

# OWNERSHIP OF CHURCH PROPERTY AND THE DOCTRINE OF IMPLIED TRUSTS

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On January 19, 1970 the Supreme Court of the United States denied a petition for certiorari in the case of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*<sup>1</sup> and thus brought to an end a controversy over church property which had begun almost four years earlier in the Superior Court of Chatham County, Georgia and which had twice been to the Georgia Supreme Court<sup>2</sup> and twice to the United States Supreme Court.<sup>3</sup> The effect of the United States Supreme Court's action in denying certiorari was a victory for the two local Presbyterian churches in Savannah, but it left the law in this area perhaps more confused than it was before this litigation arose. This article is about that litigation.

Mary Elizabeth Blue Hull Memorial Presbyterian Church (Hull Memorial) and Eastern Heights Presbyterian Church (Eastern Heights) are now autonomous Presbyterian churches in Savannah, but before this controversy both of these local churches were a part of and affiliated with the Presbyterian Church in the United States, sometimes called the Southern Presbyterian Church. The Southern Presbyterian Church is a hierarchical church with a connectional form of government. This means that the Church is composed of a number of local churches governed by a series of ascending church authorities.<sup>4</sup> Thus a local Presbyterian church is governed by its Session, composed of Elders in the Church; the Session is governed by the Presbytery, composed of several local churches in a given area; the Presbytery reports to the Synod, usually composed of all Presbyteries within a state; and the Synod in turn reports to the General Assembly, the highest governing body in the Southern Presbyterian Church.

In 1966 and prior thereto, Hull Memorial and Eastern Heights became dissatisfied with statements in Church publications and by the

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1. 396 U.S. 1041 (1970). Actually there were two cases involving two separate churches, but both cases involved identical questions and were therefore consolidated and treated as one case throughout this litigation.

2. 225 Ga. 259, 167 S.E.2d 658 (1969); 224 Ga. 61, 159 S.E.2d 690 (1968).

3. 396 U.S. 1041 (1970); 393 U.S. 440 (1969).

4. Other churches with this same general form of government are the United Methodist Church, Episcopal Church, Lutheran Church, and Roman Catholic Church. By contrast the Southern Baptist Church has a congregational form of government rather than hierarchical.

General Assembly on civil rights and civil disobedience. The two local churches also were dissatisfied with the action of the General Assembly in amending the Church Constitution to make women eligible to hold church office, with the General Assembly's policy statement on the Vietnam war and with the failure of the General Assembly to endorse an amendment to the United States Constitution to overcome the Supreme Court's decision preventing Bible reading and prayer in the public schools.<sup>5</sup> Under the Church Constitution, the two local congregations could have expressed their dissatisfaction by appealing through the various levels of the Church government. Instead, a majority of the church members present at meetings of the respective congregations voted to remove themselves from all ecclesiastical control, jurisdiction and oversight of the parent Church and so notified the Presbytery of Savannah, which by means of an Administrative Commission, attempted to resolve the controversy but to no avail. All the Ruling Elders of the two churches save one voted for the withdrawal and renounced all jurisdiction and authority over them by the parent Church. The Administrative Commission of the Presbytery then declared, in accordance with section 15-2 of the Church's *Book of Church Order* (a part of the Church Constitution) that one Elder did not constitute a Session, and since there was no Session and no one to exercise jurisdiction, the Savannah Presbytery, under authority of section 16-7(2) of the *Book of Church Order*, assumed original jurisdiction over the local churches and began to make arrangements to provide regular services of worship at the two churches. Shortly thereafter, both churches filed suits<sup>6</sup> in the Superior Court of Chatham County seeking a permanent injunction against the parent Church and its duly constituted officers to enjoin them from interfering with the local churches' exclusive use and control of the local church properties. The superior court submitted to a jury the question of whether the general assembly's statements on civil rights, civil disobedience, the Vietnam war, and the change in the Church Constitution making women eligible to hold church office constituted a "substantial abandonment" of the original tenets and doctrines of the Presbyterian Church in the United States and whether such statements were utterly variant from the original purposes of the Church. The jury found in favor of the local churches and the

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5. See 224 Ga. at 62-63, 159 S.E.2d at 692, for a more complete summary of the violations and departures claimed by the local churches.

6. Named as defendants were the Presbyterian Church in the United States and J. Lehmon Brantley, Chairman of the Administrative Commission of the Presbytery of Savannah.

superior court issued an injunction enjoining the parent Church and its authority from using the church properties.

The parent Church then appealed to the Supreme Court of Georgia and there argued strongly that the local churches were not entitled to maintain their action because they raised ecclesiastical questions which should be decided exclusively within the jurisdiction of the Church and not by civil courts. The Georgia Supreme Court recognized this argument but pointed out that the civil courts may become involved in church property disputes to make certain that when property is devoted to a specific doctrine or purpose, the property will not be diverted from that trust.<sup>7</sup> In this connection the Georgia Supreme Court recognized and approved the "implied trust doctrine" as spelled out by the United States Supreme Court in *Watson v. Jones*.<sup>8</sup> Basically the implied trust doctrine provides that in hierarchical churches such as the Presbyterian Church, there is an implied trust upon the local church properties for the benefit of the parent Church.<sup>9</sup>

The Georgia Court then proceeded to rule that it was proper for a jury to determine whether or not the parent Church had "substantially abandoned" its original tenets of faith and practice. And if there were such a substantial abandonment, as the Savannah jury found, in that event the local Church could in effect secede from the parent Church and retain control of the local church properties. The court's ruling is summed up in the following quote:

Therefore, we hold that upon a showing of substantial abandonment of, or departure from, the original tenets of faith and practice by the general church, the civil courts will afford protection to the local churches as to possession and use of the local church properties, free of any claim by the general church.<sup>10</sup>

After reviewing the evidence, the Georgia Supreme Court found that there had been a substantial abandonment and therefore affirmed the lower court's granting of the injunction. The parent Church's motion for rehearing was denied and the stage was set for the first appeal to the United States Supreme Court.

The parent Church filed its petition for a writ of certiorari in April 1968, and in less than two months the United States Supreme Court

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7. 224 Ga. at 68, 159 S.E.2d at 695.

8. 80 U.S. (13 Wall.) 679 (1872).

9. "[S]o long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property." 80 U.S. (13 Wall.) at 726.

10. 224 Ga. at 70, 159 S.E.2d at 697.

granted certiorari.<sup>11</sup> The case was argued before the Supreme Court on December 9 and 10, 1968, by Charles L. Gowen of Atlanta for the parent Church and by Owen H. Page of Savannah for the local churches. On January 27, 1969, the Supreme Court unanimously reversed the Georgia Supreme Court (special concurrence by Mr. Justice Harlan) and remanded the case to the Georgia Court.<sup>12</sup> The opinion, delivered by Mr. Justice Brennan, was not particularly surprising in view of past decisions. The *Watson* case and the implied trust doctrine established there were again reaffirmed. The Supreme Court recognized that the *Watson* rule had been raised to constitutional status by the decision in *Kedroff v. St. Nicholas Cathedral*.<sup>13</sup> The *Kedroff* decision in effect held that a state legislature could not constitutionally adopt legislation which would benefit one segment of a church over another. This rule was extended to judicial action in *Kreshik v. St. Nicholas Cathedral*.<sup>14</sup>

Quoting with approval from *Watson*, the United States Supreme Court, in *Presbyterian Church v. Hull*, stated its reasoning as follows:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. . . .<sup>15</sup>

Thus, the United States Supreme Court held that although civil courts could open their doors to church property disputes, they could not decide any question involving religious or ecclesiastical matters but rather they must accept as final (in the absence of fraud, collusion or arbitrariness) the decision by the highest church body to which the matter had been

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11. 392 U.S. 903 (1968).

12. 393 U.S. 440 (1969).

13. 344 U.S. 94 (1952).

14. 363 U.S. 190 (1960).

15. 393 U.S. at 446, quoting *Watson v. Jones*, 80 U.S. (13 Wall.) at 728-729.

taken. Applying these principles, the Supreme Court reversed the Georgia Supreme Court and held that a determination of whether there had been a substantial departure from the original tenets and beliefs of the Presbyterian Church was improper and violated the freedom of religion clause of the first amendment to the United States Constitution. Speaking for the Court, Mr. Justice Brennan summarized:

The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a 'substantial departure' from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. . . . A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of the particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids Civil courts from playing such a role.<sup>16</sup>

After reversal and remand, the Georgia Supreme Court invited the parties to submit motions with briefs covering their contentions as to what disposition should be made in light of the United States Supreme Court opinion. After these motions and briefs had been filed, the Georgia Supreme Court again affirmed the judgments of the trial court enjoining the parent Church from interfering with the local church property.<sup>17</sup> In reaching this result, the Georgia Supreme Court struck down the implied trust theory and based its decision on a determination of where legal title to the church property lay. Reasoning that since the United States Supreme Court struck down Georgia's departure-from-doctrine element of the implied trust theory, the Georgia Court held that the implied trust theory in its entirety must fall:

Since Georgia chose to adopt the implied trust theory *with* this [departure-from-doctrine] element as a condition, this court must assume that it would not have adopted the theory without this mode of protecting the local churches.

Therefore, a part of the rule having been stricken, the remainder falls

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16. 393 U.S. at 449-50.

17. *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969).

with it, and there is no implied trust on the property in controversy.<sup>18</sup>  
(Court's emphasis)

The Georgia Court then determined that since legal title was in the two local churches, they were entitled to possess the property without interference.

After a motion for rehearing was denied, the parent Church again petitioned the United States Supreme Court for a writ of certiorari on the ground that the Georgia Supreme Court had struck down the implied trust doctrine adopted in *Watson* and reaffirmed in this case. The parent Church also pointed out that if the Georgia decision were allowed to stand, it would effectively destroy the hierarchical form of church government by taking away the parent Church's authority to make a decision binding on the lower echelons of church government. But the United States Supreme Court apparently was not impressed with this argument and certiorari was denied.<sup>19</sup> Thus the result of almost four years of litigation was that the judgment rendered in the first instance by the trial court was affirmed and reinstated.

Where does this leave us now? So far as the two local churches in Savannah are concerned, they are no doubt pleased with the result since it means that they have unencumbered possession of the local church properties and they are not subject to any control by the parent Church. But more importantly, at least taking a broader view, this litigation has not solved the much larger problem of the status of churches with hierarchical or connectional forms of government. Since 1872 when the United States Supreme Court decided *Watson* and spelled out the implied trust theory, that theory has been a part of our law and all hierarchical churches have been governed in accordance with this principle. Furthermore *Watson* and the implied trust theory have been reaffirmed by the United States Supreme Court and other courts numerous times. Yet now, in Georgia anyway, the implied trust theory is dead. The Georgia Supreme Court has held that Georgia "adopted" the implied trust theory with the departure-from-doctrine element as a part of it and since the United States Supreme Court has struck down the departure-from-doctrine element, the entire implied trust theory must fall. Assuming for the moment that the result reached by the Georgia

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18. 225 Ga. at 260, 167 S.E.2d at 659.

19. 396 U.S. 1041 (1970). On the same date the Supreme Court in a *per curiam* opinion refused to consider a Maryland Court of Appeals decision in the case of *Eldership v. Church of God at Sharpsburg*. This was also the second appearance in the Supreme Court for that case. See 249 Md. 650, 241 A.2d 691 (1968), *vacated and remanded* by 393 U.S. 528 (1969) for further consideration in light of *Presbyterian Church v. Hull*, 393 U.S. 528 (1969). The Maryland Court of Appeals opinion on remand appears at 254 Md. 162, 254 A.2d 162 (1969), *appeal dismissed* 396 U.S. 367 (1970).

Supreme Court is the proper one, the method by which it was reached is not. The fallacy in the Georgia Court's reasoning is that neither Georgia, nor any other state, should be allowed to adopt or not adopt a decision by the United States Supreme Court. The *Watson* decision held that there is an implied trust on local church properties in favor of the parent Church. This is the law, according to the United States Supreme Court, and that rule should apply equally in all states, not just in the ones who choose to adopt it. The United States Supreme Court was not swayed by this argument when this matter was presented to them the second time, and in fact in *Eldership v. Church of God at Sharpsburg*<sup>20</sup> Mr. Justice Brennan in a separate opinion joined by two other Justices specifically held that the various states can "adopt" the *Watson* approach or any other approach which does not violate first amendment principles. That does not mean that the entire Court would agree.

The question now arises as to whether the result reached is the best one. A persuasive and logical argument can be made that local church members who have bought and paid for church properties should be allowed to retain those properties and use them to worship God as they see fit and to withdraw themselves from the control of the parent Church organization if they choose to do so. On the other hand, to allow local churches who are members of a larger church organization to withdraw all affiliation and support from the parent Church on a majority vote can only weaken the overall effectiveness of churches and in the long run eventually destroy the hierarchical or connectional form of church government. Whether that would be good or bad remains for theologians and laymen alike to debate. But whether it is right or wrong or good or bad is not for the civil courts to say. Yet the courts, if they are to open their doors at all to church disputes, must set down concrete rules to govern the disputes and this responsibility must eventually be borne by the United States Supreme Court.

But as is true of so many things in the law, the status of hierarchical churches and the implied trust theory is now uncertain. The United States Supreme Court in *Watson* has said that there is an implied trust on local church properties in favor of the parent Church. The Georgia Supreme Court says that there is not, and the United States Supreme Court has declined to review that decision. Which Court is right? Lawyers and churchmen alike can argue both ways, but it is the ultimate responsibility of the United States Supreme Court to decide. For the time being at least, that Court has chosen not to accept this responsibility.

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20. 396 U.S. 367, 368 (1970).

