shall thereupon become exclusively vested in the whole number of the then trustees and their successors.

Trustees may sue and be sued for congregations relative to their property.

4. *And be it further enacted*, That a majority of the acting trustees for any such congregation may sue and be sued in their own names, in relation to the title, possession or enjoyment of such property without abatement by the death of any of the trustees, or the substitution of others; but the action or suit may notwithstanding be prosecuted to its final termination in the names of the trustees by or against whom the same was instituted, and all other proceedings had in relation thereto, in like manner as if such death or substitution had not occurred: *Provided however*, That such trustees for the use of any religious congregation shall not hereafter take or hold at any one time any tract of land in the country exceeding in quantity thirty acres, or in any incorporated town exceeding two acres; nor shall such real property be held by them for any other use than as a place of public worship, religious or other instruction, burial ground and residence of their minister.

Amount of property limited.

To what uses to be held.

Commencement.

5. This act shall be in force from the passing thereof.

CHAP. 103.—An ACT for the relief of the banks of this commonwealth.

[Passed December 18, 1841.]

Acts imposing penalties on banks for nonpayment of specie, suspended.

1. *Be it enacted by the general assembly*, That so much of any act or acts as authorizes any person to recover the amount of any note or debt from the banks of this commonwealth by motion, upon ten days notice, and so much also of the fourth section of the act, entitled "an act concerning the banks of this commonwealth," passed March the fifteenth, eighteen hundred and forty-one, as subjects the said banks, from and after the first day of January next, to the payment of twelve per cent. interest per annum upon any note, bill or check due from said banks, in case of the nonpayment thereof in

THE

CODE OF VIRGINIA:

WITH THE

DECLARATION OF INDEPENDENCE

AND

CONSTITUTION OF THE UNITED STATES;

AND THE

DECLARATION OF RIGHTS

AND

CONSTITUTION OF VIRGINIA.

PUBLISHED PURSUANT TO AN ACT OF THE GENERAL ASSEMBLY OF VIRGINIA,
PASSED ON THE FIFTEENTH DAY OF AUGUST 1849.

RICHMOND:
PRINTED BY WILLIAM F. RITCHIE, PUBLIC PRINTER.

1849.

officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them:

"Be it enacted by the general assembly, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

"And though we well know that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with powers equal to our own, and that, therefore, to declare this act to be irrevocable, would be of no effect in law; yet we are free to declare, and do declare that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

§ 2. The general assembly doth now again declare that the rights asserted in the said act are of the natural rights of mankind.

CHAPTER LXXVII.

OF CHURCH PROPERTY AND BENEVOLENT ASSOCIATIONS.

Appropriation of the property held by the episcopal church before the Revolution.

1801-2. p. 8, ch. 5. 1 R. C. p. 79, ch. 32.

§ 1. All the laws relative to the former protestant episcopal church having been repealed by the act of the twenty-fourth

day of January seventeen hundred and ninety-nine,* and the principle having been recognized by the act of the twelfth day of January eighteen hundred and two, that the property formerly belonging to the said church devolved on the people (upon the dissolution of the British government here) in the same degree in which the right and interest of the said church was derived therein from them; it is now, according to the said act of the twelfth of January eighteen hundred and two, declared as follows:

§ 2. The overseers† of the county wherein there lies the greater part of any tract of glebe land that is mentioned in the said act, shall, if the same be vacant, or shall become so by the death or removal of any incumbent, enter thereon unless some person be in possession thereof, under a lease made on behalf of the said church prior to the said act, and in the latter case shall enter thereon so soon as the lease shall expire, and upon any such entry, shall sell on the premises to the highest bidder, on twelve months' credit, such tract of land, and all other property incident thereto, except so much thereof as may be kept in kind as a place of general reception for the poor of the county or otherwise for the use of such poor, and, on receiving bond with good security for the amount of the purchase money, payable to the said overseers, shall convey the property sold to the purchasers thereof.

1 R. C. p. 79, ch. 32. 1819-20, p. 78, ch. 90. 2 Munf. 513. 9 Leigh 580.

§ 3. The said overseers may, by suit in their names, recover any land upon which they are directed so to enter, and the property incident thereto, and the profits of any such land or property of which any person other than an incumbent or his tenant shall have had possession, and for the profits of which such person shall not have accounted; also all that may be due on any such lease; and whatever else any person may

1 R. C. p. 79, ch. 32. 1811-12, p. 100, ch. 65. 1813-14, p. 130, ch. 65; p. 137, ch. 78. 2 R. C. p. 270, § 23.

* In 1776 an act passed for exempting the different societies of dissenters from contributing to the support of the church and its ministers. Hen. Stat. vol. 9, p. 164, ch. 2. Former acts, providing salaries for the ministers, which had been suspended from time to time, (see Hen. Stat. vol. 9, p. 312, ch. 16; p. 387, ch. 13; p. 469, ch. 18; p 578, ch. 38; vol. 10, p. 111,) were in 1779 repealed. Id. vol. 10, p. 197, ch. 36. As to this repealing act, and the previous laws, see *Jefferson's* Works, vol. 1, p. 31, 2. In 1784 an act passed for incorporating the Protestant Episcopal church. Hen. Stat. vol. 11, p. 532. Then in 1785 there was an act to authorize the election of certain vestries, 12 Hen. Stat. p. 93, ch. 37. In 1786 the act for incorporating the church was repealed. Id. p. 266, ch. 12. And in 1788, there was an act giving certain powers to the trustees of the property of the church. Id. p. 705, ch. 47. The act of the 24th of January 1799, after reciting that these several laws of 177C, 1779, 1784. 1785, 1786 and 1788, "do admit the church established under the regal government, to have continued so, subsequently to the constitution; have bestowed property upon that church; have asserted a legislative right to establish any religious sect, and have incorporated religious sects, all of which is inconsistent with the principles of the constitution and of religious freedom and manifestly tends to the establishment of a national church," repealed those laws and declared them to be void. For the judicial decisions as to the constitutionality of the act of 1799 and that of 1802, see *Turpin, &c.* v *Lockett, &c.*, 6 Call, 113, and *Selden &c.* v. *the overseers of the poor*, 11 Leigh 127.

† See ante, p. 258, ch. 51, *of the poor;* the overseers (whose appointment is thereby provided for) are designated therein as the overseers of the county or town; but in that chapter, under the last section thereof, the word *overseers* is construed as if followed immediately by the words "*of the poor.*"

have received for the use of the said church as established under the former government, and shall not have paid.

1 R. C. p. 81, ch. 32. § 4. The said overseers shall have no power under the two preceding sections over any church, or the property therein, or any churchyard, nor over any private donations for church or other purposes where any person in being is entitled to take the same under any private donor.

1 R. C. p. 79, ch. 32. 2 R. C. p. 278, § 49. § 5. In any case in which the said overseers ought to act under the preceding sections, the court of their county may order them to act. If for three months from such order, there be a failure to act according thereto, every person so failing shall forfeit to the county two hundred dollars.

1 R. C. p. 81, ch. 32; p. 89, ch. 33, § 18. § 6. The glebe lands and church property, or the proceeds thereof, held by the overseers of any county under the said act of the twelfth of January eighteen hundred and two, or under this or any other act, which may not have been applied to some particular object under a local statute passed for the purpose, shall be appropriated to such object or objects, (other than for a religious purpose,) as may be voted for in such county, (at such time and place as the county court may prescribe,) by a majority of the persons entitled to vote in the county for a delegate therefrom to the general assembly, and, if no such object be so voted for, shall remain vested in the said overseers and be appropriated by them for the benefit of the poor of such county.

Provision as to donations.

1805-6, p. 43, ch. 74, § 1, 2. 2 R. C. p. 263, § 12, Gilm. 336. § 7. Where, previous to the thirtieth of January eighteen hundred and six, any donation was made of money or any other thing, for a charitable purpose, and the donation was to be controlled or managed by a vestry, the overseers of the poor of the county or town in which the said charity was intended by the donor to be exercised, shall exercise the same powers and perform the same duties respecting the said donation that could or ought to have been exercised and performed by the vestry if it had continued to exist and been a corporate body, and shall apply such money or other thing in such manner as may have been directed by the donor.

Property acquired by a church since the Revolution.

1841-2, p. 60, ch. 102. § 8. Every conveyance, devise or dedication, shall be valid, which since the first day of January, seventeen hundred and seventy-seven, has been made, and every conveyance shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation as a place for public worship or as a burial-place or a residence for a minister; and the land shall be held for such use or benefit, and for such purpose and not otherwise.

Id. § 9. The circuit court of the county or corporation wherein

there may be any parcel of such land or the greater part thereof, may on application of the proper authorities of such congregation, from time to time, appoint trustees either where there were or are none, or in place of former trustees, and change those so appointed, whenever it may seem to the court proper, to effect or promote the purpose of the conveyance, devise or dedication; and the legal title to such land shall for that purpose be vested in the said trustees for the time being and their successors.

§ 10. When books or furniture shall be given or acquired for the benefit of such congregation, to be used on the said land in the ceremonies of public worship, or at the residence of their minister, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, for the benefit of the congregation. 1841-2, p. 60, ch. 102.

§ 11. The said trustees may, in their own names, sue for and recover such land or property, and be sued in relation thereto. Such suit, notwithstanding the death of any of the said trustees or the appointment of others, shall proceed in the names of the trustees by or against whom it was instituted. Id.

§ 12. Such trustees shall not take or hold at any one time more than two acres of land in an incorporated town, nor more than thirty acres out of such a town. Id.

§ 13. Any one or more of the members of any religious congregation may, in his or their names on behalf of such congregation, commence and prosecute a suit in equity against any such trustee, to compel him to apply such land or property for the use or benefit of the congregation, as his duty shall require. No member of the congregation need be made a defendant to such suit, but, in other respects, the same shall be proceeded in, heard and determined as other suits in equity, except that it may be proceeded in, notwithstanding the death of the plaintiff, as if he were still living. 1846-7, p. 66, ch. 76.

Benevolent associations.

§ 14. When any conveyance of land has been or shall be made to trustees for the use of any society of free masons, odd fellows, sons of temperance, or any other benevolent association, or if without the intervention of trustees such conveyance has been made since the thirty-first day of March, eighteen hundred and forty-eight, or shall be hereafter made for such use, the ninth, eleventh and thirteenth sections of this chapter shall be construed as if they were expressly made applicable to such association. 1847-8, p 80, ch. 105, § 1.

§ 15. The trustees for the use of any such association shall not hereafter take or hold, at one time, any land exceeding two acres, nor for any other use than as a place of meeting for such association, and for the education and maintenance of children charitably provided for by them. Id. § 2.

Title 23.

EDUCATION.

CHAPTER LXXVIII.

OF THE BOARD OF THE LITERARY FUND; AND THE DUTIES AND POWERS OF THE SECOND AUDITOR IN RELATION THERETO.

Who compose the board; its general powers.

1 R. C. p. 83, ch. 33, § 6. 1819-20, p. 13, ch. 12, § 1. 1820-1, p. 12, ch. 10, § 1, 2, 8 to 13; p. 13, ch. 12. 1828-9, p. 16, ch. 14, § 13. 1845-6, p. 108, No. 6.

§ 1. The governor, treasurer, two auditors and register of the land office, shall be a corporation under the style of "The Board of the Literary Fund," and be vested with all the rights and powers now vested in the president and directors of the literary fund.

Ante, p. 340, ch. 66, § 6 to 9. Id. 1832-3, p. 16, ch. 14. 1820-21, p 14, ch. 19, § 9.

§ 2. To the meetings of the said board and their proceedings, the sixth, seventh, eighth and ninth sections of the sixty-sixth chapter shall be applicable. A copy of such proceedings, or any part thereof, certified by the secretary of the board, shall be evidence in all cases in which the original would be.

1 R. C. p. 83, ch. 33, § 6, 7. 1820-21, p. 13, ch. 10, § 5. 2 R. C. p. 61, ch. 191, § 12. 1815-6, p. 27, ch. 36. Ante, p. 350, ch. 71, § 1, 2, 3, 4, 5.

§ 3. Any money which ought to be paid into the public treasury, to the credit of the literary fund, shall (unless other provision be made therefor) be recoverable, with interest, in the manner prescribed by the first section of the seventy-first chapter, for the recovery of money to be paid to the credit of the fund for internal improvement. And the second, third, fourth and fifth sections of that chapter shall apply also to the board mentioned in this chapter.

such person himself in the first case, and in the second, the purchaser, lessee, heir or devisee from him, if a citizen of the *United States*, shall hold the same free and released from any right or claim of the commonwealth or the literary fund, by reason of such person having been an alien.

§ 4. Any woman whose husband is a citizen of the *United States*, and any person whose father or mother at the time of his birth was a citizen thereof, may take and hold estate real or personal, by devise, purchase or inheritance, notwithstanding he or she may have been born out of the *United States*. 7 and 8 Vict. p. 392, ch. 66, § 3, 16. 2 Rand. 276.

§ 5. Any alien, the subject of a friendly state, may take and hold any personal property except chattels real; and any such alien, being such subject, if he reside within this state, may take and hold any lands for the purpose of residence, or of occupation by him or his servants, or for the purpose of any business, trade or manufacture, for a term of years, not exceeding twenty-one years. An alien taking or holding under this section shall take and hold as fully or effectually, and with the same rights, remedies, exemptions, privileges and capacities, as if he were a natural born citizen of the *United States*, except that he shall not have the right to vote at elections. 7 and 8 Vict. p. 392, ch. 66, § 4, 5.

§ 6. When by any treaty, now in force between the *United States* and any foreign country, a citizen or subject of such country is allowed to sell real property in this state, such citizen or subject may sell and convey the same and receive the proceeds thereof, within the time prescribed by such treaty.

§ 7. The tributary Indians within this state shall not sell or devise any lands, actually possessed or justly claimed by them, to any other person than some of their own tribe or nation, or their descendants; any such bargain, sale or devise shall be null and void. And if any person, other than the said Indians or their descendants, shall purchase or lease, or occupy or till any such land, whether with or without the permission of the Indians, he shall forfeit two dollars every year for each acre of land so purchased, leased, occupied or tilled. 1 R. C. p. 69, ch. 25.

CHAPTER CXVI.

GENERAL RULES AS TO THE CREATION AND LIMITATION OF ESTATES; AND THEIR QUALITIES.

When deed or will is necessary to convey estate.

1 R. C. p. 361, ch. 99; p. 432, ch. 11, § 51; p. 372, ch. 101, § 2.
Call 92, 234. Munf. 122. 2 Rand. 384. 4 Rand. 332. 6 Rand. 135, 541, 764. 3 Leigh 147. 7 Leigh 119, 590. 9 Leigh 245. 10 Leigh 57. 11 Leigh 439. 3 Grat. 1.

§ 1. No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will;* and no gift of a slave or of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section.

General rules as to deeds.

8 and 9 Vict. p. 1092, ch. 106, § 5.
12 Leigh 204.

§ 2. An immediate estate or interest in, or the benefit of a condition respecting, any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

8 Leigh 163. 5 Grat. 111.

§ 3. If, in a deed made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent.

8 and 9 Vict. p. 1092, ch. 106, § 2.

§ 4. All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

Id. § 6.
1 R. C. p. 369, § 28.
3 Call 480, 488.

§ 5. Any interest in or claim to real estate may be disposed of by deed or will. Any estate may be made to commence *in futuro*, by deed, in like manner as by will. And any estate which would be good as an executory devise or bequest, shall be good if created by deed.

1836-7, p. 47, ch. 69, § 5.
Ante, p. 252, ch. 49, § 34.

§ 6. Any deed of trust, mortgage, or other writing, made by a

* As to resulting trusts, see 7 Leigh 566; effect of cancelling a deed, 10 Leigh 57.

husband or parent, to give a lien on property which is exempt from distress or levy, under the thirty-fourth section of the forty-ninth chapter, shall be void as to such property.

§ 7. A writing which purports to pass or assure a greater right or interest in real estate than the person making it may lawfully pass or assure, shall operate as an alienation of such right or interest in the said real estate as such person might lawfully convey or assure. And when the deed of the alienor mentions that he and his heirs will warrant what it purports to pass or assure, if anything descends from him, his heirs shall be barred for the value of what is so descended or liable for such value.

1 R. C. p. 368, § 20, 21.
1 Wash. 388.
1 Call 174.
3 Rand. 361.
2 Rand. 549.
5 Grat. 64.

Estates tail; and words of limitation.

§ 8. Where any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee simple or other the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant.

1 R. C. p. 369, § 27.
7 Will. iv. and 1 Vict. ch. 26, § 28, 30, 31.
1 Wash. 100.
1 Call 127.
3 Call 306.
1 Munf. 537, 549.
2 Munf. 453.
3 Rand. 280.

§ 9. Every estate in lands so limited, that as the law was on the seventh day of October, in the year one thousand seven hundred and seventy-six, such estate would have been an estate tail, shall be deemed an estate in fee simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited, upon an estate in fee simple, created by technical language.*

1 R. C. p. 369, § 25.

§ 10. Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring or descendant, or other relative, shall be construed a limitation, to take effect when such person shall die not having such heir or issue, or child or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it.

Id. § 26.
7 Will. iv. and 1 Vict. ch. 26, § 29.

§ 11. Where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body.

3 Call 50.
5 Munf. 242.
6 Munf. 470, 581.

* See 3 H. and M. 278, and opinion of president *Pendleton* in *Carter* vs. *Tyler*, &c., 1 Call 182, 3, as to the rights of tenants in fee tail, and the legislation of *Virginia* on the subject, before the act of October 1776, (9 Hen. Stat. p. 226, ch. 26,) "declaring tenants of lands or slaves in tail to hold the same in fee simple." Act of 1783, in 11 Hen. Stat. p. 271, ch. 27; and act of 1785, in 12 Hen. Stat. p. 156. Under these acts of 1776 and 1785 many decisions have been made. The provisions introduced at the Revisal of 1819, in 1 R. C. p. 369, § 25, 26, revised in the 9th and 10th sections of this chapter, have operated somewhat to diminish litigation; but those provisions have no influence upon the judicial construction of limitations in deeds made, and the wills of persons who died, before the 1st of January 1820. See 5 Rand. 273.

estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favour of, or on any contract with, two or more, one of whom dies.

CHAPTER CXVII.

FORMS OF DEEDS, AND OF COVENANTS.

A deed to convey the grantor's whole interest.

§ 1. A deed may be made in the following form, or to the same effect: *This deed, made the day of , in the year , between* (here insert names of parties,) *witnesseth: that in consideration of* (here state the consideration,) *the said doth* (or do,) *grant unto the said all, &c.* (Here describe the property, and insert covenants or any other provisions.) *Witness the following signature and seal,* (or signatures and seals.) 8 and 9 Vict. p. 1242, ch. 119; p. 1262, ch. 124.

§ 2. Every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in or to such lands. Id.

§ 3. Whenever, in any deed, there shall be used the words "*The said grantor* (or the said ,) *releases to the said grantee* (or the said ,) *all his claims upon the said lands,*" such deed shall be construed as if it set forth that the grantor (or releasor) hath remised, released and forever quitted claim, and by these presents doth remise, release, and forever quit claim unto the grantee, (or releasee,) his heirs and assigns, all right, title and interest whatsoever, both at law and in equity, in or to the lands and premises granted (or released) or intended so to be, so that neither he nor his personal representative, his heirs or assigns, shall, at any time hereafter, have, claim, challenge or demand the said lands and premises, or any part thereof, in any manner whatever. Id.

Remainders.

1 R. C. p. 369, § 28.

§ 12. A contingent remainder shall in no case fail for wan of a particular estate to support it.

1 R. C. p. 363, § 20.

§ 13. The alienation of a particular estate on which a r mainder depends, or the union of such estate with the inher tance by purchase or descent, shall not operate, by merge or otherwise, to defeat, impair or otherwise affect such re mainder.

Uses, and trust estates.

1 R. C. 370, § 29.
2 Call 263.
4 Munf. 473.

§ 14. By deed of bargain and sale, or by deeds of leas and release, or by covenant to stand seized to the use, or dec operating by way of covenant to stand seized to the use, th possession of the bargainor, releasor or covenantor, shall b deemed transferred to the bargainee, releasee or person ent tled to the use, for the estate or interest which such perso has in the use, as perfectly as if the bargainee, releasee person entitled to the use, had been enfeoffed with livery seizin of the land intended to be conveyed by such deed covenant.

4 Vict. p. 209, ch. 21, § 1, 3.
2 Leigh 358.

§ 15. Every deed of release of any estate or interest cap ble of passing by deeds of lease or release, shall be as effe tual for the purposes therein expressed, without the executic of a lease, as if the same had been executed.

1 R. C. p. 370, § 30.
2 Leigh 280.

§ 16. Estates of every kind, holden or possessed in trust, sha be subject to debts and charges of the persons to whose us or to whose benefit, they are holden or possessed, as th would be if those persons owned the like interest in the thin holden or possessed, as in the uses or trusts thereof.

1 R. C. p. 370, § 31.
3 and 4 W. iv. ch. 105, § 2.
1 H. and M. 92.
3 H and M. 321.
1 Rand. 344.
12 Leigh 265.

§ 17. Where a person, to whose use, or in trust for who benefit another is seized of real estate, has such inheritance the use or trust, as, if it were a legal right, would entitle su person's husband or wife to curtesy or dower thereof, suc husband or wife shall have curtesy or dower of the sa estate.

Estate of a joint tenant.

1 R. C. p. 359, ch. 98, § 2.
4 Munf. 316.
2 Rand. 183.
10 Leigh 406.
12 Leigh 264.

§ 18. When any joint tenant shall die, whether the esta be real or personal, or whether partition could have be compelled or not, his part shall descend to his heirs, or pa by devise, or go to his personal representative, subject debts, curtesy, dower or distribution, as if he had been tenant in common. And if hereafter an estate of inheritan be conveyed or devised to a husband and his wife, one moie of such estate shall, on the death of either, descend to h or her heirs, subject to debts, curtesy or dower, as the ca may be.

3 Rand. 179.
5 Grat. 63.

§ 19. The preceding section shall not apply to any esta which joint tenants have as executors or trustees, nor to

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[Local Law.]

JOHN MASON, *Appellant*,

v.

JOHN MUNCASTER, survivor of George Deneale and John Muncaster, CHURCH-WARDENS OF CHRIST CHURCH, FAIRFAX PARISH, ALEXANDRIA, and the said JOHN MUNCASTER and EDMUND J. LEE, PRESENT CHURCH-WARDENS OF THE SAID CHURCH, and others, *Respondents*.

A bill in equity, brought to rescind a purchase made under the decree of this Court, in *Terrett v. Taylor*, (9 *Cranch*, 43.) upon the ground that the title to the property was defective, and could not be made good by the Vestry and other persons, who were parties to the former suit. Bill dismissed.

The Vestry of the Episcopal Church of Alexandria, now known by the name of *Christ's Church*, is the regular Vestry, in succession, of the parish of Fairfax, and, in connexion with the Minister, has the care and management of all the temporalities of the parish within the scope of their authority. A sale by them of the Church lands, with the assent of the Minister, under the former decree of this Court, conveys a good title to the purchaser.

Although the *Church-Wardens* of a parish are not capable of holding *lands*, and a deed to them and their successors in office, for ever, cannot operate by way of *grant*; yet, where it contains a covenant of general warranty, binding the grantors and their heirs for ever, it may operate *by way of estoppel*, to confirm to the church and its privies the perpetual and beneficial estate in the land.

The parishioners have, individually, no right or title to the glebe lands; they are the property of the parish in its aggregate or corporate capacity, to be disposed of, for parochial purposes, by the Vestry, who are the legal agents and representatives of the parish.

APPEAL from the Circuit Court for the District of Columbia.

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This was a bill brought by the appellant, Mason, to rescind a purchase made by him, jointly with W. Jones, of a part of the glebe land which was sold under the decree of this Court, in the case of *Terrett v. Taylor*, reported in the 9th vol. of Mr. *Cranch's Reports*, p. 43. After a confirmation by the Court below, of the report of the sale made by the commissioners for this purpose, and after various intermediate negotiations, the appellant gave his promissory notes to John Muncaster, one of the respondents, and George Deneale, since deceased, who were at the time Church-Wardens of the Episcopal Church of Alexandria, in payment of part of the purchase money; and judgment having been obtained against the appellant, upon these notes, in the Circuit Court for the District of Columbia, the appellant also sought by his bill a perpetual injunction of this judgment. The grounds of the prayer of the bill were, that the title of the property was substantially defective, and could not be made good by the Vestry, and other persons, who were parties to the bill in the former suit; that the same bill contained a material misrepresentation of the facts respecting the title, of which the appellant was, at the time of the purchase, wholly ignorant, and of which he had but recently acquired full knowledge.[a]

Upon the final hearing in the Court below, the bill was dismissed, and the cause was brought by appeal to this Court.

[a] The essential parts of the pleadings and evidence will be found fully stated in the opinion of the Court.

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The cause was argued by the *Attorney-General* and Mr. *Key* for the appellant, and by Mr. *Swann* and Mr. *Lee* for the respondents.

On the part of the appellant it was contended, (1.) That the respondents had no title, legal or equitable. It was admitted to be the rule of equity, that where a *vendor* comes in for a specific execution, he is bound to show a title free from all doubt; but where the vendee is the plaintiff, and comes in to rescind the sale, he must show the title to be bad. The *onus probandi* was, therefore, on the appellant, and the counsel argued at large, to show that the conveyance from Daniel Jennings and wife to the Church-Wardens, in 1770, was insufficient to pass his title in fee for the benefit of the parish. The exposition of this deed, in the former case of *Terrett v. Taylor*,[a] merely establishes, that inasmuch as the Church-Wardens were not a body corporate capable of holding lands, this deed did not operate by way of grant to convey the title: that its only legal operation results from the covenant of warranty, which creates an *estoppel* in favour of the church and its privies; *i. e.* that the legal title still remains in Jennings and his heirs, but that they are *estopped* by the warranty from the assertion of that title against the church and its privies. Now suppose that the respondents are the regular successors of the Vestry and Church-Wardens of Fairfax, still they have no title to the land; all that they hold is an estoppel against Jennings and

[a] 9 *Cranch*, 52, 53.

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those claiming under him. What title have they which they could assert against a disseizor, or one claiming under a title foreign to that of Jennings? A mere estoppel against a particular grantor and and his heirs, constitutes neither a legal nor an equitable title to lands. This Court declares that the deed conveys *no title*, but merely an estoppel by force of the clause of warranty. But, even admitting that this estoppel is a title, it belongs to all the episcopal members of the parish of Fairfax, whose rights are precisely the same as if no part of the parish had ever been separated from Virginia. It is quite clear, that the former decision of the Court proceeded on the ground of the plaintiffs in that suit being considered as the regular successors of the original *cestui que trusts;* and that, if it had appeared otherwise, and that there was another church in the parish, or other parishioners who were not represented by them, the decree would have been different.[a] To connect themselves with this deed, therefore, the parties are bound to show that they are the successors. If they are not, the connexion between them is broken, and they have no title under it. The parish of Fairfax forms about one half of the county, which is equally divided into the parishes of Fairfax and Truro; the former comprehending the northern half, the latter the southern. This parish had but one Vestry, but it was the Vestry of the whole parish, elected by the whole body of the parishioners, charged with the common interests of the whole parish,

[a] 9 *Cranch*, 52, 58.

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and of both the churches equally. The funds with which the glebe was bought were levied from the whole parish, and consequently belonged to the whole parish; and in the case of a vacancy of the parsonage, this Court say, the parish was entitled to the profits of the glebe. It therefore follows, that previous to the separation of a part of this parish from the State of Virginia, its interests were one and identical throughout. No part of the parishioners could, by themselves, do any act affecting the interests of the whole, without giving the whole a voice in the measure, either by themselves or their representative agents. It is laid down, that although the Church of England, in its aggregate description, is not deemed a corporation, yet the Church of England, of a particular parish, is a corporation for certain purposes, although incapable of asserting its rights and powers, except through its parson regularly inducted.[a] And in the judgment of this Court in the former case, it is strongly intimated, that the corporate character conferred on the Vestries in 1784, could be taken away at pleasure, without any fault in the corporation.[b] If then the parish of Fairfax was a corporation, its name becomes a part of its identity, and those who call themselves successors, must have the same name. If it was a corporation, all the corporators have equal rights, and no part of them could exercise the rights which belong to the whole. But, suppose

a Town of Pawlet v. Clark, 9 *Cranch*, 292. 325.
b Terrett v. Taylor, 9 *Cranch*, 51, 52.

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it not to have been a corporation, it was a definite body; it had a unity and identity which separated it from all others. It had a technical identity.[a] It consisted of all the Episcopal members within the territorial limits. It was represented by a Vestry chosen by the voice of the whole of that parish, in which election no other parish could interfere. Those who claimed to be their successors, must, before the separation of the District of Columbia from the State of Virginia, have shown these qualifications; and it is determined that the separation has produced no change in the unity and identity of the parish, so far as the rights of property are concerned.[b] The Vestry and Church-Wardens of the Episcopal Church of Alexandria, cannot be the regular successors of the Vestry and Church-Wardens of the parish of Fairfax, because they have a distinct name, which it would have been needless to assume, unless from a consciousness of a distinct origin and nature. In fact, they have a different origin, different powers, and different duties. In the period which intervened from 1796 to 1803, there was no incumbent. What then were the rights of the parties? This Court has answered, that "the fee remained in abeyance, and the profits of the parsonage were to be taken by the parish for their own use."[c] What parish? Most certainly the

a 2 *Henn. Stat. at large*, 218.

b Terrett v. Taylor, 9 *Cranch*, 53.

c Terrett v. Taylor, 9 *Cranch*, 47. Weston v. Hunt, 2 *Mass. Rep.* 502. See also, 1 *Tuck. Bl. Com.* Part 2. App. 113.

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parish of Fairfax, to which it belonged. The Vestries chosen in 1804, and subsequently, cannot be deemed the Vestries of the parish of Fairfax, but must be considered as the Vestries of the Episcopal Church of Alexandria, because, in the parish books, the entries constantly style them the Vestry of the Protestant Episcopal Church *at*, or *in*, or *of*, Alexandria, and not the Vestry of the parish of Fairfax. The congregation of Christ's Church actually separated themselves, in 1803, from the parish of Fairfax, and formed a distinct Episcopal Church; and the elections were made by subscribers and contributors to the Episcopal Church in Alexandria, and not by the parishioners at large of the parish of Fairfax.

2. This defect in the title being thus made out, it follows that the appellant has a right to require that the contract should be rescinded, unless there be some special objection to preclude him. As to the sale being under a decree, the English practice on this subject relates to objections arising on the abstract which is presented to the purchaser. But defects subsequently discovered, may be objected, and if it appears that the vendor can make no title, the bill will be entertained.

As to notice, there is no proof of actual notice; and the circumstances are not sufficient to infer constructive notice. Nor has the objection to the title been varied by taking possession. The doctrine is, that if the vendee has knowledge of the defects before he takes possession, it is considered as a waiver of the objection, and it will be found that all the cases turn upon this distinction.

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On the part of the respondents, it was insisted, 1. That the appellant had full notice, either actual or constructive, at the time of the sale, of all the facts and circumstances of which he now seeks to avail himself, in order to rescind the sale. The proceedings in the former case were alone sufficient to charge him with notice.

2. This being a judicial sale, under a decree, the party was bound to have applied to the Court below, either before confirmation of the sale, or afterwards, to rescind the sale, and cannot now maintain an independent bill for that purpose, the effect of which would be, collaterally, to set aside the sale, as it stands confirmed by the report.[a]

3. The contract has been executed on the part of the appellant, by taking possession of the land, and it is now too late for him to make any objection to the sufficiency of the title.[b]

4. But a careful examination would show that there was not any defect in the title. The former decision of this Court had put at rest the question as to the sufficiency of the deed from Jennings, to pass his title to the Church-Wardens, for the benefit of the parish. It was there determined that the conveyance could not operate by way of grant, but might operate by way of estoppel, to confirm to the church, and those claiming under it, the perpetual estate in the land.

a 1 *Fonbl. Eq.* 371. Note 6. 1 *Atk.* 489. 3 *Ves. jr.* 333. 3 *P. Wms.* 220. 306. 1 *Rev. Code*, 80. s. 34.

b 1 *Ves. jr.* 221. 226. 3 *P. Wms.* 191. 4 *Dess. Ch. Rep.* 134. 12 *Ves.* 25.

c Terrett v. Taylor, 9 *Cranch*, 53.

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The present Vestry of the Episcopal Church at Alexandria, called Christ's Church, are the legal successors of the Vestry of the parish of Fairfax. From the year 1765 until 1801, the town of Alexandria was a part of the county of Fairfax, and the parish of Fairfax. After the year 1792, the Vestry met exclusively in Alexandria; the congregation at the Falls Church, by degrees became extinct; and the Vestry of the parish, with the church at Alexandria, has been constantly kept up, whilst the congregation that used to assemble at the *Falls Church* has ceased to exist. The consequence is, that the glebe land belongs to the Alexandria congregation, as much as if the two congregations had agreed to meet in the church at Alexandria, and had disposed of the other. There never was, and there never could be, two Vestries in the parish, that is, one for each church. Since the year 1776, there have been no compulsory means used for the support of the church, and it has rested on the voluntary contributions of the parishioners; yet every thing that has been done in respect to the property of the church, shows conclusively the regular succession of this Church and Vestry, as the Church and Vestry of the parish of Fairfax. The Vestry has been elected by the members and contributors to the church, but the right of voting did not belong to the parishioners generally, it was confined to those members and contributors. At the same time, no inhabitant of the parish has been denied the privilege of becoming a contributor, with its consequent right of voting. All parties who had

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any title to the property, were before the Court in the former case, in which the sale was decreed.[a] It was unnecessary to make the whole body of parishioners parties to that suit. They have not individually any right or title to the property. It is the property of the parish, and the Vestry are the legal agents and representatives of the parishioners, with authority to administer and dispose of it.

Feb. 20th. Mr. Justice STORY delivered the opinion of the Court.

Upon the very voluminous pleadings in this case, assuming more the shape of elaborate arguments, than the simple and precise allegation of facts, which belong to Chancery proceedings, the principal questions discussed have been, 1. Whether the Vestry of the Episcopal Church of Alexandria, now known by the name of *Christ's Church*, is the regular Vestry in succession of the parish of Fairfax. 2. Whether the existence of another parish church, called the *Falls Church*, within the same parish, has any material bearing upon the title, either as to making parties, or settling the right to the glebe. 3. Whether the appellant had full notice of the true nature of the title before the purchase, and so took it with its infirmities, if any such existed. 4. Whether, this being the case of a judicial sale under a decree, the party was not bound to have applied to the Court below, before confirmation of the sale, or

[a] 3 *Ves. jr.* 505

afterwards, to rescind the sale; and can now maintain an independent bill for that purpose, the effect of such bill being collaterally to set aside the sale, as it stands confirmed by the report. Another point was made at the bar, as to the sufficiency of the conveyance by Jennings to the Church-Wardens, in 1770, to pass his title in fee for the benefit of the parish. But that point was put at rest, in the case of *Terrett v. Taylor*, and is not now open for discussion.[a]

a. Upon this point, the Court says, in the former case, "Upon inspecting the deed, which is made a part of the bill, and bears date in 1770, the land appears to have been conveyed to the grantees, as Church-Wardens of Fairfax, and to their successors in that office, for ever It is also averred in the bill, that the plaintiffs, together with two of the defendants, (who are Church-Wardens,) are the Vestry of the Protestant Episcopal Church, commonly called the Episcopal Church of Alexandria, in the parish of Fairfax, and that the purchase was made by the Vestry of said parish and church, to whom the present Vestry are the legal and regular successors in the said Vestry; and that the purchase was made for the use and benefit of the said church in the said parish. No statute of Virginia has been cited, which creates Church-Wardens a corporation for the purpose of holding lands; and at common law, their capacity was limited to personal estate. (1 *Bl. Com.* 394. *Bro. Abr. Corp.* 76. 84. 1 *Roll. Abr.* 393. 4. 10. *Com. Dig. tit. Esglise*, F. 3. 12 *Hen.* VII. 27. *b.* 13 *Hen.* VII. 7. 9. *b.* 37 *Hen.* VI. 6. 30. 1 *Burns' Eccles. Law*, 290. *Gibs.* 215.) It would seem, therefore, that the present deed did not operate by way of *grant*, to convey a fee to the Church-Wardens and their successors; for their successors, as such, could not take: nor to the Church-Wardens in their natural capacity; for 'heirs' is not in the deed. But the covenant of general warranty in the deed, binding the grantors and their heirs for ever, and warranting the lands to the Church-Wardens and their successors for ever, may well operate, by way of *estoppel*, to confirm to the church and its privies the perpetual and beneficial estate in the land." 9 *Cranch*, 52, 53.

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If the first question is decided against the plaintiff, it will be unnecessary to consider the other question, for it is not denied, that the Vestry of the parish of Fairfax sufficiently represent the whole parish for all the purposes of the original bill, and that both by the former laws of Virginia and the canons of the Episcopal Church, they, in connexion with the Minister, have the care and management of all the temporalities of the parish within the scope of their authority. To the consideration of this question, the attention of the Court has been mainly directed; and it is now my duty to explain the grounds upon which we have come to the conclusion, that the Vestry of the Episcopal Church of Alexandria is the regular Vestry in succession of the parish of Fairfax; and being so at the commencement of the former suit, the main objection to the title to the glebe falls, and the bill of the plaintiff ought to be dismissed.

By the laws of Virginia, passed antecedent to the revolution, each parish was authorized to elect a Vestry of twelve persons, to manage their parochial concerns; and however many distinct Episcopal Churches, or places of public worship, there were within the parish, the same Vestry had the superintendance and direction of them all. In point of fact, there were two such places of worship within the parish of Fairfax, the church at Alexandria, and the Falls Church; but the cure of both belonged to the same Minister, who was the rector of the whole of the parish, and the parochial concerns were managed by a single Vestry. Not the least trace can be found of any other Vestry

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until the year 1819, when a Vestry was chosen *de facto*, by persons purporting to belong to the Falls Church, and that portion of the parish of Fairfax which is not included within the District of Columbia. Up to the year 1796, it is not disputed that a Vestry was regularly chosen for the whole parish; and the place of the choice of the Vestry, as well as the Vestry meetings, appears to have been usually, but not universally, at Alexandria. In April, 1796, a Vestry was chosen for the parish, to serve for the usual period of three years, who continued to hold meetings until April, 1799; and from that time, there seems to have been an interregnum, so far as the minutes in the parish books afford information, until April, 1804, when a Vestry was chosen, for the usual term of three years; and there has been a continuation of Vestries from that election down to the present time. The validity of these elections, from 1804, as elections of the Vestry of the parish of Fairfax, forms the point in controversy, and will be presently considered. Since the year 1800, the Falls Church has fallen into a state of dilapidation and decay, and public worship has not been celebrated there by the Minister of the Episcopal Church, on account of its deserted state; but there has been a regularly inducted Minister at the parish church in Alexandria, where divine services have been constantly performed.

The counsel of the plaintiff contend, that the Vestries chosen in 1804, and subsequently, are not to be deemed the Vestries of the parish of Fairfax, but of the Episcopal Church, (that is, of Christ's

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Church,) in Alexandria; and they support their argument upon the following grounds: 1. That in the parish books the entries constantly style them the Vestry of the Protestant Episcopal Church, *at*, or *in*, or *of*, Alexandria, and not the Vestry of the Parish of Fairfax. 2. That, in point of fact, the congregation of Christ's Church, in 1803, separated themselves from the parish of Fairfax, and formed a distinct Episcopal Church. 3. That the elections were made by subscribers and contributors to the Episcopal Church in Alexandria, and not by the parishioners at large of the parish of Fairfax.

Under some one of these heads, all the objections urged at the argument may be arranged.

As to the first point. It is true, that in general the style of the entries of the Vestry meetings, since 1804, is as the plaintiff stated it to be. But it will scarcely be contended, that the errors of a recording clerk, in description, will change the nature or character of the Vestry proceedings, or devest them of their authority, if, in point of fact, they constituted the Vestry of the parish of Fairfax. The irregularities of merely ministerial officers, and especially of parish clerks, whose records are generally kept in a loose and inaccurate manner, have never been, hitherto, supposed to have such a controlling authority. Courts of justice will examine into the proceedings of ecclesiastical bodies with indulgence; and if, upon the whole, a consistent construction can be given to them, in conformity to existing rights, they will suppose them to be done in the exercise of those rights, ra-

ther than in gross usurpations of authority. Now, there is no pretence to say, that there existed any right on the part of the congregation of the Episcopal Church at Alexandria, to choose a Vestry of its own, which should not be the Vestry of the parish. The church itself, with the church-yard and appurtenances, belonged to the parish of Fairfax. It was the parish church. The Vestry, which had a right to govern and manage its temporal concerns, was the parish Vestry. It was an Episcopal Church, under the direction and authority of the General Episcopal Church of Virginia; and by the canons of that church, made in conformity with the laws of Virginia, and never repealed, the Vestry were to be elected for the parish. It is not lightly to be presumed, therefore, that an election of a Vestry was intended to be made in any other manner than the canons of the Episcopal Church and the rights of the parishioners would justify. The very fact of a total silence, and absence of any objection, through so long a period, would authorize the conclusion that e Vestry was understood to be a parish Vestry, an its acts were for the benefit of the whole, and not for the part connected with the Alexandria Church. It should also be recollected, that the Falls Church had fallen into decay, and was no longer used for purposes of public worship. It was considered in the same light as if totally destroyed; and then, as the Alexandria Church was the only worshipping church in the parish, nothing could be more natural than, in common parlance, and in parochial records, to designate the Vestry as the Vestry of the Episcopal Church *of*.

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in, or *at*, Alexandria. It was so in a strict sense, not because it was not the parish Vestry, but because the church at Alexandria was the parish church, and its congregation, in an ecclesiastical sense, consisted of the Episcopalian parishioners of Fairfax. If we advert to the history of the Virginia legislation on this subject, there will be found a natural reason for this apparent change of style, without any intended change of character. That legislation is referred to, somewhat at large, in the case of *Terrett v. Taylor*, and need not here be minutely examined. The act of 1784, ch. 88. created the Minister and Vestry of every parish a corporation, by the name of the Protestant Episcopal Church, in the parish where they respectively resided. When, by the subsequent act of 1786, ch. 12. this act was repealed, there was provision made, that all religious societies might, according to the rules of their sect, appoint, from time to time, trustees to manage their property, which trustees were, by the subsequent act of 1788, ch. 47. declared to be the successors to the former Vestries. The general Episcopal Church of Virginia, in convention, adopted general regulations on this subject, conforming, in substance, to the act of 1784, and providing for the regular appointment of Vestries, who should be trustees, for every Episcopal Church in every parish. Under such circumstances, the natural denomination of the Vestry would be, the Vestry of the Episcopal Church in the particular parish. And when, in consequence of the separation of the county of Alexandria from the State of Vir-

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ginia, by the cession to the United States, the parish church fell within the boundaries of Alexandria, the embarrassment arising from this new state of things, might well create doubts as to the proper designation, and introduce the new appellation. Whether this description was right or wrong, is of no consequence; for if there has been no legal change of character, in contemplation of law, the regular Vestry of this church remains the Vestry of the parish. It appears in proof, that a number of the congregation of the church at Alexandria, are persons residing without the boundaries of the District of Columbia, and in the Virginia part of the parish; and there is not the slightest evidence that, in the election of Vestries since 1804, a single parishioner of Fairfax has ever been refused his vote at any election, on account of his residence. We think, then, that the circumstance of a change of style in the parish records, furnishes no proof of the asserted change of character. In the election, however, of 1810, the entry in the books is, that the Vestry were elected "to serve the parish as Vestrymen;" and, immediately afterwards, in subscribing the test, they speak of themselves as the Vestry "of the Protestant Episcopal Church of Alexandria." Now, what parish is here spoken of? Plainly the parish of Fairfax, for no other parish is pretended to exist. And when the Vestry subscribed the test, as Vestry of the church of Alexandria, it is as plain that they understood that the parish and the church of Alexandria meant the same thing. If then the books of the

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church are to furnish evidence against the defendants, they are entitled to the benefit of the same records, by way of explanation.

The second ground is, that the congregation of the church at Alexandria has separated itself from the parish, and formed a distinct society, and can no longer be deemed the parish church of Fairfax. This is principally attempted to be sustained by an agreement made in 1803, which is found fastened, by wafers, to the vestry book. That agreement, after reciting that a committee was appointed by "the Protestant Episcopal Church of Alexandria," to adopt measures for insuring a competent salary for a Minister, &c. and that the committee so appointed had reported, as an advisable mode, to rent out the pews to occupiers and others, at a fixed annual rent, amounting in the aggregate to 1186 dollars, and further proposed soliciting a voluntary subscription to supply any deficiency; then proceeds to state, that the subscribers agree to rent the pews, and to pay to the Rev. Thomas Davis, (then the Rector of the parish,) the sums annexed to their names, in quarterly payments, &c. &c. reserving a right to surrender up their pews at the end of a year. Such is the substance of the agreement; and it is extremely difficult to perceive how it conduces to prove, in any shape, the establishment of a new society. It is to be considered, that the church, whose pews were to be disposed of, was the parish church of Fairfax; and it cannot be pretended that the parish could be deprived of it, except by its own consent through its authorized

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agents. A new society, composed partly of the parishioners, had no more right or power to dispose of the pews than utter strangers. It would be as gross a usurpation, and as tortious an act, in the one case as in the other. But there can be no doubt, that a parish may regulate the sale or renting of the pews of the church, in such manner as may conduce to the general benefit. The parish is not the less the owner of the church, because the pews in it are rented or sold to others; for the right to the exclusive use of the pews, is very different from the right to the freehold in the church itself. The agreement, in the present case, was nothing more, and purports to be nothing more, than a mere agreement for renting the pews. It is made with persons who are the committee of the church, and who claim the right to use it. It is an act which might be done by authority of the parish, without in any respect transcending its rights or duties. How then is it to be deemed an act which indicates the creation of a new society, or a separation from the parish? What authority could any new society claim to the parish property? If such a claim had been made, it would have been resisted; and the very circumstance, that no resistance was made, is conclusive that the agreement was made in the exercise of ordinary parochial rights, and indicated no severance of interests. In point of fact, an agreement, in substance like the present, was made, respecting the pews in this very church, in the year 1785; and yet no one supposed that the church ceased to be the parish church, or that the

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subscribers constituted a new society. There is another circumstance, which is too significant to be passed over in silence; it is, that the Rev. Mr. Davis, to whom the agreement in question refers, was regularly inducted, in the year 1792, as Rector of the parish of Fairfax, and continued to officiate as such, in this very church, down to the year 1806, three years after this agreement was made. During all this period, the freehold of the glebe was vested in him, as *persona ecclesiæ*. How then is it possible to maintain, that the support of the Rector of the parish in the exercise of his parochial rights and duties, and the continuance of the Rector in possession of the glebe and the church, can be construed as an abandonment of all connexion with the parish, and a renunciation of its privileges? It is a fact, also, corroborative of the view that has been already taken by the Court of this agreement, that the possession and management of the temporalities of the church, have always been in the Vestries of the Alexandria Church, since 1804. They have exercised the sole and exclusive control over them. They have never disclaimed, in any ecclesiastical assembly, their former connexion. They have not applied to the Bishop, or other proper authority, to be formed into a new and distinct society, separate from the parish. And yet it is not denied that, by the rules and customs of the sect, new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority. In the act of consecration of the

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church in 1814, the Vestry expressly declare the church to be the parish church of Fairfax, and in virtue of their authority, as the Vestry thereof, they dedicate it to the public worship of God; and the Bishop of the diocess then acknowledged and consecrated it as such. In the year 1807, the Rev. Mr. Gibson was elected Rector of the parish, upon the resignation of the Rev. Mr. Davis; and on that occasion, the Vestry resolved, that he should be inducted *as Rector of the parish*; and in the succeeding election of the Vestry, in the same year, the Vestry are stated in the records to be chosen "to serve the parish." So that, if in the records there are single expressions which, standing alone, might be of doubtful interpretation, the solemn acts of the Vestry in consecrating the church, in choosing the Minister, and in managing the temporalities, all point to their character as representatives of the whole parish. It may be added, that in the bill of *Terrett v. Taylor*, the Vestry assume to be the parish Vestry in succession; and that in the answer to the present bill, by the defendants, who are the existing Vestry of the Church of Alexandria, they assert, in the most positive and solemn manner, the same character, and utterly deny the allegations of the defendant's bill on this point. So that, unless the Court were prepared to divert the clear purport of the evidence, and the solemn acts of the Church, for a series of years, and the presumptions arising from long and undisputed possession of the property, and exercise of parochial authority, on account of some irregularities, which may occur in the trans-

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actions of most public bodies, the conclusion cannot be arrived at, that the church at Alexandria has ceased to be the parish church of Fairfax, or that its congregation has become a distinct society.

The third ground of objection is, that the Vestry were chosen, not by the parishioners of Fairfax, but by subscribers and contributors to the Episcopal Church at Alexandria. This objection proceeds upon the supposition, that if the Vestry is *de facto* the Vestry of the parish, the very mode of choice demonstrates that it cannot be the Vestry *de jure*. Whether, in a case like that before the Court, the inquiry can properly be gone into as to the mode and regularity of the choice of a Vestry actually in office and exercising the duties thereof; and if the inquiry be proper, whether the legal distinction between a Vestry *de jure* and *de facto*, could avail the plaintiff, are questions upon which it is not necessary for the Court to express any opinion. We think a short examination of the subject will put the objection at rest, whatever might be the conclusion drawn from such a legal distinction.

Before the revolution, the Episcopal Church was the established church of Virginia, and all the parishioners were liable to be rated for parish taxes, and were entitled to vote in the choice of the Vestry. But the church establishment fell with the revolution, and the compulsive power of taxation ceased; and as no person could be compelled to worship in the Episcopal Church, or pay taxes for its support, the parishioners of the Episcopal Church, in the ecclesiastical sense of the term, af-

terwards consisted only of the Episcopalian contributors and members. The act of 1784, ch. 88. provided that, at all future elections of Vestries, no person should be allowed to vote, who did "not profess himself a member of the Protestant Episcopal Church, and actually contribute towards its support." Although this act was repealed by the act of 1786, ch. 12. yet the same act saved the management of their property and regulation of their discipline, according to the rules of their own sect, to all religious societies. By the canons of the Episcopal Church, subsequently passed, the right to elect Vestries is confined to the "freeholders and housekeepers, who are members of the Protestant Episcopal Church within the parish, and regularly contribute towards the support of the Minister, and to the common exigencies of the church within the parish." These canons being assented to by the various parishes which they govern, and not being inconsistent with the laws of Virginia, are not denied to be in force for parochial purposes. Now, there is not in this record the slightest proof, that any election of the Vestry has been made in any other manner, than that pointed out by the canons of the church; and the answer of the defendants expressly avers, that the choice has been constantly made according to the canons of the church, and that no person belonging to the Falls Church, has ever been a contributor, or ever offered to vote at any election. It seems to the Court, therefore, that, the elections being regularly made, by persons qualified according to the canons, the whole foundation of the objection is removed.

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No inference can be deduced from this circumstance, in proof of the Alexandria Church having separated itself from the parish, and become a distinct and independent society.

It has been said, that the parishioners of the whole parish are the *cestuis que trust* of the glebe and other parochial property, and ought to be parties to any bill to dispose of it. But in an accurate and legal sense, the parishioners are not the *cestuis que trust*, for they have, individually, no right or title to the property. It is the property of the parish, in its corporate or aggregate capacity, to be applied and disposed of for parochial purposes, under the authority of the Vestry, who are its legal agents and representatives. Upon the sale of the glebe, the proceeds become parochial property, and must be applied for the common benefit, the maintenance of the Minister, the repairs of the churches, and other parochial expenses, by the Vestry, in good faith. But the mode, and extent, and circumstances, under which the fund is to be applied, are necessarily left to the discretion of the Vestries, from time to time chosen. An abuse of their trust, or duty, is not to be presumed; and if it should occur, the same remedy will belong to the parishioners as in other cases, where money is wantonly misapplied to wrong purposes, which constitute a common fund for the benefit of the whole parish, and not for the benefit of a part. It will be sufficient to decide upon such a case when it shall arise in judgment. But the individual parishioners residing out of Alexandria county, were no more necessary to be made

parties to the bill praying a sale of the glebe, than the individuals residing within the county. Both were represented in the only way known to the laws, by the Vestry duly appointed to manage parochial concerns.

These are some of the reasons which have led the Court to the conclusion that has been already stated, to wit, that the Vestry of the church in Alexandria is, in succession, the regular Vestry of the parish of Fairfax.

This decision renders it unnecessary to consider the other points raised at the argument; and it remains only to declare, that the judgment of this Court is, that the decree of the Circuit Court dismissing the bill, be affirmed with costs.

[Local Law.]

Doddridge v. Thompson and others.

Under the reserve contained in the cession act of Virginia, and under the acts of Congress of August 10th, 1790, ch. 67. [xl.] and of June 9th, 1794, ch. 238. [lxii.] the whole country *lying between the Scioto and Little Miami rivers*, was subjected to the military warrants, to satisfy which the reserve was made.

The territory lying between two rivers, is the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source, must be considered as the true river.

The act of June 26th, 1812, ch. 482. [cix.] to ascertain the western boundary of the tract reserved for the military warrants, and which provisionally designate *Ludlow's line* as the western boundary, did

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OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

1824.

Kirk
v.
Smith.

[Local Law.]

KIRK and others, *Plaintiffs in Error*,
v.
SMITH, ex. dem. PENN, *Defendant in Error*.

The act of Pennsylvania, of 1779, "for vesting the estates of the late proprietaries of Pennsylvania, in this Commonwealth," did not confiscate lands of the proprietaries which were within the lines of manors; nor were the same confiscated by the act of 1781, for establishing a land office.

The statute of limitations of Pennsylvania, of 1705, is inapplicable to an action of ejectment, brought to enforce the unpaid purchase money, for lands of the proprietaries within the manors for which warrants had issued.

Nor is the statute of limitations of 1785, a bar to such an action.

ERROR to the Circuit Court of Pennsylvania. This was an ejectment, brought by the defendant in error, in the Court below, to recover the possession of certain lands in York county, in the State of Pennsylvania. On the 4th of March, 1681, Charles II. granted to William Penn, the ancestor of the lessor of the plaintiff below, that tract of country which now constitutes the State of Pennsylvania. The grant contains special powers to erect manors and to alien the lands, with liberty to the alienees to hold immediately of the proprietor and his heirs, notwithstanding the statute of *quia emptores*. On the 11th of July, in the same year, William Penn, having interested many persons in his grant, agreed with "the adventu-

the owners of the Fanny, then the freight for the hides, excluding the freight on the *lignum vitæ*, to be deducted from the appraised value of said hides.

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Danforth v. Wear.

[Local Law.]

Danforth v. Wear.

The acts of Assembly of North Carolina, passed between the years 1783 and 1789, invalidate all entries, surveys, and grants, of land within the Indian territory, which now forms a part of the territory of the State of Tennessee. But they do not avoid entries commencing without the Indian boundary, and running into it, so far as respects that portion of the land situate without their territory.

The act of North Carolina, of 1784, authorizing the removing of warrants which had been located upon lands previously taken up, so as to place them upon vacant lands, did not repeal, by implication, the previously existing laws, which prohibited surveys of land within the Indian boundary. The lands to which such removals are made, must be lands previously subjected to entry and survey.

ERROR to the Circuit Court of West Tennessee.

This cause was argued at the last term, and again argued at the present term, by the *Attorney-General* and Mr. *Swann*,[a] for the plaintiff, and by Mr. *Williams*, for the defendant.

Feb. 15*th.*

a They cited 2 *Tenn. Rep.* 157. *N. C. Rep. in Confer.* 440. 1 *Tenn. Rep.* 30.

b He cited Preston v. Browder, 1 *Wheat. Rep.* 115. Danforth v. Thomas, *Id.* 155.