New York Supreme Court

NEW YORK COUNTY

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Plaintiff,

v.

JOHN KEDROFF, *et al.,*

Defendants.

DECISIONS

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SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, Plaintiff, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Defendants.

SUPREME COURT,

TRIAL TERM—NEW YORK COUNTY.

February 18, 1948.

ACTION in ejectment.

RALPH MONTGOMERY ARKUSH and ROBERT H. KILROE for plaintiff.

PHILIP ADLER for defendants.

BOTEIN, J. In 1925, the Appellate Division of this Department held that one John S. Kedrovsky was the accredited Archbishop of the North American Diocese of the Russian Orthodox Church and as such entitled to occupy the Cathedral of St. Nicholas in New York (*Kedrovsky* v. *Rojdesvensky,* 214 App. Div. 483). Its determination was affirmed without opinion by the Court of Appeals (242 N. Y. 547).

Kedrovsky had sought to prevent the defendant Rojdesvensky who likewise claimed a valid appointment as Archbishop of the North American

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Diocese, from occupying the Cathedral. The complaint asserted that the defendants were not the archbishop and dean of the church, and that by their occupancy they were diverting the property of the church from the trust to which it was subject, that is, occupancy by the accredited archbishop and dean. The complaint took the form of an action for the enforcement of the trust upon the real property occupied by the defendants.

In arriving at this decision the Appellate Division found that none of the bodies purporting to recognize Rojdesvensky as an archbishop was shown to have had any authority to appoint an archbishop. The court, on the other hand, found that Kedrovsky was appointed by the Holy Synod and that this body derived its powers to make a valid appointment from a legally convoked Sobor, or ecumenical convention of the church, held in Moscow in 1923. "As to Kedrovsky's authorizations from the Holy Synod there is no dispute whatever. The Holy Synod has authority to appoint an Archbishop for North America and a delegate of the Holy Synod" (p. 488).

The court therefore concluded (p. 489): "To set aside the actions of the second Sobor under these conditions in favor of the shadowy claim of the defendant Rojdesvensky, on the theory that the doctrinal necessities of the Russian Church require it, would put a civil tribunal of New York in ascendancy over the ecclesiastical authority in the decision of a purely ecclesiastical question with which it can have no concern."

In making this determination, the courts were applying well-defined principles enunciated in the leading cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679) and *Trustees of Presbytery* v. *Westminster Church* (222 N. Y. 305). Each of these cases, as well as the instant one, grew out of a schism "which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired (*Watson* v. *Jones*, *supra*, p. 726). Both leading cases, as well as the instant one, involved the third of the three classes of cases discussed in *Watson* v. *Jones*. "It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government" (p. 726).

In laying down the rule governing such cases, the Supreme Court, in *Watson* v. *Jones*, avowedly departed from the doctrine of the English courts. It held: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them" (p. 727). "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" (p. 729).

In *Trustees of Presbytery* v. *Westminster Church* (*supra*) the Court of Appeals rejected "the claim of defendants in substance that they will be obeying all the requirements of denomination uses if they devote the property in their custody to the observance and propagation of what may be regarded as the general, fundamental principles of the Presbyterian faith, although they secede from the church organization at large with which they have been affiliated and utterly refuse to obey its government or be bound by its rules and regulations" (p. 313). The court went on to say: "Expressed in another form defendants' claim is that they can utilize the church property of which they hold title for the maintenance and support of an 'independent' Presbyterian church—a church free from and independent of any government or control of the Church at large. * * * We do not accept this view."

The opinion rendered in *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 547, *supra*), over twenty years ago, while not citing these authorities, groups itself logically in the pattern they set. It simply directed that occupancy of a cathedral built in 1903, for a diocese established in 1793, with funds furnished in large part by the Russian Orthodox Church in Russia, should be given to an archbishop duly appointed by that church—not to an archbishop deriving his authority from a convention held in Detroit in 1924, which, as the court put it, "purported to secede from the Russian Church and to make Rojdesvensky archbishop of an independent church" (p. 487).

It is in this setting that we must consider the facts which have transpired in the ensuing twenty-odd years and which have led to the institution of this lawsuit.

Following final court determination of his right to occupancy, Kedrovsky entered into possession of the cathedral. The plaintiff corporation, which was incorporated by special act of the Legislature in 1925, and claims legal title to the cathedral, permitted him to remain in possession until his death in 1934. The plaintiff corporation likewise made no effort to oust Kedrovsky's son, Michael J. Kedroff, who claimed to have succeeded him as ruling archbishop, and he remained in possession until his death in 1944. During this period the breach still existed between those who acknowledged the spiritual leadership of the patriarch in Moscow, but who asserted and maintained autonomy in all other regards, and those who subscribed to the administrative as well as spiritual leadership of the patriarch and holy synod. The head of the first group is Metropolitan Theophilus; the latter group is headed by the defendant Metropolitan Benjamin.

This is an action in ejectment, tried before the court without a jury. The plaintiff, claiming to be the owner in fee, seeks immediate possession of the cathedral, which it asserts is being unlawfully withheld from it by the two defendants. We need only determine the rights of one defendant, Metropolitan Benjamin, as the other defendant concededly derives whatever rights he might possess through the former.

The defendant, by way of separate defenses, alleges that as accredited Archbishop of the North American Diocese he is entitled to possess, occupy and use the premises, that the plaintiff has no authority to bring this action, and that the action is barred by the Statute of Limitations and by the plaintiff's laches. At the conclusion of the trial the defendant also urged that the plaintiff's title to the property involved is defective and that it had failed to prove the necessary ingredients of an action in ejectment.

Ejectment is a proper form of action for the determination of the right of possession of property held or claimed by a religious corporation (*Westminster Presbyterian Church* v. *Trustees of Presbytery,* 170 App. Div. 439). The plaintiff in this case holds title to the cathedral for the benefit of the North American diocese and of the ecclesiastical dignitaries entitled to possession (*Kedrovsky* v. *Rojdesvensky, supra*). It, by its trustees or officers, may bring an action in ejectment when, as claimed here, the persons entitled to possession are alleged to have been unlawfully ousted and refused re-entry. "The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use. * * * They have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the church." (*Watson* v. *Jones, supra,* p. 720.) "They [the defendants] should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them, to enjoy the uses, to protect which that trust was created" (p. 721).

The one issue which looms large in this case is whether, as asserted by the plaintiff, Metropolitan Theophilus is the accredited head of the church in North America, or whether, as claimed by the defendant Metropolitan Benjamin, he is that head.

The facts in this case parallel, with a fidelity seldom encountered in litigation, the facts in the *Kedrovsky* case. The holy synod was there held to have had the authority to appoint the ruling archbishop and there was no dispute as to Kedrovsky's authorization from that church body. Likewise, there is no dispute in this case that the defendant Metropolitan Benjamin was duly appointed by the patriarch and Holy Synod as ruling archbishop in 1934, following Kedrovsky's death. It was also held that the group which "purported to secede from the Russian Church and to make Rojdesvensky Archbishop of an independent church" had no authority to appoint the ruling archbishop. It is this same group which now purports to designate Metropolitan Theophilus as ruling archbishop and the plaintiff corporation, by virtue of such designation, seeks judgment which in effect would secure possession of the cathedral for Metropolitan Theophilus.

The plaintiff has, at least inferentially, assailed the soundness of the findings made by the Appellate Division in the *Kedrovsky* case as to the canonical validity of Kedrovsky's appointment and the invalidity of Rojdesvensky's purported appointment, and asks this court, in substance, to distill different findings from substantially the same evidence that was submitted in the earlier case. This, of course, may not be done, and the inexorable parallel between the *Kedrovsky* case and the instant case would seem immediately to require judgment for the defendant. However, intervening legislation must first be considered.

In 1945, the new article 5-C of the Religious Corporations Law (L. 1945, ch. 693) relating to Russian Orthodox churches was enacted. This statute constitutes a legislative recognition of the historical fact that since 1924, a representative group of Russian Orthodox churches, formerly subject to hierarchical administrative and spiritual control of the sacred synod, have asserted their administrative autonomy and have organized an independent Russian church in America. Accordingly, the statute defines the "Russian Church in America" and a "Russian Orthodox Church" (§ 105), provides for the incorporation of a Russian Orthodox Church (§ 106), the management of its affairs and property (§ 107) and reincorporation of existing incorporated Russian churches as newly incorporated Russian Orthodox churches (§ 108).

There is nothing in the statute which indicates a legislative intent to accomplish a transfer of property of all Russian Orthodox Churches in this country to the use of the newly recognized "Russian Church in America." There are no legislative findings accompanying article 5-C which might be expected were that the Legislature's intent. It contains none of the bluntness and direct statement of an expropriation statute such as the Act of Congress of 1887 recited in *Mormon Church* v. *United States* (136 U. S. 1).

It is urged that the statute inferentially provides for the dedication and use of the property of *all* Russian Orthodox churches for the benefit of and at the direction of the Russian Church in America. While the statute so states (§ 107) it is limited by the definition in section 105 preceding which defines a Russian Orthodox church as one "founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of * * * the Russian Church in America." When St. Nicholas Cathedral was "founded and established" there could have been neither "purpose" nor "intent" to adhere and to be subject to the "Russian Church in America", for that church was not then factually in existence.

All that the new article 5-C accomplished was to provide a framework for jurisdiction and authority over churches and their property in accordance with the rules, regulations and usages of the Russian Church in America (§ 107), applicable only to Russian Orthodox churches which might thereafter be organized (§ 106) or which, having theretofore been incorporated, should thereafter be reincorporated (§ 108). Since St. Nicholas Cathedral falls within neither of these categories, it follows that its use is not subject to the direction of the Russian Church in America.

This conclusion as to the scope of Article 5-C of the Religious Corporations Law makes it unnecessary to consider the question of the constitutionality of the statute as violative of "due process" in effecting a transfer of property.

Judgment is accordingly directed for the defendants. Suggestions as to the form and subject matter of the judgment will be entertained upon settlement of the judgment. Settle judgment.

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SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, Appellant, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents.

First Department, January 17, 1950.

APPEAL from a judgment of the Supreme Court in favor of defendants, entered March 8, 1948, in New York County, upon a dismissal of the complaint on the merits by the court at a Trial Term (BOTEIN, J.), without a jury, at the close of the entire case.

RALPH MONTGOMERY ARKUSH for appellant.

PHILIP ADLER for respondents.

CALLAHAN, J. This action in ejectment involves a dispute over the right to possess and use certain church property known as Saint Nicholas Cathedral of the Russian Orthodox Church located on East 97th Street in the city of New York. The dispute has its origin in a break or schism within that church following the Bolshevik revolution in 1918.

Prior to that time the Russian Orthodox Church was a world-wide religious denomination which had existed for 900 years with its headquarters in Russia. It has also variously been known as the Christian Orthodox Catholic Church of the

Eastern Confession and the Christian Orthodox Greek Catholic Church.

The adherents of this faith spread to the United States about a century ago and eventually parishes were established in the city of New York.

In 1903, the Saint Nicholas Cathedral was erected with money furnished by the central church authorities in Russia. It was to be used as the Episcopal See of the Diocese of North America. Title to the property was taken by Russian Orthodox Saint Nicholas Church in New York, a corporation organized under the Religious Corporations Law. Under its charter this corporation was to be controlled by two trustees who were to be the Russian Ambassador and the Russian Consul General to the United States.

The Russian Orthodox Church was a centrally organized one and the archbishops or metropolitans who occupied the cathedral prior to 1918, were appointed pursuant to canon law by the controlling church authorities in Moscow and were answerable only to such authorities.

Historically the head of the Russian Orthodox Church was the Patriarch but from the time of Peter the Great to the Kerensky rebellion the czars had forbidden the calling of any "Sobor" which was the traditional convention of church delegates authorized to elect a Patriarch. As a result during this long period no Patriarch had held office and the church was governed by the Holy Synod, a member of which was the Chief Procurator, who was the representative of the czars.

In 1917, the Kerensky government permitted a sobor to be called in Russia. It elected one Tikhon as Patriarch. A year or two later the Bolshevik revolution occurred. Religion was proscribed and Tikhon was imprisoned.

As a sequence to the antagonism of the Soviet government to religion and its persecution of church dignitaries, many of the American adherents of the church decided to separate from the mother church administratively though adhering to it spiritually. In 1924, they held an American "Sobor" in Detroit and selected one Platon Rojdesvensky as American archbishop or metropolitan. The asserted authority for the holding of this American diocesan sobor was a certain ukase—issued by Tikhon from his prison, but this decree by its terms would seem to be limited to dioceses in Russia. In any event the right of local self-government was clearly a temporary measure effective only until the central church was restored.

In the meantime in 1923, another "Sobor" had been permitted to be called in Russia. It selected a "*locum tenens*" or temporary head of the central church. There has always been some dispute among churchmen as to canonical validity of this sobor. About 1924, one Kedrovsky appeared in New York claiming to be the metropolitan appointed by the central church authorities. Litigation was commenced in 1925, between the forces of Platon and those of Kedrovsky over the right to possess the cathedral which eventually reached this court and the Court of Appeals (*Kedrovsky* v. *Rojdesvensky,* 214 App. Div. 483, affd. 242 N. Y. 547).

Although Special Term ruled in that case in favor of Rojdesvensky and the American group this court reversed that decision and gave judgment in favor of Kedrovsky and the central church enjoining Platon Rojdesvensky from occupying the cathedral and that judgment was affirmed by the Court of Appeals. In that action both sides had claimed that the respective archbishops supported by them had been appointed by the central church authorities. Rojdesvensky claimed an oral designation by Patriarch Tikhon and Kedrovsky claimed to have a written appointment signed by that Patriarch and also that his appointment was approved by the church dignitaries elected in the sobor held in 1923. The canonical validity of that sobor was one of the issues litigated in the former suit. This court upheld its validity at least as a de facto "Sobor" or convention. However, the parties to the present litigation all contend that the 1923 sobor was not canonically valid because, among other reasons, it was not universal or world-wide in character. We do not see that this question of validity of the 1923 sobor alters the weight to be given to the earlier decision. The principle that controlled that decision was that the right to appoint the American archbishop was vested in the central church authorities.

After the decision in the earlier case by Special Term and before it was reversed by this court, a special act was adopted by the Legislature (L. 1925, ch. 463) incorporating plaintiff. This act provided that Russian Orthodox Saint Nicholas Church in New York might convey the cathedral property to plaintiff which was controlled by Platon Rojdesvensky and his followers in the American church. Thereafter a deed was executed purporting to convey the cathedral property from the old corporation to the new, but this deed was executed by only one of the two trustees. One of the issues presented in this case concerned the validity of that deed. We find, however, that it is unnecessary to discuss that issue as the question of legal title is not controlling.

For twenty years or more after the prior litigation Kedrovsky and his successors continued to occupy the cathedral on behalf of the mother church. In 1927, the Soviet government permitted the Russian Orthodox Church to resume activities, but under a pledge of loyalty to the Soviet regime. In referring to this church as it existed from 1918 to 1927, the parties designated it the "Renovated" church as distinguished from the "Patriarchal" church.

In 1945, another sobor was held in Russia. It was world-wide in character and some delegates from the separated American group attempted to attend it. They did not reach Moscow in time, apparently due to interference by Soviet civil officials. But, a new Patriarch, one Alexi was elected by this sobor, and the American church now recognizes him as the spiritual head of the Russian Orthodox Church. The American church on several occasions since 1945, has petitioned the Patriarch to reunite the two churches but has insisted on the right of the American church to elect its own archbishop. Up to the time of trial of this action, efforts to effect reunion continued but the churches have never been able to agree on the question of autonomy, the authorities of the central church insisting on their right, under canonical law, to appoint the American archbishop. It appears that in number the adherents of the American group or church largely exceed those in this country continuing to be connected to the Moscow patriarchate, but in a church that is centrally organized the matter of numbers is not controlling on questions of church procedure (*Watson* v. *Jones,* 80 U. S. 679; Zollmann on American Civil Church Law [Columbia University, 1917], pp. 178-185, 190-193, 197).

After Platon Rojdesvensky's death in 1934, one Theophilus was elected American archbishop by an American convention. Defendant Benjamin Fedchenkoff succeeded Kedrovsky upon the latter's death, having been appointed American archbishop by the central authorities of the church in 1934. His appointment has since been ratified and confirmed by Patriarch Alexi. These two dignitaries are the controlling archbishops involved in the present action which was commenced a day before certain legislation affecting the issues was enacted in New York in 1945 (L. 1945, ch. 693).

The present action took the form of a suit in ejectment and the parties discuss in the briefs the question of whether such a suit will lie and whether it is barred by the Statute of Limitations, but we feel that it is necessary to discuss only the principal issue as to whether, as contended by plaintiff, the archbishop selected by an American convention or, as contended by defendant, the one appointed by the central church authorities in Russia had the right to the use of the cathedral.

Special Term decided the issues in the present case in favor of defendants, representing the central church, thus following the principle enunciated in *Kedrovsky* v. *Rojdesvensky* (*supra*). It held that the 1945 statute did not lend any support to plaintiff's claim of its right to possess the cathedral. It applied the rule of common law that whenever a part of a centrally organized church breaks away to form a new society the temporalities are to be administered according to the rules of the ecclesiastical body to which the church corporation is subject (*Westminster Church* v. *Presbytery of New York,* 211 N. Y. 214), and the further rule of common law that in a centrally organized church whenever questions of discipline or ecclesiastical rule have been decided by the highest church tribunal within the church, the civil courts will treat that ruling as controlling (*Watson* v. *Jones, supra; Baxter* v. *McDonnell,* 155 N. Y. 88).

The principal if not the sole contention advanced by plaintiff-appellant on this appeal is that Special Term misconstrued the 1945 statute. Before discussing that question we must note that after the decision by Special Term the 1945 statute was amended by chapter 711 of the Laws of 1948. We will assume upon this appeal that plaintiff is entitled to the benefit of the law in its amended form (see *Gilpin* v. *Mutual Life Ins. Co.,* 299 N. Y. 253).

These two statutes added a new article 5-C to the Religious Corporations Law, the general purpose of which was to define the Russian Church in America and to provide a procedure for the incorporation of churches to be affiliated with it.

Plaintiff points to several provisions in article 5-C which it contends indicate that the purpose of the Legislature was to declare that the American church has the right of autonomy in its relations with the Russian Orthodox Church. It contends that this statute warrants a judgment in its favor awarding it possession of St. Nicholas Cathedral.

First, plaintiff points to the provisions of section 105 of article 5-C of the Religious Corporations Law reading: "The 'Russian Church in America', as that term is used anywhere in this article, refers to that group of churches, cathedrals, chapels, congregation, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as

* * * (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four."

It contends that this constituted a declaration by the Legislature of this State that the American church was entitled to autonomy in its relations with the central church.

While this definitive section is far from a model of clarity, we find nothing in it to support the claim of plaintiff that the Legislature intended to determine the issue of ecclesiastical autonomy existing between the two branches of the church. The clause found in the definition is merely descriptive in its historical reference to the administrative autonomy of the "Russian Church in America". Section 105 proceeds through subdivisions "a", "b" and "c" to refer to the groups constituting the earlier American church by reciting historical events connected with the development of the church in America, first as the American mission of the central church and then the American diocese of said church. In referring to the separation of the American church from the church in Moscow in 1924, subdivision "d" recites the historical events connected with that separation and refers to the purport of certain resolutions adopted at the Detroit convention for the autonomous status of the separated church. It does not purport, according to our construction, to set forth any legislative *finding* determining the ecclesiastical dispute as to the right of autonomy. At most it amounts merely to a legislative recognition of the fact that the American branch or "Metropolitan District" asserted its independence in administrative affairs in this country. It should not be construed to mean that the Legislature has taken sides in the religious controversy as to the right of autonomy, involving the right to appoint or elect archbishops dependent as it is on the canon law of the church. Such a construction would show an intent by the Legislature to interfere in ecclesiastical concerns which is hardly within the competence of legislative action (U. S. Const., 1st Amendt.; N. Y. Const., art. I, § 3), and certainly would be a departure from the traditional American principle of separation of church and State. As was said in *McCollum* v. *Board of Education* (333 U. S. 203, 212), in discussing the first amendment of the Federal Constitution: "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Plaintiff then points to the provisions of section 107 of article 5-C claiming that they indicate a legislative intention to grant jurisdiction or authority to the American church over every Russian orthodox church in the State, even those established prior to the creation of the "Metropolitan District" and never affiliated with the new group and to grant control to the American church over property of churches adhering to the ecclesiastical statutes or rules of the central Russian Orthodox Church in Russia.

The provisions of section 107 that every Russian orthodox church incorporated before or after the creation of the autonomous "Metropolitan District" shall recognize and be subject to the jurisdiction of the governing authorities of the "Russian Church in America" must be read in the light of the definition of the "Russian Church in America" as set forth in section 105. In other words, it appears to us that it was intended to mean that any church heretofore or hereafter incorporated for the purpose of adhering to the American church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church. Surely it was not intended to mean that Russian orthodox churches formed for the purpose of adhering to the Moscow Patriarchate must be subordinate to the American church.

The control given trustees of the temporalities of the Russian Orthodox Church in subdivision 3 of section 107 must be likewise limited. This subdivision does not purport to grant control to the "Russian Orthodox Church in America" to St. Nicholas Cathedral or any other property of the mother church. The general scope and purpose of the Religious Corporations Law is to authorize the creation of religious corporations as secular agencies to aid in the conduct of church business and affairs, including the acquisition, holding and disposal of property (*Walker Memorial Baptist Church* v. *Saunders,* 285 N. Y. 462). But the State attempts no interference with the practices and rules of any spiritual body in the matter of its temporalities. We find no departure from this general policy in the provisions of Article 5-C. Subdivision 3 of section 107 simply provides that the trustees of a Russian orthodox church (meaning Russian Orthodox Church in America) shall administer its own temporalities in accordance with the rules of the "Metropolitan District". We can find no suggestion in the present article of any intention to transfer any beneficial interest of a religious trust in the St. Nicholas Cathedral to the "Russian Orthodox Church in America" contrary to the wishes of the supreme ecclesiastical authority of the beneficiary church.

That the Legislature did not intend by these statutes to strip the Russian or central branch of the church of its property in New York is further evidenced by the fact that in other sections of the Religious Corporations Law the Legislature has recognized the mother church in Russia as a living ecclesiastical body and has granted the Moscow Patriarchate certain powers with respect to church affairs (see Religious Corporations Law, §15, subd. 3; art. 15, as added by L. 1943, ch. 145). That these separate provisions with respect to the Moscow Patriarchate and the Russian Church in America are concurrently carried in the same statute indicates a legislative recognition of two separate and independent churches to both of which the Legislature has granted the right to incorporate churches, conduct their own affairs and hold their own temporalities.

This brings us to consider the views expressed by our dissenting brethren. First, they disagree with our construction of article 5-C of the Religious Corporations Law, construing it, as does the plaintiff, to contain a grant of autonomy and a declaration in effect that the American church is entitled to the temporalities of all Russian orthodox churches in this State. We have already dealt with this subject. Then they have taken a position which we find that plaintiff does not contend for, which is in effect that the Russian Orthodox Church in Russia is not a true church but a mere instrumentality of the Russian government, made so by the subservience of the high church authorities to that government and that therefore the American church is the only true Russian Orthodox Church and has the right to possess the cathedral. In support of this theory the dissenting opinion proceeds with great vigor to attack communism, the prevailing political creed in Russia today, as atheistic and the Soviet government as a totalitarian despotism, and concludes that in fact no real religious activity would be or is permitted in Russia. They arrive at the determination that the present Russian Orthodox Church is not a real, but merely a sham or phantom, church deprived of all power of action in respect of its followers and property in America by duress imposed by the Soviet state.

The dissenting opinion sets forth at considerable length the antireligious ideologies of communism, points out and condemns the totalitarian rule of the Soviet state and then concludes that any church that has pledged loyalty to such a government is not a true religious organization. The conclusion drawn is that a judicial finding is warranted that there is no restored Russian Orthodox Church in Russia today. We concur entirely with the views of our brethren attacking communism. We yield nothing to them in their condemnation of the lack of religious freedom in Soviet Russia, but we disagree with the conclusion drawn as to the nonexistence of the Russian Orthodox Church in Russia, because we believe that we may not draw that conclusion on this record, even if we might desire to do so.

We are dealing with a judicial action and we do not act on suspicion or news reports; we act solely on legal proof. We must consider the contentions of the parties and the proof they have chosen to submit except as to matters concerning which we may take judicial notice. Here, both parties have taken the position that the Russian Orthodox Church is presently restored in Russia. Plaintiff introduced proof that since the last World War greater rights have been afforded to the Russian Orthodox Church in Russia. Its witnesses recognized the 1945 sobor as authentic and as restoring the Moscow Patriarchate and accepted the restoration of the traditional church as a fact. Plaintiff makes no suggestion that the restored church is a new or different church, a mere state agency, as suggested in the dissenting opinion. Plaintiff and the American Russian church it represents choose to treat the Patriarchate Alexi as a holy man, a church leader and the Holy Synod as an existing hierarchy. The American church has repeatedly petitioned the Russian church authorities to reunite the American church to the mother church. Right down to the time of trial of this action, negotiations were proceeding for this reapproachment. The fact that the mother church was required to pledge loyalty to the Soviet civil regime and had agreed not to attack communism from the pulpit was apparently considered no obstacle to reunion. The only factor causing cleavage seems to be the insistence of the American church on its right to elect its own archbishop and the refusal of the mother church to yield that right unless at least the power of veto of any selectee was reserved to the high church authorities.

The plaintiff and the American church that it represents do take the position, as we understand it, that the "Renovated" church was noncanonical. But we are dealing with the church since

1945. Plaintiff recognizes the domination of the Soviet civil authorities over the present church and deplores its pledge of loyalty to the Soviet regime but concedes nevertheless that the old Russian Orthodox Church has authentically been restored at least since the 1945 sobor and is presently an existing though subjugated church. Perhaps this belief is fostered in whole or in part by religious convictions instilled by a faith that has been accustomed to look up to a mother church in Russia for the past 900 years. Plaintiff and those it represents certainly have the right to decide whether or not to believe in the existence of a true church and the genuine spiritual qualifications of its hierarchy. That judges may suspect that the parties have a wrong conception of what is going on in the church in Russia today is wholly immaterial. The parties have been in direct consultation with the representatives of the church in Russia. Whether these church heads are truly religious men trying to keep the faith alive and to serve the religious needs of their people of Russia to the best of their ability or whether they are willing and servile tools of an anti-religious government is not to be decided by this court adversely to the contentions of the parties on any theory that we may take judicial notice of actual conditions behind the "iron curtain" in Russia today. Such matters are not so notorious as to be subject to the rule of judicial notice.

When we accept the attitude of the parties as to the existence of a restored Russian Orthodox Church in Russia today, the issue presented in this case becomes a simple one and the rule of law controlling its decision is plain. The law requires us to hold that the decision of the church judicatories on the question of whether bishops must be appointed or may be elected must be controlling on us, and the right to use the cathedral would rest in the archbishop selected by those judicatories.

While the importance of this decision cannot be gainsaid, we are unable to agree with our dissenting brethren as to its scope or effect. It involves no question of the denial of religious freedom to any group nor is any group being ousted from its place of accustomed worship. The forces behind the plaintiff in this case have not been in possession of Saint Nicholas Cathedral since the decision in the *Kedrovsky* case (*supra*) almost a quarter of a century ago. The present determination does not reach beyond the right to use and control a single church property built and maintained with funds supplied by the mother Church in Russia. This decision is at least partly controlled by New York statute law which can have no extra-territorial effect. If and when it should appear that the Russian Orthodox Church is no longer existent in Russia or if and when the Legislature of this State may make appropriate disposition of property within this State found to be subject to its control and disposition, our courts may take other action. Thus far we find no declaration by the Legislature and no proof offered to this court that the trust purposes for which plaintiff holds the cathedral have been extinguished or terminated.

Meanwhile plaintiff holds at least the nominal legal title to the property involved. For as long as it may continue to do so the plaintiff remains in a position to protect whatever claims the American church may have to the cathedral.

Accordingly, we have reached the conclusion that the defendant is entitled to prevail.

The judgment appealed from should be affirmed.

VAN VOORHIS, J. (dissenting). The dissenting Justices concur with the majority, nor is there disagreement in the court, in condemning the attitude and conduct of the government of the Soviet Union toward religion. The difference in opinion relates entirely to whether, in view of the canons, ecclesiastical practices and history of the Russian Orthodox Church, the law of New York State requires that the material possessions of its American branch must continue to be administered from Moscow while the Patriarch and Holy Synod there are, as plaintiff contends, dominated and controlled by the Soviet atheistic regime. Our dissent is based upon the view that the law does not require this result.

The immediate subject of this action is the right to occupancy and control of St. Nicholas Cathedral on East 97th Street in New York City. In order to decide that question, it is necessary to determine who at this time is deemed to be in administrative control of the Russian Orthodox Church in America, since that official is entitled to occupy and control the cathedral. The outcome of this suit, therefore, depends upon who is to have charge of the temporalities of the entire Russian Orthodox Church on this continent, including churches, parish houses, rectories and revenue-producing properties. Plaintiff represents a large group of Russian Orthodox Churches which have proclaimed the independence of the American branch from administrative control by the central church authorities in Moscow while dominated by the Soviet state. Defendant Benjamin Fedchenkoff has been designated by the Patriarch while under such domination as archbishop and metropolitan to rule over the Russian Orthodox Church in the United States and elsewhere in North America. The autonomous group has created no doctrinal schism, and its members desire to worship in their ancestral churches according to their ancient forms, but without being subject to administrative control by a central organization which has become subservient to the Soviet state. The judgment appealed from, in denying to plaintiff the occupation and control of St. Nicholas Cathedral, necessarily determines that plaintiff and its affiliated churches to which belong most of the communicants of the Russian Orthodox Church in the United States, have lost the right to the enjoyment of their properties while they continue to refuse to recognize the administrative acts of the Russian central church authorities.

It seems to us that, instead of being schismatics, the group in America to which plaintiff belongs is adhering, insofar as possible, to the orthodox tradition, from which the Russian high church authorities departed when, yielding to force, they accepted what might be termed the Russian Orthodox Church of the communist obedience. These ecclesiastical officials in Moscow, having become in fact an instrumentality of the Soviet Government, have ceased to function as the church tribunal to which the civil courts must look in ordering disposition of temporalities in this country, and the conventions (sobors) of the Russian Orthodox Church in America have, for a period of indefinite duration, taken their place as the authority to be followed by us respecting property of the Russian Orthodox Church within this jurisdiction. The New York State Legislature has recently so declared in clear and, as it seems to us, unmistakable terms (L. 1945, ch. 817; L. 1948, ch. 711).

Although the church in Russia was aided financially and subjected to political influence of the czars, one is not justified in assuming, nor does the majority opinion go so far as to state, that the orthodox church in Russia was ever before sought to be reduced by government to a condition approximating that of being a mere communist front. The majority opinion admits that religion was proscribed and the orthodox church in Russia persecuted by the Soviet Government.

This record and facts to which we may not blind ourselves show that religious liberty in Soviet Russia is nonexistent; that the church has lost its independence and freedom of action under superimposed political pressures; that the government in Russia does not permit freedom of activity to the church itself or its judicatories; that the political creed of the controlling power in Russia is essentially atheistic; that the Soviet regime is anti-religious; that the supreme church authority in Russia has pledged itself to the government of the communistic atheistic state, and the church in Russia is under involuntary restraint of the civil authorities. In such state of facts, how can it reasonably be said that the central organization of the orthodox church in Russia is able to function as the governing entity of a Christian religious society? If neither the church nor its head are free, their administrative acts are not their own but those of the Soviet state.

It is fundamentally erroneous to treat St. Nicholas Cathedral and the parishes comprising at least four fifths of the Russian Orthodox Churches in the United States as schismatics, for the reason that they desire to retain their ancient faith and order, unmolested by the group which has seized power in Russia, and has seized the church for its own uses. The repeated efforts of these American communicants to achieve some tangible expression of their spiritual unity with believers in Russia, but without being subject to the formal functioning of the central church organization as a department of the Russian state, should count in their favor in this action. Their adherence to tradition is one of the indications that they are not the chief divisive element, but rather that, in truth and in fact, it is the church in Russia that has been constrained. The distinction between spiritual communion in faith and administrative control must be kept in mind. Christianity cannot permanently be suppressed in Russia. That is something which principalities and powers have been unable to accomplish from the beginning. But it is hardly facing the facts if one fails to realize that the present Russian government has done and is doing all that is politically possible to extirpate it, except as a mere form for purposes of Soviet aggrandizement, and that such persistence as the religion has manifested there since the revolution has come from the bottom up rather than from the top down. The problem *sub judice,* as both the trial court has held and as this court is holding, concerns the identification of the beneficiaries for whose use and enjoyment St. Nicholas Cathedral and the other temporalities in this country were dedicated. Instead of disputing the trust principle, the plaintiff stands upon it. The difference in point of view is that plaintiff maintains that these temporalities are torn away from their intended use, if they are held to be subject to the jurisdiction of officials who could not function in Moscow, whatever pious names they bear, except on the dictates of a government whose every action indicates that its political philosophy is based upon the destruction of what christians of all denominations hold to be dear.

Recognition of these facts does not place the courts or the Legislature in the fields of theology or of ecclesiastical jurisdiction; it is necessary for the civil authorities to act upon them in ascertaining and identifying the "church judicatories" mentioned in *Watson* v. *Jones* (13 Wall. [U. S.] 679), whose word in those fields is to be accepted as final in ordering the temporal concerns of religious corporations.

The statement in the majority opinion that the central church organization in Russia was sufficiently real for the Russian church in America to deal with it and seek reunion, is answered by the utter frustration of those efforts. The 1945 sobor in Russia was "universal" in character only if we ignore the subterfuge whereby the American delegates were detained in Siberia until the sessions of the sobor had been completed. This maneuver is not to be brushed aside as something done by the Russian "civil" as distinct from ecclesiastical authority. The Patriarch did not deplore but availed himself of it, refused to give a hearing to the American delegates, and handed them an uncompromising ultimatum upon arrival based upon action that had been taken in their absence. This incident illustrates the closeness of the connection between the civil and high ecclesiastical authorities.

That was the sobor at which the present ruling Patriarch Alexi was chosen, who is to have rule over St. Nicholas Cathedral and the rest of the Russian orthodox churches in the United States if the judgment below is affirmed.

Always the American delegates safeguarded their declaration of administrative independence, by expressly adhering to their refusal to acknowledge any connection with the church in Russia as a formal functioning organization while under Soviet dominance. Reunion upon the terms of the American delegates would have required a fundamental change in the present relation in Russia between church and state. No such reform was forthcoming, and the situation remained as before. This willingness to be in spiritual communion amounted to no waiver of rights by the autonomous body in America. Neither did the 1946 sobor in Cleveland, Ohio, sacrifice administrative independence. Its effect was to re-emphasize that no doctrinal schism separated the mass of believers in Russia and in the United States, but that there must be administrative independence while the identity of the church organization in Russia remains merged in the Soviet state. American members of the Russian church are not responsible for what has happened in the Kremlin.

When the proposition is thus stated, it is beside the point that Soviet citizens are permitted to own property in the United States. That has no relation to whether St. Nicholas Cathedral and the other Russian church temporalities in America have been dedicated to the use of those who have been, or who desire to be, identified with the traditions of this religious society as they existed before its central organs were subverted by Soviet power.

In order to approach more closely to the problem presented for decision, it is necessary to review briefly the development of the autonomous group in America, culminating in the recognition by the Legislature of this group in 1945 and in 1948, as the successor to "that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which * * * were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until on or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan" in 1924 (Religious Corporations Law, art. 5-C, §105; enacted by L. 1945, ch. 693, as amd. by L. 1948, ch. 711).

From April 2 to April 4, 1924, clerical and lay delegates of parishes of the Russian Orthodox Church of North America met in convention at Detroit, Michigan, to consider how to free themselves from Russian secular domination. The acuteness of their problem arose from the Russian revolution's character, and its impact upon the historical ties between Russian orthodox churches in America and the ecclesiastical governing bodies or officials in Russia. The situation was complicated by the connection which had existed between the czarist government and the Russian church. The St. Nicholas Cathedral building on 97th Street, in New York City, involved herein, was constructed in 1903, with money some of which was supplied by the then czarist Russian government and by the church in Russia.

The old regime in Russia gave way to a new one which did more than expect political reciprocity from churches. It militantly proclaimed that religion is merely the opium of the people, that the soul of man has no significance, and man himself none, except as merged in the State. So all-embracing are its claims, that it does not tolerate literature, art, music, science or religion except in complete subordination to and in the service of ends of the Soviet state. The office of Patriarch was restored in 1917, but that important church dignitary, however much against his will, became a creature of the Soviet government. "There is no doubt," said one of the delegates at the 1924 Detroit convention, "that we all stand for the Patriarch. But do you know that he would be thankful to us if we separated from him? By such an act we would relieve his heavy cross."

The delegates to this Detroit convention of 1924, recognized their underlying spiritual kinship with their Russian brethren, voted "Not to break at all the spiritual ties and communion with the Russian church, but always to pray for her good, give her every co-operation and mention the Most Holy Patriarch as the head of the Russian Mother Church to which the American church is obligated for her existence", and they looked forward to a time when the relationship between the Russian and the American churches might be ordered by an oecumenical council of the entire Russian Orthodox Church "with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority or its decisions for the entire church"; but this convention resolved, nevertheless, "temporarily", until such a council could be convened, "to declare the Russian Orthodox Diocese in America a self-governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity, and periodic Sobors of the entire American Church." A procedure was authorized to establish "a new constitution of the American Church."

The use of the word "temporarily" is shown by the context to mean until, and not before, the dictatorship of the proletariat withers away, to an extent necessary to enable an oecumenical council to be held at which representatives of the American church can participate under conditions of political freedom.

The context shows that the mention of the Patriarch as the head of the Russian mother church, to which the majority opinion ascribes so much importance, was an expression of the reverence which the devout churchman has for the priestly office, that exists without relation to the conduct of the man who holds it. It is not clear by what reasoning it can be argued that in revering the office of Patriarch, these American delegates were sacrificing the independence which they were at pains to assert as an essential condition of any *rapprochement,* nor that they were surrendering their well-founded contention that the official acts of the Patriarch are controlled by the Soviet state. No one is concerned with attacking the character of Patriarch Alexi for yielding to the demands of the Russian dictatorship, nor in praising him for casuistry in so doing. The determining fact, which stands out above everything else in the record, is that if Patriarch Alexi did not administer the Russian church so as best to promote the spread of atheistic world communism, in the judgment of the Russian chiefs of state, he would quickly have been superseded by another who would have done so. If the directives of such an official are to be binding upon the traditional branch of the Russian church in America, it has a just grievance.

A constitution was prepared and adopted by the autonomous Russian church in America, and at a convention held in Cleveland, Ohio, November 20 to 23, 1934, Archbishop Theophilus Pashkovsky was elected metropolitan, and certain so-called normal statutes for parishes were adopted. If plaintiff-appellant is successful in this action, Archbishop Theophilus will conduct the religious services in the cathedral as metropolitan, as the duly selected head of the Russian Orthodox Church in North America.

In 1935, the Moscow Patriarchate issued a decree suspending Metropolitan Theophilus, and purporting to prohibit him from performing divine service "until either he repents or the ecclesiastical court shall have rendered a decision." The Patriarchate of Moscow had previously declared null and void the proclamation of the autonomous nature of the North American diocese, which was described as "an act rudely violating Church Discipline". Defendant-respondent Archbishop Benjamin Fedchenkoff was proclaimed by Moscow "as permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America, and also granting to him the right to wear the cross on his Klobuk; to accept with recognition as such."

Thus, the outcome of this case involves more than whether Archbishop Theophilus shall conduct the services in the cathedral: on it depends whether the communicants of the Russian church in America who refuse to submit to Soviet overlordship, shall within our jurisdiction have the use of the church buildings, revenues and other temporalities of their traditional church.

It is unnecessary further to detail the efforts of the American branch of the Russian church to establish its administratively autonomous status, as shown by the record, nor to outline the particular steps by which the Soviet government has pursued the policy of seizing the machinery of religion in order to control the minds of men. As phrased in the dignified statement of the American delegates, who vainly sought to achieve a *modus vivendi* on their mission to Moscow in January 1945: "It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power."

Respondents' position is lucidly and briefly stated in the motion by respondents' counsel to dismiss the complaint at the close of plaintiff's evidence at pages 268-270 of the record, and in the resumé of the Gregory Tchukov testimony at pages 271-278.

The grounds that plaintiff cannot maintain an action for ejectment, and that this action is barred by the Statute of Limitations or laches, do not require comment. The decision of the Trial Term is not based upon them, and they are effectually answered in appellant's brief. The important ground, upon which the decision of the case was made at Trial Term, is that plaintiff holds title to the St. Nicholas Cathedral properties on 97th Street, as trustee for the duly accredited archbishop appointed by the supreme church authorities in Russia, and that the case of *Kedrovsky* v. *Rojdesvensky,* (214 App. Div. 483, affd. without opinion 242 N. Y. 547) held that an archbishop appointed by such authorities is the only person who has the right to possess, occupy and use that cathedral.

The Tchukov testimony is that as a result of enactments of a general convention (sobor) in Russia in 1917-1918, the Patriarch and the Holy Synod, of which the Patriarch is the head, are the supreme authority of the Russian church, that the American branch of the Russian church is a diocese of the Russian Orthodox Church, and is ruled by an archbishop appointed by the supreme church authority, which may suspend or remove such archbishop and appoint another in his place at its pleasure. He further stated that canon law, and the rules and usages of the Russian Orthodox Church, do not permit any diocese or any subdivision or constituent part of the church, for any reason whatsoever, to secede from or declare itself independent of the main branch of the church at large, or declare itself autonomous or a self-governing body or district. He testified that the action of the group of Russian orthodox churches in America, and the resolutions adopted by them in the convention in Detroit of 1924, and the purported election of the predecessor of Archbishop Theophilus as the archbishop of said churches violates these canons, rules and usages, and specifically he added: "Saint Nicholas Cathedral, in accordance with the rules and usages of the Russian Orthodox Church, must be possessed, occupied, and used by the Archbishop of the American Archdiocese, who is duly appointed by the Supreme Church Authority, above referred to, namely, the Patriarch and the Holy Synod, and said Cathedral may not be occupied by any other official or person.''

If this position, upheld by the trial court, be correct, it means that the courts and the Legislature are powerless to accord to these American communicants of the Russian church the use of their accustomed church buildings, and other temporalities, unless they submit to the high church authorities in Russia, who are captive to the Soviet Government. We think that this would be exalting form above substance.

In reversing the judgment appealed from and deciding in favor of the plaintiff as the representative of the autonomous Russian church in America, there would be no conflict with the rulings in *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*) or *Trustees of Presbytery* v. *Westminster Church* (222 N. Y. 305). Those cases hold, as section 5 of the Religious Corporations Law declares, that the ''temporalities and property, real and personal,'' belonging to a religious corporation are to be administered ''in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto''.

It is readily conceded that the rule no longer obtains in New York State that a religious corporation holds its temporalities free from regulation by any ecclesiastical authority, or by a tenure so independent that it could change its creed or denominational character without losing its hold upon its property (*Westminster Church* v. *Presbytery of New York,* 211 N. Y. 214).

Respondents are also correct in asserting that it was formerly the practice in the Russian Orthodox Church in America for its archbishops and bishops to be subject to administrative control by some higher church authority, although the composition of such authority has changed from time to time, as when the office of Patriarch was abolished in 1700 and so remained for two centuries until it was restored in 1917.

The essential point on which we consider that the trial court erred, and on which we differ with the majority of this court, is the failure to recognize that approval or direction by the high church authorities in Russia has lost all canonical significance, while those authorities have been deprived of their freedom of action. It is as though they were constantly, and in all things, subject to duress, and subjected to duress by a government founded upon principles inimical to the existence of any Christian church. Their action or inaction is, therefore, nugatory.

"'Duress exists,' says Judge COOLEY, 'when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.' *Hackley* v. *Headley,* 45 Mich. 569, 574, 8 N. W. 511. Duress by the government or its officers, in this class of cases, is defined by the supreme court as 'moral duress not justified by law.' *Maxwell* v. *Griswold,* 10 How. 242, 256, 13 L. Ed. 405. It must be the pressure arising from unlawful acts or demands on the part of the government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form involuntary and void." (*Newburyport Water Co.* v. *City of Newburyport,* 103 F. 584, 594.)

Under conditions existing today, it would be an idle ceremony, void of all religious or ecclesiastical meaning, to call for approval by the so-called supreme church authorities in Russia of the selection of an archbishop to preside over the American branch of the Russian church. The only theory on which such an act could signify anything, would be that the Russian Government is exercising a lawful function in utilizing the machinery of church organizations, however deviously, to promote worship of the Russian state and its leaders. We cannot recognize the validity of such a procedure, especially where the purpose is clearly to use the Russian Orthodox Church in America as an instrument of foreign Soviet propaganda here. That such conduct, offensive to our public policy, has been engaged in by a government recognized by the United States, affords no reason why it should be upheld in our courts (*Vladikavkazsky Ry. Co.* v. *New York Trust Co.,* 263 N. Y. 369, 378-379, citing *Baglin* v. *Cusenier,* 221 U. S. 580). This is in accordance with declarations of public policy by the State Department of the United States. In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistice Day Address, November 11, 1949).

Even the intellectual and spiritual ties by which men are held together, are so controlled by the totalitarian state as ultimately to disintegrate all autonomous groups outside of the state itself, or the single political party that rules it. That technique is applied to scientific and cultural as well as to religious groups, so that ultimately no autonomous group with any independence remains. In the final analysis, the state and the state alone becomes all. It involves a retreat from reality if we do not clearly see that. In this case the technique of suppression, and the attempted use of a religious group merely as an instrumentality to serve the all-embracing and dominant ends of the Soviet state, is the real issue presented. The so-called "Russian church at large", so frequently mentioned by respondents, is in reality and unfortunately the Russian church group whose high ranking functionaries have been completely subjected and dominated by the men who control the Politburo, and the relatively small group that constitutes "the party", through whom the vast millions in Russia and Soviet-dominated satellite countries are regimented and controlled.

The case of *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 483, affd. without opinion 242 N. Y. 547, *supra*) has mistakenly been regarded as controlling. In that case, it is true, the same group now represented by plaintiff was defeated, and the representatives of a group styled as the "Living Church", "Renovated Church" or "Soviet Church", were held entitled to this cathedral. As a result of that decision, Archbishop Kedrovsky occupied it until his death in 1934, and his son, the defendant John Kedroff, remained there until his retirement ten years later. Archbishop Benjamin Fedchenkoff, whose right to occupation of the cathedral is confirmed by the judgment appealed from, does not claim through Kedrovsky, nor through his son, the defendant John Kedroff. Respondents in this case concede that Archbishop Kedrovsky's appointment was uncanonical, and that the group represented by him had no standing and is now extinct. Thus, in the testimony of Tchukov, it is stated concerning the 1923 convention (sobor) in Russia, from which Kedrovsky derived his supposed canonical status: "This sobor is not regarded as having met with canonical requirements because it was not called by the Patriarch and the Holy Synod. However, within a few years thereafter, these Church movements subsided and practically all of the leaders, adherents and parishes of this Church joined with and were absorbed by the Patriarchal Church." He also stated that the resolutions of this sobor "shortly became a dead letter," and "that the constituent parties of the Sobor of 1923 shortly died out and the Patriarchal Church functioned effectively and without restraint."

When the case of *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 483, affd. 242 N. Y. 547, *supra*) was in the courts, it evidently did not suit the purposes of the ruling power in Russia to furnish evidence to establish the lack of canonicity of the group which succeeded in that lawsuit. That circumstance should result in scepticism concerning the present assertion, that since the extinction of the winning faction in that action "the Patriarchal Church functioned effectively and without restraint." As stated by Lord Mansfield in *Blatch* v. *Archer* (Cowp. 66): "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted" (quoted in 2 Wigmore on Evidence, §285, p. 163). It does not exceed the limits of judicial notice to recognize that in this action defendant Benjamin Fedchenkoff, like Kedrovsky in the prior action, had access in Russia to whatever helpful documentary or other evidence respondents needed, whereas the door to obtaining similar proof in plaintiff's behalf was undoubtedly closed, as it was to Archbishop Platon in the prior case. Were it to suit the purposes of the ruling caste in Russia at some future time to disavow the authority of Archbishop Benjamin, there is little doubt that the lack of it could be demonstrated as effectively as has been accomplished in the case of Archbishop Kedrovsky, who appeared to possess the tokens of investiture when he was in court a quarter of a century ago.

Nevertheless, it is urged, and has been held, that the *Kedrovsky* case controls, on the theory that it established that whoever is to be the rightful incumbent of St. Nicholas Cathedral, must have obtained the approval of the Patriarch and Holy Synod in Russia.

In considering the *Kedrovsky* case, decided in 1925, it should be borne in mind that the relationship of the Russian Government to churches was not and could not have been widely known, to the extent that has since been manifested in Russia and its satellite countries. The situation has become so obvious and acute that, since the *Kedrovsky* case was decided, the Legislature has recognized the administratively autonomous group established at the 1924 Detroit convention, and subsequent conventions, as being the traditional branch of the Russian Church in America. If *Kedrovsky* v. *Rojdesvensky* were otherwise held to be controlling, its effect would have been overcome by these acts of the Legislature. Article 5-C was added to the Religious Corporations Law by chapter 693 of the Laws of 1945, and amended by chapter 711 of the Laws of 1948. The amendment, effective March 31, 1948, was evidently intended to interpret rather than to change the content of the 1945 act (*People ex rel. Westchester*

Fire Ins. Co. v. *Davenport,* 91 N. Y. 574; Sutherland on Statutory Construction [3d ed.], §1931, p. 418), and is of special interest since it became law after the decision was rendered herein by Trial Term, and interprets the 1945 statute otherwise than as it was construed in Trial Term's opinion, as is pointed out hereafter.

In analyzing these statutes, it should be recollected that the purpose of the Religious Corporations Law is to deal with the temporalities of religious societies, and to insure that they will be administered for the benefit of the societies for which they have been dedicated (*Walker Memorial Baptist Church* v. *Saunders,* 285 N. Y. 462, 472; *Watson* v. *Jones,* 13 Wall. [U. S.] 679, *supra*). There is no attempt by the State, acting either through the Legislature or the courts, to enter into matters of doctrine or ecclesiastical law, except only insofar as necessary to the administration of real or personal property. In *Watson* v. *Jones,* in discussing controversies arising in the civil courts concerning property rights of religious societies, in an often quoted statement, the Supreme Court said (p. 727): "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

This principle is embodied in section 5 of the same chapter of the Consolidated Laws to which article 5-C of the Religious Corporations Law was added in 1945 and 1948.

The Legislature undoubtedly bore this principle in mind when in enacting article 5-C it declared the autonomous group represented by this plaintiff, to be the true successor and representative in America of the Russian branch of the Eastern Orthodox or Greek Catholic Church, and therefore entitled to "the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom * * *" (Religious Corporations Law, §107, subd. 3). When article 5-C was added, at least four fifths of the parishes in the United States had joined the autonomous group, and declared themselves administratively independent of Moscow. They had firmly and convincingly avowed that the Synod and the Patriarch had lost their freedom of action, and that their ostensible administrative acts were therefore not their own. They had become puppets. It was within the competence of the Legislature, as it would be within that of the courts in the absence of legislation, in searching for the "church judicatories" mentioned in *Watson* v. *Jones,* whose decisions on questions of ecclesiastical rule are to be final, to determine that the higher church authorities in Moscow have become a phantom, a mere semblance having the form but not the substance of organs of the orthodox eastern church, and that while under such duress their action may be treated as void or superfluous. The Legislature has expressly determined that, in this instance, the church judicatories whose determinations are to be followed, are the Detroit and Cleveland conventions of 1924 and 1934 and the New York convention of 1937.

The case of *Watson* v. *Jones* involved a decision in a Presbyterian parish in Kentucky over the question of slavery at the time of the Civil War. It was held that the independent faction in that parish was subject to the Presbytery, Synod and General Assembly of the Presbyterian Church in the United States even though it disagreed on the question of slavery. There was no such factor in that case, as in this, that the organs of the general church had ceased to have anything but a formal ecclesiastical existence of their own, and had been in reality merged in an atheistic state. To regard the high church functionaries in Russia as having administrative freedom independent of the Russian government, is as unwarranted as it would be to attempt to distinguish between the Russian state and any other communist front.

The extended narration of the history of the Russian church in America contained in section 105 of article 5-C of the Religious Corporations Law, appears to have been inserted in order to leave no room for dispute that the "group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)" which had been known historically by various names, enumerated in the statute, including that of "Diocese of North America and the Aleutian Islands", and which "*were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow*" do "*now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor)* *of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.*" (Emphasis supplied.)

The structure of this statute is not such as to provide for the incorporation of new parishes in a new religious denomination, as the majority opinion indicates, without reference to the Russian Orthodox Church as previously organized in America. This statute gives civil recognition to the action taken at the Detroit sobor in 1924, which was not concerned with organizing new parishes but in severing the old ones from control by Moscow. In plain language it describes the Russian Orthodox Church, identifying it by all the names under which it had been known historically in this hemisphere since 1793, and then declares that this same church organization in America which was previously subject to control by the central church authorities in Moscow shall be so no longer, but shall constitute an administratively autonomous district to be known as the "Russian Church in America", erected by conventions held in the United States. Neither do we think that such a clearly stated intent on the part of the Legislature in 1945 and 1948, to act in respect of this very situation, should be nullified for the reason that in 1943 a minor amendment was passed to an old section of the Religious Corporations Law affecting the powers of trustees of the four orthodox Greek catholic primary jurisdictions in America—Constantinople, Antioch, Serbia and Moscow (L. 1943, ch. 145, §1, amdg. Religious Corporations Law, §15, subd. 3), nor for the reason that in the same year (1943) a new article was added (art. 15) providing for incorporation of parishes of churches subject to any of said four primary jurisdictions. In any event, the 1945 and 1948 legislation, applying to this particular situation, should be held to control over the former more general enactments and, if necessary, to have repealed them *pro tanto* (*Strauch* v. *Town of Oyster Bay,* 263 App. Div. 833; *Wood* v. *Wellington,* 30 N. Y. 218).

Subdivision 1 of section 107 of article 5-C provides that every orthodox church in this State shall recognize and be and remain subject to the administrative authority of the governing bodies and officials of "the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)."

Subdivision 3 of section 107 provides for the further administration of the temporalities in accordance with church by-laws, and of the statutes for parishes of the Russian church in America approved at a general convention thereof held at Cleveland, Ohio, from November 20 to 23, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian church in America. The Cleveland convention, held on the dates specified in this statute, was the one which named Archbishop Theophilus Pashkovsky to preside over the Russian church in America, who will occupy St. Nicholas Cathedral if plaintiff succeeds.

Trial Term took, as we think, too restricted a view of article 5-C of the Religious Corporations Law, in holding it "applicable only to Russian Orthodox churches which might thereafter be organized (§106) or which, having theretofore been incorporated, should thereafter be reincorporated (§108)", and in holding that "Since St. Nicholas Cathedral falls within neither of these categories, it follows that its use is not subject to the direction of the Russian Church in America" (P. 333). After Trial Term's decision, article 5-C of the Religious Corporations Law was amended, not only so as to insert the word "administrative" to characterize the independence from Moscow of the American body, but also so as to define the application of article 5-C (§107) to *"Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law."* (Emphasis supplied.) This language was not intended to limit the application of article 5-C to churches thereafter incorporated or reincorporated under that article. Plaintiff was incorporated by a private law known as chapter 463 of the Laws of 1925, and its corporate existence was confirmed, moreover, by chapter 817 of the Laws of 1945, by the same Legislature which added article 5-C to the Religious Corporations Law. We think that article 5-C, particularly as it was amended and construed by chapter 711 of the Laws of 1948, was intended to relate to plaintiff, and to direct the courts by what authority the temporalities of the Russian church in America are to be administered.

In order to accomplish its purpose, this act need not be an expropriation statute, such as that which deprived the Mormon Church in Utah of property which was subsequently used for common schools (*Mormon Church* v. *United States,* 136 U. S. 1), nor must it involve what Trial Term further described as "a *transfer* of property of all Russian Orthodox Churches in this country to the use of the newly recognized 'Russian Church in America'" (emphasis supplied). (Pp. 332-333.) All that was intended by these statutes, being all that was necessary to the end in view, was to determine that the Russian church in America, as defined in these acts, is the traditional Russian Orthodox Church on this continent, that the communicants are legally entitled to worship in the same buildings and have the use and revenues of the other temporalities which they had previously enjoyed, that they are not to be put out or kept out of possession upon directions emanating in reality from the Kremlin, and that the Synod and the Patriarch in Moscow are to be regarded as having no present functional existence apart from the Soviet Government. The Legislature recognized the Detroit convention of 1924, and subsequent conventions in this country, declaring the autonomous Russian Church in America to be the same religious society which had previously been known in this country by the other names which had been borne here by the Russian branch of the Eastern Orthodox or Greek Catholic Church.

A statute does not infringe the constitutional guarantee of religious liberty nor the separation of church and state, which provides for a decent separation here between the church and the Russian state. Statutes are presumptively constitutional (*Matter of Buoneto* v. *Buoneto,* 278 N. Y.

284), and the constitutionality of article 5-C of the Religious Corporations Law is not subject to attack if the administrative acts of the Russian central church authority are controlled by an antireligious dictatorship. Nothing in the cases of *Watson* v. *Jones* or *Trustees of Presbytery* v. *Westminster Church* holds that the State, acting through courts or Legislature, cannot trace and identify under changed circumstances the religious society for whose benefit temporalities have been dedicated. Legislatures and courts have more than once been called upon to ascertain what has become of the group which the founders meant to endow, to identify it behind a changed facade, or to decide by *cy pres* what is the religious society that most nearly resembles the original if the latter has become extinct or altered beyond recognition. Construed as a legislative ascertainment under conditions now existing in the world, of the organized religious society for whose use the temporalities here in question had been dedicated, no question of constitutionality arises. Traditional Russian orthodox parishes in the United States have declared, in effect, that they are, and as of right ought to be, free from administrative control by an aggressivly atheistic Russian state. The Legislature has merely confirmed the existence of this well-known fact, and has not caused any deprivation of property without due process of law, nor interfered with religious liberty. On the contrary, it has provided for the enjoyment of this property by its accustomed beneficiaries.

The majority of this court professes to be in ignorance concerning whether the domination of the central church authorities by the Russian state is really a fact, and rebukes the minority for being guided in this matter "on suspicion or news reports; we act only on legal proof.'' The record contains proof on the point; but even if it did not, the wise rule was thus expressed by Lord COLERIDGE in *Lumley* v. *Guy* (2 El. & Bl. 266, quoted in 9 Wigmore on Evidence, §2583, note): ''Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times.''

In *Nankivel* v. *Omsk All Russian Government* (237 N. Y. 150, 156) notice was taken that recent Russian history in considerable detail is a matter of common knowledge. In 15 Ruling Case Law (Judicial Notice, §28, p. 1093) it is stated that ''Matters of religious history are deemed to be subjects of common knowledge and therefore of judicial notice,'' which is also said to be taken of ''the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition.'' (§1.)

Moreover, the constitutionality of article 5-C is to be presumed, and, if it depends upon the domination of the Russian central church authorities by the Soviet state, the Legislature is deemed to have found that as a fact, and the burden is cast upon those who are attacking the constitutionality to establish that the fact is otherwise. In *O'Gorman & Young* v. *Hartford Ins. Co.* (282 U. S. 251, 257-258) it was said: ''As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.'' In *Powell* v. *Pennsylvania* (127 U. S. 678, 685) the court stated: ''And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts." In *People* v. *Lochner* (177 N. Y. 145, 169) it was stated in a concurring opinion by VANN, J., on a question of constitutionality: "Necessarily in considering the subject we may resort to such sources of information as were open to the legislature." Again in *Noyes* v. *Erie & Wyoming Farmers Co-op. Corp.* (281 N. Y. 187, 195) the rule was declared: "But a known state of facts warranting legislative action is presumed * * *." In *Szold* v. *Outlet Embroidery Supply Co.* (274 N. Y. 271, 278) it was stated in an opinion, per LOUGHRAN, J., in considering an assertion of facts which would impair the constitutionality of a statute: "We think the assertion is without support in the ordinary data of human experience, but if we are not supposed to know this to be so, then the presumption is that the Legislature inquired and found the need * * *."

In view of the statutory enactment in this State determining that the autonomous group with which plaintiff is affiliated is the successor to the American branch of the Russian Orthodox Church, entitled to the control and administration of its properties, we are required to assume that the Legislature examined into the question and determined that the central church authorities in Moscow function in reality as a department of the Russian State. The majority opinion toward the end suggests that if and when the Russian Orthodox Church no longer exists in Russia, *or* "if and when the Legislature of this state may make appropriate disposition of property within this state found to be subject to its control and disposition, our courts may take other action. Thus far we find no declaration by the Legislature and no proof offered to this court that the trust purposes for which plaintiff holds the cathedral have been extinguished or terminated." This statement fails to consider that, under the cases above cited, it was not necessary for the Legislature in enacting article 5-C to enumerate specifically the facts conditioning its validity, but that the existence of such facts would be presumed. Among the facts which the Legislature is deemed to have found are a Patriarch and Synod in Moscow dominated, directed and controlled by a totalitarian atheistic regime. If it is to be decided that the trust purposes for which plaintiff holds the cathedral require that any Christian society shall submit to administrative control by such authority, it is difficult to conceive what more aggravated circumstances could exist that would call for legislative or court action to overrule the conclusion reached by the majority herein.

It is said that there have been instances in history where a church or sect has been subject to varying degrees of political control or domination without drawing in question its functional existence. It is probable that history has never known such refined techniques, whether based upon subtle psychology of propaganda or the ruthless use of brute force, for coercing body, mind and spirit as those which have been developed with the aid of modern science, and used so effectively by totalitarian countries in the present era. A venerable church, widely respected, can be transformed into a powerful engine for the exercise of such coercion and control. That objective could not be reached except by making use of ecclesiastical forms, but the fact that these are to some extent left undisturbed indicates only that by doing so the church can more effectively be used for political opportunism, and not that there is any real area of freedom for church functionaries. It has been the unmistakable purpose of the Soviet Government to prostitute historical churches to that end, and where highly placed clerics have been bent to the will of that government, reason dictates that their utterances should not be regarded as the official expression of their communions but as the voice of the Politburo.

The point is not whether the Soviet Government will succeed in annihilating all religion except worship of the Russian state; it is, rather, that our law does not require us to assist in the process, so far as churches in America are concerned, by sustaining the eviction of their communicants and compelling them to find other places of worship, unless they submit to administrative direction by top level church officials who would not be permitted to function, unless they consented to the use of their powers to promote the advancement of atheistic world communism. It is not believed that the purposes of the present regime have been substantially altered, as thus expressed in a statement by Josef Stalin in his conversation with members of the First American Trade Union Delegation September 9, 1927, as set forth at pages 345-346 of this record: "The Party cannot be neutral with regard to religion, and it conducts anti-religious propaganda against any and all religious prejudices because it stands for science, while religious prejudices go against science, since every religion is something contrary to science. * * * The Party cannot be neutral with regard to the bearers of religious prejudices, with regard to the reactionary clergy, poisoning the minds of the toiling masses. Have we oppressed the reactionary clergy? Yes, we have oppressed them. The trouble is only that they are not yet fully liquidated. Antireligious propaganda is the means which must carry through to the end the work of liquidating the reactionary clergy." Whatever this statement may signify in respect to science, it is an expression of uncompromising and ruthless hostility toward Christianity. The Roman emperors Nero and Trajan also persecuted the Christians, but they were not in the anomalous position of attempting to be at the same time in actual charge of the administration of the Christian church.

The Orthodox Eastern or Greek Catholic Church, in its origin, was affected to a greater degree by the civil power exerted through the eastern empire, than was true in the west. It appears to be true enough that the czars, professing Christians, like the Emperior Justinian before them, frequently ruled the church in important respects. On the other hand, there were periods when the civil power was weak, when the Russian church became the chief permanent institution of the Russian nation, and the patriarch of Moscow stood out as the visible center of unity (Adeney on The Greek & Eastern Churches [Scribner's, 1908], pp. 406-407).

The church in the east never had the cohesion of the Roman Catholic church, and after Justinian's empire disintegrated, the church-state relationships made the rising forces of nationalism tend to eliminate central authority, and to divide the Orthodox Eastern Church along nationalist lines. This is said to have resulted in the establishment of about seventeen autonomous Orthodox Eastern churches (see Columbia Encyclopedia [1946 ed.], tit. "Orthodox Eastern Church", p. 1314). The Russian Orthodox Church itself was formed by breaking away from the Patriarch of Constantinople, after he became subject to the "infidels"—to a lesser degree, however, than in Russia today—upon the fall of Constantinople to the Turks at the end of the Middle Ages in 1453. This, says a leading historian (Adeney, p. 392), had the immediate consequence of gaining ecclestiastical independence for the Russian church, resulting in the election of the metropolitan of Moscow by a council of Russian bishops instead of his being appointed by the Patriarch of Constantinople. There was no doctrinal schism. Even when express recognition finally was wrested from the enfeebled Patriarch in 1589, and the office of Patriarch of Moscow was set up, there was grave doubt among formalists concerning the power of the Patriarch of Constantinople to do this without the approval of an oecumenical council and, furthermore, there was no ceremony of investiture. The latter was withheld as a concession to the Byzantine Greeks, who were thus enabled to adhere to the view that the Russian church was uncanonical and void (Janin on The Separated Eastern Churches [Sands & Co., London, 1933], pp. 94-95; Adeney, *op. cit.*, p. 392, *et seq.*). "But", continues the latter author, "beyond this accession of dignity the patriarch of Moscow had acquired no more real power than had been secured already by the metropolitan." (P. 406.)

The autonomous Russian church in America is following a similar course today. The headquarters has not been in Russia for 900 years, but was in Constantinople until the Patriarch of Constantinople fell into the hands of the Turks. That created a situation which was as intolerable for the churches in Russia as the autonomous group in America are finding it today, now that the Patriarch of Moscow has fallen into the power of modern infidels. Until then there was no Patriarch of Moscow, who was brought into being by this earlier historical parallel. The fiduciary principle, on which the outcome of this case depends, can hardly be so inelastic as to require that a Christian religious society must submit to the dictates of either militant atheism or militant Mohammedanism in order to continue to possess its property.

In the case of an established national church, it is inevitable that foreign branches will become autonomous where the mother country insists upon using it as an instrument of national policy. An illustration of judicial recognition that the tides of history are not to be confined by legal fictions, is found in the holding that the Episcopal Church in America ceased to be subject to control by the Archbishop of Canterbury after the American Revolution (*Sohier* v. *Trinity Church,* 109 Mass. 1, 20; Zollman on American Civil Church Law [Columbia University, 1917], pp. 161-162), notwithstanding that the "establishment" of the Anglican Church in England involved no such absorption of the church into the state as exists in Russia, that the cultural and traditional backgrounds of the two countries were homogeneous, and that the beliefs and ecclesiastical practices of those two denominations were almost identical.

An appeal to history tends to result in confirmation of the legal position of the autonomous Russian church in America as successor to the branch of the Russian Orthodox Church on this continent, and in the conclusion that the Legislature has acted within the historical pattern of the Orthodox Eastern Church in accordance with which the church in Russia itself was established.

In these latter days there have been declarations by high ecclesiastics, before being arrested in communist countries, to disregard whatever they may afterward say. The human being cannot always forecast what he will say or do when subjected to extremes of physical or mental torture. Religious leaders have sometimes found it possible to be foresighted enough to delegate their authority in anticipation of such catastrophies. The Russian high church authorities in recent times endeavored to do so in event of dioceses cut off from Moscow by "military movements". The Patriarch and

Holy Synod, while they still enjoyed some freedom of action, were not farsighted enough expressly to delegate power to branches of the Russian Orthodox Church beyond the reach of Soviet control, in anticipation of absorption of the central authority into the Russian state. There is indication in this record that Patriarch Tikhon, had he known what was to come, might have done something of that kind. His hand appears to have been forced, however, and he died in 1925. There is no reason to believe that Patriarch Alexi could have been appointed or continue to hold office if he were not a willing tool of the Kremlin.

If express delegation of authority in advance is indispensable, it would appear to be a postulate of that principle, that if the central church authority in Russia had been prevented from functioning by German military occupation during World War II, the American and other foreign branches of the Russian Orthodox Church could not have operated outside of the orbit of the captured central authority, except as the latter had previously authorized them to do so. The German invaders, if Moscow had fallen, could, in the absence of that formality, have been masters of the Orthodox Russian Church throughout the world. If this be true, it behooves every church organization within striking range of Soviet power to discern the pattern of the future—whatever that may be—and to delegate authority accurately in anticipation of all contingencies, since otherwise under the majority ruling herein whoever seizes the central organs of authority will have *de jure* control of the functioning of the entire religious society wherever situated.

In ecclesiastical as well as in legal thinking, there is a well-grounded professional instinct that lines of authority should be rendered explicit, but it seems to be a *reductio ad absurdum* to regard the absence of such anticipatory express delegations as a warrant of power for usurpers of ecclesiastical rule. It is sound legal doctrine to treat as null and void the words and acts of persons or officials who have been deprived of their freedom of action. Nor should the historical Russian church in the United States be held to have disintegrated, for the reason that the voluntary direction and consent of the Patriarch and the Holy Synod in Moscow are no longer obtainable. Expressly delegated lines of authority are desirable, but if they be always essential, a church communion would be in a sorry plight if its high officials, failing to read the future correctly, neglected to delegate administrative power, or did so in the wrong direction or to the wrong persons. Nice questions might arise, even then, of power to delegate power, and a vital church organism be strangled in legal technicalities.

The majority opinion states that we have misunderstood the controversy between these parties; the record shows that we have not misunderstood it, that there is a fundamental matter in difference, and of a type that is not likely to be settled until it is settled right.

The judgment appealed from should be reversed, with costs, and judgment entered awarding to the plaintiff possession of the real property described in the complaint, to be held by it subject to its acts of incorporation, by-laws and the statutes, regulations and usages of the Russian church in America described in article 5-C of the Religious Corporations Law.

Cohn and Shientag, JJ., concur with Callahan, J.; Van Voorhis, J., dissents and votes to reverse in an opinion in which Dore, J., concurs.

Judgment affirmed, with costs.

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SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, Appellant, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents.

Argued June 1, 1950; decided November 30, 1950.

* * * * * *

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1950, affirming, by a divided court, a judgment of the Supreme Court in favor of defendants, entered in New York County upon a dismissal of the complaint by the court at a Trial Term (BOTEIN, J.; opinion 192 Misc. 327), without a jury, at the close of the entire case.

Ralph Montgomery Arkush for appellant. I. Article 5-C of the Religious Corporations Law applies to plaintiff. (*People ex rel. Westchester Fire Ins. Co.* v. *Davenport,* 91 N. Y. 574.) II. Article 5-C, construed as contended for by plaintiff, is within the competence of the Legislature. (*State* v. *Powell,* 58 Ohio St. 324; *Robertson* v. *Bullions,* 11 N. Y. 243; *Baptist Church in Hartford* v. *Witherell,* 3 Paige Ch. 296; *Parish of Bellport* v. *Tooker,* 29 Barb. 256; *Petty* v. *Tooker,* 21 N. Y. 267; *Westminster Presbyt. Church* v. *Trustees of Presbytery,* 142 App. Div. 855; *Matter of Third M. E. Church,* 67 Hun 86; *State ex rel. Barry* v. *Getty,* 69 Conn. 286; *Krauczunas* v. *Hoban,* 221 Pa. 213.) III. The principles of *Watson* v. *Jones* (13 Wall. [U. S.] 679) are not to be read into the constitutional restraints on legislative action. (*Westminster Presbyt. Church* v. *Trustees of Presbytery,* 142 App. Div. 855; *Girard* v. *Philadelphia,* 7 Wall. [U. S.] 1; *Canovaro* v. *Brothers of Hermits of St. Augustine,* 326 Pa. 76.) VI. The Legislature is deemed to have found that the top Moscow hierarchy is dominated by the Soviet Government. (*Matter of Reuss,* 196 Misc. 24; *Matter of Frankel,* 196 Misc. 268; *Lapchak* v. *Baker,* 298 N. Y. 89; *East New York Sav. Bank* v. *Hahn,* 293 N. Y. 622; *Merit Oil Co.* v. *Director of Necessaries,* 319 Mass. 301.)

Philip Adler for respondents. I. Plaintiff has no claim on the merits. Plaintiff is acting on behalf of a group that has seceded from the Russian Orthodox Church and thus has lost all right in the cathedral. (*Watson* v. *Jones,* 13 Wall. [U. S.] 679; *Connitt* v. *Reformed Prot. Dutch Church of New Prospect,* 54 N. Y. 551; *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church,* 222 N. Y. 305; *McGuire* v. *Trustees of St. Patrick's Cathedral,* 54 Hun 207; *Rector of St. James Church* v. *Huntington,* 82 Hun 125.) II. Article 5-C of the Religious Corporations Law, with or without the amendment, does not apply to St. Nicholas Cathedral. The statute does not transfer the use of St. Nicholas Cathedral from the patriarchal church to the metropolitan district. (*Shielcrawt* v. *Moffett,* 294 N. Y. 180; *Geneva & Waterloo Ry. Co.* v. *New York Central & H. R. R. R. Co.,* 163 N. Y. 228.) III. Article 5-C of the Religious Corporations Law, as construed by plaintiff, would violate the First and Fourteenth Amendments to the United States Constitution and section 3 of article I of the New York Constitution. (*Illinois ex rel. McCollum* v. *Board of Educ.,* 333 U. S. 203; *Everson* v. *Board of Educ.,* 330 U. S. 1; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624; *Drozda* v. *Bassos,* 260 App. Div. 408; *Marsh* v. *Alabama,* 326 U. S. 501; *Busey* v. *District of Columbia,* 138 F. 2d 592; *Terminiello* v. *City of Chicago,* 337 U. S. 1.)

CONWAY, J. In 1903, a church was built at 15 East 97th Street in New York City, title to which was held by a corporation, created in 1899 under the Religious Corporations Law of this State and named "Russian Orthodox St. Nicholas Church in New York". The church was constructed with funds supplied partly from abroad and partly from local contributions and it was dedicated to the use of the members of the local congregation of the Russian Orthodox Church in New York City established in 1893. Two years later in 1905, the See of the Russian Orthodox Diocese of North America and the Aleutian Islands was transferred from San Francisco to New York and St. Nicholas Church became a cathedral occupied by the ruling bishop of the North American Diocese and dedicated to the use of all the members of the diocese as a central place of worship of the Russian Orthodox Church in North America. This cathedral is the subject of the present controversy. Simply stated, it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral so that there may be proper administration of this religious trust. In approaching that task, it is vital to our inquiry that we understand the history and organization of the Russian Orthodox Church, and the origins of its difficulties in modern times as disclosed in the record here and the record in *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547), which was submitted to us upon the argument.

The Russian Orthodox Church is one of that loosely knit group which generically is referred to as the Eastern Confession or the Eastern Orthodox Church—an allusion to the rupture of the eastern and western portions of the Catholic church in 1054. The Russian church originally was subject to the Patriarch of Constantinople but acquired greater autonomy when Constantinople fell to the Turks and the Metropolitan of Moscow was no longer appointed by the Patriarch of Constantinople but was elected by the Russian bishops. Finally, express recognition of the "autocephaly", i.e., the complete independence, of the Russian church came in the 16th century when the Metropolitan of Moscow was raised to the dignity of Patriarch. The Patriarch ruled the church until 1700 when Peter the Great forbade the election of a new Patriarch and established the Most Sacred Governing Synod, consisting of a Procurator appointed by the Czar, and several metropolitans and bishops, to govern the church in place of the Patriarch. This form of church government continued for over two hundred years until 1917.

During that period, the Russian Orthodox Church conducted missionary activities in many parts of the world. A mission was established in 1793 in the then Russian territory of Alaska, and spread down the Pacific coast. In 1870, the mission had grown to the extent that the Diocese of Alaska and the Aleutian Islands was created with its See at San Francisco. Since it extended from Alaska through Canada to San Francisco, we shall refer to it herein as the North American Diocese or as the diocese.

A New York City congregation of the Russian Orthodox Church was established in 1893, incorporated in 1899, as already noted, and completed

St. Nicholas Church in 1903. In 1905, when the See of the diocese was moved from San Francisco to New York, the church became a cathedral occupied, in accordance with the rules of the church, by the ruling bishop of the diocese. Throughout that period, the paramount jurisdiction of the Most Sacred Governing Synod in Russia over the North American Diocese was recognized and unquestioned.

Such was the condition of the Russian Orthodox Church and its North American Diocese until 1917 —the year of the Kerensky revolution in Russia.

Following the overthrow of the czarist regime, a great "Sobor" or convention of the Russian Orthodox Church was called. This sobor of 1917-18, it is conceded here by all parties, had indisputable canonicity and validity. The sobor reestablished the Patriarchate and elected thereto Patriarch Tikhon, the "arch-prelate" and "head of Church Administration", the first such since Peter the Great. The Patriarch, as the head of the Sacred Synod and of the Supreme Church Council, constituted the Supreme Church Authority and ruled the Russian Orthodox Church. Other enactments of the sobor provided a procedure for the local election of diocesan bishops and the confirmation of such election by the Supreme Church Authority. It also provided that the Patriarch might call a sobor every three years and that he should preside over it. No sobor was ever called by Patriarch Tikhon (and he was the only one with power to do so) prior to his death in 1925.

Up to 1917, the ruling archbishop of the diocese had been appointed by the central church authorities. Tikhon himself, later to be Patriarch, was the diocesan archbishop from 1904 to 1907. Archbishop Platon succeeded him and ruled until 1914 when he returned to Russia and Archbishop Evdokim came in his stead. Archbishop Evdokim remained until 1917 when he too returned to Russia. All three duly appointed archbishops, in conformity with the rules of the Russian church, used and occupied St. Nicholas Cathedral as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy.

Archbishop Evdokim's departure in 1917 marked the beginning of the difficulties which have ever since beset the diocese. No discussion of the Russian Orthodox Church since 1917 is possible without constant reference to the political conditions upon which its character and its existence depended. In March of 1917, the Provisional Government of Kerensky replaced the czarist regime. The Kerensky Government itself was soon overthrown by the so-called Bolsheviki led by Lenin in the famous "October Revolution". Prior to his downfall, Kerensky, as noted, had authorized the convocation of the great sobor of the Russian Orthodox Church, which was in session through the latter part of 1917 and up to February of 1918 and which named Tikhon as Patriarch. Upon their accession to power, the Bolsheviki, in accordance with the then acknowledged and asserted principles of communism, attempted by every means at their command to destroy religion in Russia. In the years following 1917, church property was confiscated, clergymen were killed, exiled or imprisoned, and Patriarch Tikhon himself, old and in poor health but a useful symbol, too valuable to be destroyed, was confined under house arrest and later imprisoned.

This frontal attack upon the church continued for five years. In November of 1920, however, at the height of the persecution, Patriarch Tikhon issued his now famous ukase No. 362 of 1920. This document contained "instructions to the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administration, *or in case the latter's activity stop*". (Emphasis supplied.) It was provided in part that "if the highest Church Administration * * * would for any reason discontinue their church-administrative activity", the diocesan bishop, either with the bishops of neighboring dioceses or, if that were not possible alone, should "assume the full hierarchical power" and "do everything possible to regulate the local church life, and if necessary * * * organize the diocesan administration suitable to conditions created". Other paragraphs provided for the continuation of such local administration of the church if the discontinuance of activity of the highest church administration "should acquire a protracted or even permanent character". Finally, it was provided that "all measures that were taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is re-established."

The apparent forebodings of Patriarch Tikhon, which prompted this ukase, proved accurate, for in the spring of 1922 he was arrested and imprisoned. The Russian Government, then, for its own purposes, as later became evident, permitted a group of priests to visit Tikhon and they procured from him a letter authorizing the transfer of certain *business papers* of the church to a named archbishop (Agathangel) who was to be his representative. Instead of doing that, the recipients of the letter—members of a radical group styling themselves the "Living" or "Renovated" church—declared themselves to be the

Supreme Authority of the Russian Orthodox Church and purported to authorize and summon the pseudo-sobor of 1923. Patriarch Tikhon later referred to them as "ambitious and wilful men" who took advantage of the situation "to usurp the highest clerical power of the Orthodox Russian Church which did not belong to them", and he denounced their statements as "nothing but lies and deception". It is now conceded here that this was a schism which is now extinct. Nevertheless, while Tikhon was still in prison, this schismatic group purported to call another sobor of the church although power so to do resided only in the Patriarch Tikhon, as we have seen. There is evidence that they were aided and abetted in their plan by the Russian Government which permitted them to proceed while killing, arresting or exiling those members of the church who objected. This new pseudo-sobor met in 1923.[1] Tikhon was roundly and vehemently condemned by all the speakers. The patriarchate was dissolved and Tikhon, reviled and denounced

[1] The minutes of its deliberations contain frequent obsequious expressions of praise of and devotion to the Soviet Government. Lenin was referred to as "the world's leader" and the Soviet Government was said to be "the only one in the world of all time of the existence of mankind, to fight actually for good and equality." A resolution was adopted which declared that the world was divided into two classes—the capitalist exploiters and the proletariat—and continued: "The Christians cannot be indifferent spectators of that battle. The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians. In Soviet Authorities the Sobor sees a world's leader for fraternity, equality and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority." Christians "through the entire world" were called upon to "bring into life the principles of the October Revolution."

as an apostate and traitor, was unfrocked. The church created by the pseudo-sobor of 1923 was called the "Living Church" or the "Renovated Church". It was schismatic and had no canonical validity. That fact, it should again be noted, is conceded by all the interested parties here.

The turmoil and the turbulence with which the Russian Orthodox Church was beset in Russia was not without its echoes in this country. Bishop Alexander of Canada became acting head of the diocese by designation of Archbishop Evdokim (see p. 6, herein). Several conventions were held in this country at which the status and fate of the North American Diocese were discussed and measures were proposed to preserve it from disintegration or the usurpation of pretenders. Archbishop Platon, who had ruled the diocese from 1907 to 1914, in proper canonical succession, returned to this country in 1921. He succeeded in restoring peace and order in the diocese, and prominent churchmen of the diocese urgently petitioned Patriarch Tikhon to reappoint him formally as archbishop of the diocese. This was just before Tikhon was actually imprisoned. While he was technically at liberty, his visitors in Moscow were being watched and interrogated carefully, and his correspondence, especially with Americans, was systematically searched. The American entreaties regarding Archbishop Platon were relayed to the Patriarch by a representative of the Y.M.C.A. who was in Moscow. The Patriarch, in the presence of another witness, Bishop Pashhovsky, assured him that Platon would be appointed the ruling bishop of the diocese and that he would issue papers to that effect. The Patriarch asked that Platon be notified immediately, but it was agreed that it would not be possible at that moment to put the appointment in writing because of the constant surveillance of the civil authorities and the fear that any such communication, if seized, would endanger the safety or the life of the Patriarch. The Patriarch's intention and will were transmitted to Archbishop Platon by the Y.M.C.A. representative and Bishop Pashhovsky. Alexander, the acting archbishop, recognized in writing Platon's appointment as ruling bishop of the diocese, as did the bishops of the church outside Russia. Tikhon was imprisoned by the Soviet Government immediately after making this oral appointment. A diocesan convention was held at Pittsburgh in October, 1922, and after investigating the situation Platon was acknowledged as the ruling bishop. Platon accordingly took possession of St. Nicholas Cathedral and exercised administrative supervision over the diocese.

Patriarch Tikhon was released from prison in the latter part of 1923, after the pseudo-sobor of that year had completed its work. Under date of September 20, 1923, from a monastery, he signed an order directed to Platon advising him that, *with the concurrence of the Sacred Synod,* "having taken cognizance of the situation of the American Church we deemed it necessary to appoint you to rule the North American Church".

Meanwhile, one John Kedrovsky, a priest of the Russian Orthodox Church in this country, had, in 1918, commenced an action in this State on behalf of himself and other priests against the association or corporation known as the Archbishop and Consistory, which was a managing and advisory group handling the affairs of the diocese. In that complaint Kedrovsky asserted that he was one of the clergy of the Russian

Orthodox Greek Catholic Church of North America; that it was a religious denomination of about 300 churches with about 300,000 members organized in various unincorporated parishes or bodies throughout North America[2]; that his lawful archbishop was Archbishop Evdokim (Meschersky) who had departed from the United States for Russia about August 6, 1917, and had since remained there; that Alexander (Nemolovsky) was then a bishop of the church in Canada and had been assuming to act as the acting archbishop of the church pursuant to a cablegram from the lawful Archbishop Evdokim but that in truth no such appointment had been made by Archbishop Evdokim and that Alexander was therefore a usurper.

After the institution of that action, but before trial, the aforementioned psuedo-sobor of 1923 was held in Moscow. It created the "Living Church" or "Renovated Church", which, as noted, is now conceded to have been schismatic and uncanonical. Kedrovsky, the same priest who in his 1918 action had asserted that he was subject to Archbishop Evdokim as the true archbishop of the North American Diocese, procured from this "Renovated Church" certain credentials in the latter part of 1923. One document purported to consecrate him as North American archbishop and to excommunicate and condemn Archbishop Platon. The other documents contained Kedrovsky's formal appointment as arch-

[2] On the trial, he introduced in evidence an exhibit which listed deeds of 135 church properties to Bishop Alexander in Alabama, Alaska, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

bishop of the North American Diocese and a full power of attorney to act for the church.

In March, 1924, he commenced another action, this time asserting that he was the lawful archbishop of the North American Diocese, in order to gain control of St. Nicholas Cathedral, the subject premises in the case at bar, which he then conceded had been possessed by Bishop Alexander in 1919 "as the de facto or acting archbishop". As noted, Archbishop Platon was occupying the cathedral in 1924 by virtue of his oral appointment by Patriarch Tikhon and the written confirmation thereof in September, 1923.

In March of 1924, immediately prior to the institution of the cathedral action by Kedrovsky, a document, dated February, 1924, appeared in the newspapers here purporting to have been issued by the Patriarch Tikhon accusing Platon of engaging "in public acts of Counter-Revolution directed against the Soviet power and of disastrous consequences to the Orthodox Church". It provided for the dismissal of Platon "from the day on which this Present Decision is announced to him", by a new ruling bishop who was to be chosen. The publication of this decree, dated less than five months after the patriarchal order confirming Platon and the legal action instituted by Kedrovsky, caused bewilderment among the members of the diocese. A North American sobor was called and held at Detroit in April of 1924 to consider the situation, excerpts from the minutes of which appear in the record.[3]

[3] The purported new order of the Patriarch was compared with his recent decree confirming Archbishop Platon, the language of the new order was analyzed and found to be couched in terms similar to those used by the schismatic Kedrovsky, and there were comments upon the very serious condition of the Patriarch's health. (He

It was pointed out that the North American Diocese, for a good many years, had been "cut off from the highest organ of the administration of the Russian Church" and that that situation made operative the above-quoted ukase of 1920 providing for local administration and election of bishops. The sobor then adopted resolutions asking Platon to head the administration of the church. Another resolution emphatically stated it to be the will of the sobor "not to break at all the spiritual ties and communion with the Russian Church, but always to pray for her good". The "final regulation" of the status of the North American church was to be left to "a future Sobor of the Russian Orthodox Church which will

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did, in fact, die the next year, in April of 1925.) It was concluded that "somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him", and in particular that the decree of February, 1924, was "undoubtedly forced by the Soviet power". Another speaker stated: "The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all that the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is 'to execute'. As everything is done to 'consolidate the conquests of the revolution' his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage." It was said that if such forced acts of the Patriarch continued, the North American Diocese would be subject to "all kinds of surprises, which could basically undermine that church order and peace which have with such great labor already been practically arranged" by Archbishop Platon, and "would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present * * *. We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet power."

be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

The second or 1924 action brought by John S. Kedrovsky reached us two years before the 1918 action brought by him. In that 1924 action there was evidence as to most of the facts already detailed. However it was not there conceded as it is now that the "Renovated Church" had been schismatic in origin and had been later absorbed by or merged with the patriarchal church nor that the 1923 sobor was not considered as having complied with canonical requirements because it was not convened pursuant to a call by the Patriarch and the Holy Synod. Moreover, in that action there was not before the court ukase No. 362 of 1920 of Patriarch Tikhon. The Appellate Division (214 App. Div. 483) stated that "The validity of Kedrovsky's appointment really depends upon the validity of the second Sobor [that of 1923] as it is called." (P. 487.) It then found (contrary to what is now conceded to be the fact) that the sobor was properly called and that the "Renovated Church", created by it, had the power to appoint Kedrovsky as the ruling bishop of the North American Diocese. When the appeal from that decision reached us we treated it as one involving only questions of fact as to whether (1) there was a governing body of the church and whether (2) that governing body had recognized Kedrovsky as archbishop of the church. We determined that there was evidence to sustain the findings of the Appellate Division on both of those points. We thereupon affirmed the judgment, one Associate Judge being recorded as absent. (*Kedrovsky* v. *Rojdesvensky,* 242 N. Y. 547 [1926].) The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church,* 222 N. Y. 305, 315; *Watson* v. *Jones,* 13 Wall. [U. S.] 679, 724-727; Religious Corporations Law, §§ 4, 5).

Two years later there was presented the original or 1918 action commenced by Kedrovsky, as a priest of the patriarchal church, on behalf of himself and all others similarly situated. It had been brought against the "Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, alleged corporation", and others. Archbishop Platon (Rojdesvensky) was again an appellant. In that action a receiver *pendente lite* had been appointed and the judgment at Special Term directed that the defendant Platon and other defendants deliver over to such receiver, who in turn was directed to deliver to plaintiff John S. Kedrovsky, all the properties and deeds thereto held by Bishop Alexander and conveyed by him to the general board of trustees by the exhibit dated June 7, 1921, which listed and enumerated all of the 135 church properties in the 19 States and the Territory of Alaska heretofore referred to. That judgment was unanimously affirmed by the Appellate Division (220 App. Div. 750). We, however, granted leave to appeal. The decision of the Appellate Division there was correct and unassailable if by our affirmance in *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), we had adopted the view that the properties of the North American Diocese were required to be administered by an appointee of the central authorities of the patriarchal church as it then existed in Russia, whatever the status and characteristics of the church there might be, and that Kedrovsky had been validly appointed by such authorities. We, however, declined so to consider our earlier affirmance in the cathedral case two years before. Realizing that the legitimate claims of the North American Diocese, whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below. (*Kedrovsky* v. *Russian Catholic Church,* 249 N. Y. 75 [1928].)

We pointed out that the title to the properties "was either in Archbishop Nemolovsky [Alexander] for the benefit of the faithful of the church within his diocese, or in the defendants [Platon and the general board of trustees] to whom he attempted to transfer his trusts * * * or in the faithful of the church themselves." (P. 77.) We further noted that in none of those views was title in the members of the Consistory, then headed by Kedrovsky. Then, taking cognizance of the doubt as to Kedrovsky's status as archbishop by appointment of the "Renovated Church", and of the declaration of administrative autonomy by the American church at Detroit in 1924, we said (pp. 77-78): "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114). Whether such trustee should be the plaintiff, who is the present Archbishop, or the incorporated Archbishop and Consistory, or some one else, we do not now determine. This question is one to be passed upon by the Supreme Court in its discretionary supervision of the conduct of trustees. That discretion has not been exercised by any judgment yet pronounced. * * *''

That 1928 decision by this court thus recognized that the difficulties of the Russian Orthodox Church in this country differed substantially from the situations presented in the *Westminster* and *Watson* cases (*supra*), and that those cases were not helpful in the solution of the problem. The problem, indeed, was one which strained the limits of judicial power, and we deemed it proper to return the case to the Supreme Court leaving it to that court, after full consideration of the facts, in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russion Orthodox Church in this country might enjoy their accustomed religious temporalities under the supervision of trustees who might ''be relied upon to carry out more effectively and faithfully the purposes of this religious trust''.

While this litigation was in progress, the Soviet sponsored ''Renovated Church'' was the only one permitted to function in Russia, the central office of the patriarchal church being suppressed by the Government. Despite this State assistance, the ''Renovated Church'' had no popular following and few adherents outside its own clergy. In a few years it joined with and was absorbed by the patriarchal church. For two years, after Tikhon's death in 1925, there was no Patriarch of the Russian Orthodox Church. Then in 1927, one Sergius, the Metropolitan of Moscow, made peace with the Soviet Government and concluded an agreement with it under which the central office of that church was permitted to reopen, after acknowledging its "loyalty" to the Government and promising to secure similar written pledges of loyalty from the clergy of the church abroad. No election to fill the office of Patriarch was permitted. Instead, Sergius was appointed the acting *locum tenens* of the patriarchal throne. Unsuccessful discussions subsequently ensued with a view toward reuniting the North American metropolitan district with the patriarchal church.[4]

Under the leadership of Metropolitan Platon following the creation of the administratively autonomous metropolitan district by the Detroit sobor of 1924, to which reference will be made hereafter, the church grew and prospered. With the exception of schismatics such as Kedrovsky, who was recognized by no one but who occupied St. Nicholas Cathedral by virtue of the decision and injunction of 1924, the North American church followed Metropolitan Platon. In 1933, the Acting Locum Tenens, Sergius, dispatched one Benjamin (Fedchenkoff) to the United States in order to take over the administration of the metropolitan district from Platon, whose proclamation of autonomy was declared to be "null and void". Sergius also purported to excommunicate Platon and all the clergy and laymen who followed him, until they submitted themselves to the jurisdiction of the patriarchal Exarch Benjamin (in America) or directly to the Acting Locum Tenens (in Moscow). Finally in 1934, Sergius appointed his ambassador, Benjamin, as "permanent Ruling Bishop

[4] The position of the Russian church in America appears to have been that no such pledge of loyalty to the Russian Government as demanded could be given by the clergy here and that the church in Russia was becoming a slave to the atheistic Russian Government and was aiding it in its fight against all religion. In view of those conditions, the Russian church here felt it had no alternative but to insist upon temporary autonomy envisaged by the ukase No. 362 of 1920.

of the Russian North American Diocese". The text of the order contains a recital that Benjamin had "organized in New York a Diocesan Council and that our *North American Diocese has begun official existence.*" (Emphasis supplied.) This would appear to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese. By 1945, the number of parishes which recognized the new diocese set up by Benjamin in 1934, and which we must assume, in view of the provisions of the Religious Corporations Law since 1875, were organized for the purpose of adhering to such new diocese set up by Benjamin, was only 13, while those adhering to the autonomous metropolitan district were said to total 358.

Platon died in 1934 and another sobor of the American church convened at Cleveland. Bishop Theophilus (Pashkovsky) was elected as ruling bishop and has served as such since. The temporary autonomy of the North American metropolitan district created in 1924 was reaffirmed, and rules for the administration of parishes were adopted. Another sobor at New York in 1937 again confirmed the temporary autonomy of the North American metropolitan district. The central church authorities in Moscow immediately issued a decree suspending and excommunicating Bishop Theophilus.

In 1934, John S. Kedrovsky, the schismatic, also died, but his son, Nicholas, continued to occupy the St. Nicholas Cathedral, even though by that time the "Renovated Church" had ceased to exist. Nicholas remained there until 1944, when he too died, and possession of the cathedral passed informally to his brother, John, who claimed to be a priest by virtue of an ordination of the "Renovated Church".

In 1940, the status of the metropolitinate again came before this court in *Waipa* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780). That was a suit to oust a priest from a Russian Orthodox Church in Yonkers, N. Y. He had been suspended by Archbishop Theophilus of the metropolitan district and in the civil action brought against him, he defended on the ground, among others, that Benjamin, the appointee of the Moscow Patriarchate and not Archbishop Theophilus, the elected metropolitan, had the power and authority to administer the affairs of the church here. The lower courts rejected that contention, finding authority for the creation of the administrative autonomous metropolitan district in the ukase of 1920 of Patriarch Tikhon which was to continue "until such time as the existing civil authorities * * * would cease interfering with the church." (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5.) We denied leave to appeal.

Following the invasion of Russia by Germany in 1941, the Soviet Government, fighting for survival, apparently found it expedient to permit a somewhat broadened area of activity to the Russian Orthodox Church in that country. Then, following the death of Sergius in 1944, it consented to the convening of a sobor at Moscow in January of 1945. The news which was permitted to seep out of Russia after 1941 encouraged the hope in the members of the metropolitan district that unity might again be found.[5]

[5] As stated in an official report of the metropolitan district, "It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. * * * The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited."

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Suddenly, without advance notice, an invitation was received for the North American church to be represented at the new sobor in Moscow. Four delegates were hurriedly chosen—three clergymen and one layman, the attorney for the church—who made preparations to travel to Alaska, from which place the Russian Government was to provide transportation to Moscow. After two of the clergymen had started, the Soviet Government cancelled the visa of the attorney on the pretext that entry was permitted only to clerical persons—a restriction which was not observed with reference to the delegation from Yugoslavia. The two clergymen who had already left were met by a Russian airplane which was to carry them to Moscow. Instead, they were landed in Siberia and transferred to a train to continue their journey. As a result, they arrived in Moscow ten days after the sobor had adjourned.

They found that one Alexy had been named Patriarch of the Russian Orthodox Church, and they presented to him a report of the church in North America and a request for the lifting of the spiritual separation on terms of autonomy. In return, they were handed a prepared document, the so-called ukase of February, 1945, for delivery to Metropolitan Theophilus. The terms of this ukase were not acceptable to the North American church. Instead of the necessary autonomy, the ukase provided for the calling of a sobor in America to be presided over by an archbishop sent from Russia. The sobor was to be required to declare in the name of the church "its abstention from political activities against the U. S. S. R. and give corresponding orders to all parishes". There was no comment or provision concerning the status of Metropolitan Theophilus, the elected head of the North American church. Instead, the sobor was to be required to elect a new person to be head of a new metropolitan district. Two representatives of the then Moscow Patriarchate were recommended as candidates for the position, and the right was reserved to refuse confirmation of the person chosen "if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever". There was an intimation that "some extended powers" might be given to the person so chosen and confirmed, "but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy."

A council of the bishops of the North American metropolitan district met in May, 1945, and decided that the terms proposed in the ukase of February, 1945, were not acceptable.[6]

[6] In an official report to the clergy and laymen, published in July, there was a full discussion of the background and necessity of the 1924 declaration at Detroit of temporary autonomy for the North American metropolitan district. Reference was made to the recent efforts at unity, the chicanery by which the American delegates were prevented from attending the Moscow sobor, and the substance of the ukase then issued. The report emphasized that the metropolitan district considered itself as part of the Russian church and desired that the suspension be lifted. It was pointed out, however, that the text of the ukase disclosed that the Moscow Patriarchate had "little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed." Then followed a point-by-point analysis of the ukase. One of the major obstacles was the insistence of the patriarchy upon renunciation of political activities against the U. S. S. R. The report said: "It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal

The attempts at reconciliation having met with failure, the metropolitan district decided to commence this action to recover possession of St. Nicholas Cathedral, which by custom and rule had always been the See of the Russian Orthodox Church in North America and the residence and place of worship of the ruling bishop of the church in North America. Technically, the plaintiff in this action is the corporation, "Saint Nicholas Cathedral of the Russian Orthodox Church of North America". When the land for the proposed cathedral was acquired in 1899, title was taken in the name of a religious corporation organized pursuant to the Religious Corporations Law of 1895 (L. 1895, ch. 723, § 50) which provided that the incorporators of such Orthodox churches should be, by virtue of office, the Russian Ambassador and the Consul General. This corporation, so formed, retained title until 1925, with the exception of one year (1916-17) when title was temporarily placed in the name of the then ruling Archbishop Evdokim to whom John S. Kedrovsky, when he brought his 1918 action, was subject as a priest and whom he, in his complaint, recognized as the true head of the North American Diocese.

In 1925, a special act of the New York State Legislature (L. 1925, ch. 463) created the plaintiff corporation, composed of Metropolitan Platon and others of the metropolitan district, to which the old or 1899 corporation transferred the cathedral property. The deed was signed by the Russian

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Ukase." Another stumbling block was the vagueness of the ukase as to the powers of the North American church. It was felt that "the precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime."

Consul General, but not by the other statutory incorporator, the Russian Ambassador, as we did not then recognize the Russian Government in that country. That necessary defect was cured, and all such deeds validated by a subsequent act of our Legislature. (L. 1942, ch. 206.) Moreover, the corporate existence of the plaintiff corporation was specifically confirmed by still another act of our Legislature (L. 1945, ch. 817), "notwithstanding any nonuser by said corporation of its corporate rights, privileges and franchises or the lapse of any period of time during which said corporation was inactive." The plaintiff corporation, accordingly, is the present owner of the record title to St. Nicholas Cathedral. This is not, however, the ordinary ejectment action, in which proof of such title and of an ouster would constitute ground for relief. Since 1875 (L. 1875, ch. 79), our Legislature has provided for the denominational control and administration of church properties and temporalities. (See Religious Corporations Law, § 5.) The corporate owner of the title thus holds the property *in trust* for the religious body for whose use it was dedicated. Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, § 105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government.

The action, as stated, was commenced against John Kedroff, the second son of John S. Kedrovsky, in April, 1945. Apparently fearful of his anomalous status, as a cleric of a concededly extinct church (the "Renovated Church"), Kedroff made overtures to Benjamin, the representative of the Moscow Patriarchate, and in October, 1945, was *reordained* by Benjamin and thereupon surrendered the cathedral premises to Benjamin, as head of a new diocese of a different church. We must remember that Benjamin never possessed or occupied the cathedral until after the commencement of this action on April 9, 1945, against the defendant Kedroff. Benjamin was not originally a party herein because he was not an occupant of the cathedral but was later permitted to intervene. Kedroff, the second son of Kedrovsky, was but a priest of the schismatic "Renovated Church" and thus could not have defended this action as an occupant of the cathedral. He therefore went to Benjamin, recognized him as the "Chief Church Authority", and said "Ordain me all over again" and had himself reordained as a priest by Benjamin in what must have been the latter's new diocese. When Benjamin did so reordain Kedroff as a priest, the latter "gave" the cathedral to Benjamin according to Benjamin's counsel here. Thereafter, in order to obtain an adjournment in this action, Benjamin stipulated to and did give up possession of the catherdal on June 6, 1947. At the time of the trial, when he was called by the plaintiff *only,* Benjamin was living at 38 Halsey Street in Brooklyn. Benjamin was therefore an occupant of the cathedral only from October, 1945, a time subsequent to the commencement of this action, until June 6, 1947.

Kedroff had interposed a general denial to plaintiff's complaint. After Benjamin, following such surrender by John Kedroff, took over the cathedral, he was permitted to intervene and interpose the present amended answer setting up four affirmative defenses. Only the first need concern us here. The second, third and fourth defenses, i.e., nonuser and lack of authority in plaintiff, the Statute of Limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor below. There was little or no discussion concerning them and they have been effectively eliminated from the case. The first affirmative defense sets up Benjamin's appointment and his asserted right to occupy the cathedral by virtue of such appointment to that office.

Before this action was commenced a new article of the Religious Corporations Law, 5-C, was passed by both houses of the New York Legislature. It was subsequently signed by the Governor. This legislation had a conclusive effect upon the issues presented in the case at bar and will be discussed at length below. Quite apart from this legislative action with respect to the specific dispute here involved, we think that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records before us, the conclusion would have been fully warranted that the leaders of the North American metropolitan district are the trustees "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (pp. 77-78), i.e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

The courts below, in granting judgment herein to defendants, did not determine, in the exercise of their discretion, whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminster* and *Watson* cases (*supra*), were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore entitled to the possession of the cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox Mission and Diocese prior to 1924 when it became an administratively autonomous metropolitan district. (Religious Corporations Law, §105.)

We know that a nominal church organization exists in Russia, but that is not enough. We are told—by the *only* witness called by the defendants and one who supplied the *only* testimony to this effect—that "from 1925 to date, the Church has received greater liberty and is functioning freely as an Orthodox Church, without interference by the civil authorities, and the political views held by the authorities, *and any atheistic sentiment that they may have in no way interferes* with the unhampered activities of the Russian Orthodox Church.'' (Emphasis supplied.) On the other hand, plaintiff urges that, willingly or not, the Moscow patriarchy is unable to conduct ''church-administrative activity'' except as an arm of the Russian Government to further its domestic and foreign policy; that that is a fact publicly recognized by our President and our State Department; and that it is attested to and demonstrated in the records submitted to us by (1) the imprisonment of Patriarch Tikhon, (2) the suppression of the patriarchal church during the days of the State-supported schism of the ''Renovated Church'' and (3) by the later re-establishment of an enfeebled patriarchate, when the ''Renovated Church'' had served its purpose, willing to pledge its loyalty to the Russian State and to attempt to exact a similar pledge from clergy abroad. Having in mind the warning of Lord COLERIDGE, in *Lumley* v. *Gye* (2 El. & Bl. 216, 267), ''Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with'', we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN VOORHIS, below: ''* * * In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistice Day Address, November 11, 1949)." (276 App. Div. 309, 330.)

Everyone agrees that the Russian Orthodox Church has continuously existed down through the centuries, for no communicant would concede that the suppression of the church by the Soviet Government had ever destroyed the patriarchy as a *spiritual symbol* of the spiritual unity of the church as distinguished from its temporalities. Moreover, members of the North American metropolitan district admittedly revere and respect the *office* of the patriarchy, whatever may be their feelings as to the merits of the current incumbent of the office. This devotion is traditional and serves as a common bond for the members of the *Russian* Orthodox Church, as distinguished from the members of other Orthodox churches in various countries which have recognized as their spiritual heads at various times the Patriarchates of Constantinople, of Alexandria, of Antioch, of Serbia and of Jerusalem. Recognition of the Moscow patriarchy by the North American metropolitan district in that sense is by no means a disavowal of the position steadfastly maintained by it down to the present day, viz., that the beloved patriarchy has been absorbed by the Russian Government and its action deprived, during the period of such domination, of any religious significance.

In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American metropolitan district, was the proper person to administer the temporalities of

St. Nicholas Cathedral and whether he was the proper trustee "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114)." (*Kedrovsky* v. *Russian Catholic Church,* 249 N. Y. 75, 77-78, *supra.*) That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminister Prsbyt. Church* (222 N. Y. 305, *supra*), required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further, for there is another ground requiring reversal here and judgment in favor of plaintiff and the North American metropolitan district which it represents.

We refer, of course, to the authoritative and unambiguous action finally taken by the New York State Legislature in 1945 and 1948 with respect to the controversy which has now occupied the attention of our courts for a quarter of a century.

If there were any doubt as to the proper determination of the case along common-law lines, it has been completely eliminated by the Legislature. In April of 1945 (L. 1945, ch. 693), the Governor signed a bill adding a new article 5-C to the Religious Corporations Law consisting of four sections, two of which, sections 105 and 107, are presently material. In 1948 (L. 1948, ch. 711) important amendments were made to these sections which will be noted later. In the first section (§105), the Legislature defined the "Russian

Church in America" (i. e., the North American church as we have referred to it above) and carefully traced its origin. The first paragraph of section 105, as it reads today, is as follows: "The '*Russian Church in America*', as that term is used anywhere in this article, *refers to that group of churches, cathedrals,* chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) *which were known as* (a) Russian American Mission of the Russian Orthodox Church from in or about 1793 to in or about 1870; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about 1870 to in or about 1904; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about 1904 to in or about 1924; and (d) Russian Orthodox Greek Catholic Church of North America since in or about 1924; *and were subject* to the administrative jurisdiction of the Most Sacred Governing Synod *in Moscow* until in or about 1917, later the Patriarchate of Moscow, *but now constitute an administratively autonomous metropolitan district* created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April 2nd to 4th, 1924." (Dates in Arabic; emphasis supplied.)

The second paragraph of section 105, defines what is meant in the statute by the phrase "Russian Orthodox church". This is used as a word of art and is used generally to denote the particular local buildings or organizations of the Russian Orthodox faith as distinguished from the spiritual church. The statutory definition reads as follows: "A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chapel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission [(a) above], diocese [(b) and (c) above], or autonomous metropolitan district [(d) above] hereinabove defined as the Russian Church in America." It is to be noted that the words "Russian Orthodox church" refer not only to those church buildings and religious organizations founded and established for the purpose and with the intent of adhering to, and being subject to the autonomous North American metropolitan district *since 1924,* but also to those properties and organizations adhering and subject in the past to the Russian Mission from 1793 to 1870, and the North American Dioceses from 1870 to 1904 and from 1904 to 1924.

These definitions, in turn, make the meaning and intent of section 107 clear. With them in mind, the following command of the Legislature in section 107 is abundantly plain:

"1. *Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district,* and whether incorporated or reincorporated pursuant to this article *or any other article of the religious corporations law,* or any general or private law, *shall recognize and be and remain subject to the jurisdiction and authority* of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities *of the Russian Church in America,* pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October 5th to 8th, 1937, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America *and shall in all other respects conform to, maintain and follow the faith,* doctrine, ritual, communion, discipline, canon law, traditions and *usages of the Eastern Confession* (Eastern Orthodox or Greek Catholic Church).

"2. * * *

"3. *The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property,* real and personal, belonging to such church and of the revenues therefrom *and shall administer the same in accordance with the by-laws* of such church, the normal statutes for parishes of the *Russian Church in America* approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November 20th to 23d, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America." (Dates in Arabic; emphasis supplied.) Little, if anything, is left for the courts to construe in the face of such a clear manifestation of intent. St. Nicholas Cathedral, the subject property herein, is indisputably a "Russian Orthodox church", as defined in the statute. It was built in 1903 and dedicated as a cathedral in 1905, in connection with the establishment of the Diocese of North America and the Aleutian Islands, which as we have seen, is listed in the first paragraph of section 105. It is a "cathedral * * * founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, *diocese* or autonomous metropolitan district hereinabove defined as the Russian

Church in America.'' (Emphasis supplied.) As such, it is within the purview of subdivision 1 of section 107 and must be subject to the jurisdiction and authority of the governing bodies of the North American church. Likewise, pursuant to subdivision 3 of section 107, the trustees of the St. Nicholas Cathedral corporation must administer the cathedral in accordance with the by-laws, the normal statutes for parishes of the Russian Church in America as therein defined.

Special Term attempted to construe the statute, as it stood in 1945, in such a manner as to make it applicable *only* to those *new* parishes, founded and established *after 1924* for the express purpose of adhering to the Russian Church in America. Whether the court's construction was justified under the then wording of the statute is not before us, for after the decision at Special Term, and obviously as a result of it, the Legislature amended the statute to read in its present form, above quoted. In order that there might not be any doubt that the 1945 legislation was intended to apply to a property, such as St. Nicholas Cathedral, the second paragraph of section 105, defining ''Russian Orthodox church'', was amended so that there was included within its compass any cathedral ''founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined as* the Russian Church in America.'' (New matter italics.) Likewise, subdivision 1 of section 107, which provides that every such Russian Orthodox church in this State shall ''recognize and be and remain subject to the jurisdiction and authority'' of the Russian Church in America, was amended to provide that such Russian Orthodox churches were within its coverage "whether incorporated *before or after the creation* [1924] *of said autonomous metropolitan district*". (New matter italics.) These significant amendments, enacted within a month after Special Term's decision, illustrate beyond cavil that the decision of that court did not correspond with the intent of the Legislature, which immediately interpreted and explained its prior enactment.

Nevertheless, the majority in the Appellate Division, while conceding that plaintiff was entitled to the benefit of the statute in its amended form, failed properly to appreciate and give meaning to what we consider to be the plain legislative intent. It said in part (p. 317): "In other words, it appears to us that it [§107] was intended to mean that any church *heretofore or hereafter* incorporated for the purpose of adhering to the American church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church [the American church, the autonomous metropolitan district, created in 1924]." Such a view gives no meaning to the change made by subdivision 1 of section 107 by the 1948 amendment. That amendment excised the three words ("heretofore or hereafter") which we have italicized in the above quotation, and substituted the words: "before or after the creation of said autonomous metropolitan district [in 1924] * * *." The following quotation from subdivision 1 of section 107 shows in brackets the words eliminated by the 1948 amendment and indicates by italicizing the words substituted by that amendment: "Every Russian Orthodox church in this state, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district* * * * shall recognize and be and remain subject to the jurisdiction and authority of * * * the Russian Church in

America * * *." The Legislature quite clearly made the amendment after the decision at Special Term herein so as to remove the possibility of a construction such as that adopted by the Special Term and later the Appellate Division, that the statute was limited in its operation to churches incorporated after 1924. If, as the Appellate Division construed it, the statute were limited to churches "incorporated for the purpose of adhering to the American church", that would mean that it could only apply to churches founded and established after 1924, since that was the year in which the autonomous metropolitan district, denominated by the Appellate Division, the American church, was created. Yet subdivision 1 of section 107 clearly states that it is to apply to Russian Orthodox churches "whether incorporated *before or after* the creation of said autonomous metropolitan district", i.e., before or after 1924. The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable.

The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions,* 11 N. Y. 243, 263-264; *Petty* v. *Tooker,* 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.,* 36 N. Y. 161.) For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, § 5.) As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties.

That, as we see it, is all that the Legislature has done in the above-quoted provisions of article 5-C. The Legislature has made a determination that the "Russian Church in America" was the one which, to use our words in 249 New York at pages 77-78, was the trustee which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114)" by reason of the changed situation of the patriarchate in Russia. No purpose would be served by repeating all the circumstances which forced the North American church to declare its temporary autonomy, and the process by which the Moscow Patriarchy has been subjugated by the Russian Government and used as its tool. All that has been detailed fully above. These facts must be deemed to have been found by and to have been within the actual knowledge of the Legislature when it decided to act in 1945 and 1948. Even assuming that we, as judges, are prevented from recognizing these facts, it cannot be successfully contended that the Legislature is required to labor under such unrealistic handicap.

The Legislature of the State of New York, like the Congress of the United States, in addition to the general knowledge of its members, has access to vast sources of information to assist it in determining the need and scope of new statutory law. Every new piece of legislation is the result of certain factual premises, whether they be expressed or tacit. In gathering the material for these premises, and in evaluating conflicting data, the Legislature is not bound by any formal rules. It has the widest latitude of inquiry. It cannot, and does not, close its eyes to any legitimate avenue of knowledge.

The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate directives. The courts have traditionally refused to consider the wisdom or technical validity of such findings of fact, if there be some reasonable basis upon which they may rest.

Thus, in passing upon matters of legislative intent and competence, the courts do not merely read the bare end product of the legislative labors. They read the statute in the light of the state of facts which were found by the Legislature, and which prompted the enactment. Then, and only then, can the courts intelligently approach their assigned tasks.

A recent pertinent example of such judicial recognition of the extent of the power of the legislative body to find the facts in a situation involving communist activity is found in *American Communications Assn.* v. *Douds* (339 U. S. 382). There, the noncommunist oath provision in the National Labor Relations Act was upheld, not because any such oath requirement was generally within the power of Congress, but because the specific evil, *the existence of which Congress was assumed to have reasonably found as a fact,* was such that some infringement upon traditional liberties was justifiable. The case illustrates well that enactments which might seem unconstitutional on their face may yet be sustained if the factual background found by the legislative body warranted an extended exercise of its powers. The case is noteworthy, too, in that it rejects the fallacious contention that the legislative body cannot go behind a carefully constructed facade to ascertain the real motives, ends and techniques of communist activity. It recognizes, as we must recognize in the instant case, that problems created by the extension of Soviet communist activity in this country are *sui generis,* and can only be dealt with intelligently on that basis.

As Justice JACKSON said in his opinion (p. 423, n. 1): "Of course, it is not for any member of this Court to express or to act upon any opinion he may have as to the wisdom, effectiveness or need for this legislation. Our 'inquiries, where the legislative judgment is drawn in question, must be restricted to the issue *whether any state of facts either known or which could reasonably be assumed affords support for it.' United States* v. *Carolene Products Co.,* 304 U. S. 144, 154." (Emphasis supplied.) (See, also, *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257-258; *Szold* v. *Outlet Embroidery Supply Co.,* 274 N. Y. 271, 278.)

The judicial technique of ascertaining the legislative finding of fact supporting a particular enactment is shown in Justice JACKSON's opinion in the *Douds* case (*supra,* pp. 424-433). He wrote (p. 424):

"From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics.'' (Then follows a footnote containing a long list of books and articles.) * * *

''It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights * * *'' (p. 425).

The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system.[7] The Legislature realized that the North American church, in order to be free of Soviet interference in its

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[7] Our former Ambassador to Russia wrote: ''The new tolerance for the Orthodox Church can be seen, therefore, as severely limited and primarily designed to serve as an instrumentality of an expansive foreign policy.'' (Walter Bedell Smith, My Three Years in Moscow, p. 268). See, also, Anne O'Hare McCormick in the *New York Times*, April 8, 1950 (p. 12): ''The church has again an official place in the Soviet Union, but as an agency of the state; on the same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute.''

affairs, had declared its temporary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts.

It is clear, therefore, that the plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action in accordance with the legislative finding and mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral.

The judgments below should be reversed, with costs in all courts, and judgment directed for the plaintiff.

Froessel, J. (concurring). As I view this controversy, we have the rather unusual situation of a foreign government, which all of us agree is grossly antireligious, assuming domination and control over the Russian Orthodox Church, leaving that church fettered, helpless and restrained of its freedom. Any other view, it seems to me, is to ignore stark reality. Under that domination, which is nothing less than plain duress, it seeks to reach out to the United States to assume control of church property within this State, title to which is held by plaintiff, a New York State corporation, and which property has been dedicated to the use of members of a parish and of a diocese.

The evidence in the records before us, and as outlined in the prevailing opinion, buttressed by facts of historical knowledge of which we may take judicial notice (*Nankivel* v. *Omsk All Russian Govt.,* 237 N. Y. 150, 156), and as found by the Legislature of this State (*East New York Sav. Bank* v. *Hahn,* 293 N. Y. 622), leads inescapably to the conclusion that plaintiff is entitled to judgment.

Judge CONWAY has sufficiently outlined in detail the history of the Russian Orthodox Church, so far as pertinent here. We are all in accord that the election of Patriarch Tikhon at the sobor of 1917-18, following the Kerensky revolution, had indisputable validity, and that Archbishop Evdokim was the duly appointed diocesan archbishop for North America in 1917, before he returned to Russia. It was he who held title to the property in suit for a short time (1916-17), and then voluntarily reconveyed it to plaintiff's corporate predecessor. After Kerensky was overthrown and the Bolsheviks came into power, the patriarchal chain of succession was broken. The prevailing opinion outlines briefly what happened to the Russian Orthodox Church in Russia. When Patriarch Tikhon, the last duly elected Patriarch, was imprisoned, he issued his famous ukase to the Russian Orthodox Church abroad. In 1923, with the concurrence of the Sacred Synod, he designated Platon as ruling bishop of the North American church, who continued until his death in 1934, following his active participation in and approval of the American sobors, commencing in 1922, which invoked the ukase of 1920.

The first sobor of the Russian Orthodox Church held since Tikhon was elected Patriarch was the pseudo-sobor of 1923, at which no Patriarch was elected, and which is now conceded to have been uncanonical. The only other sobor held since was the one at Moscow in 1945, when the American delegates, two clergymen, were met by a Russian airplane, but deposited in Siberia instead of Moscow in the month of January, rendering it impossible for them to complete their journey by train until ten days after the sobor had adjourned, thus denying them representation though duly invited.

We do not have here any such situation as was presented in *Watson* v. *Jones* (13 Wall. [U. S.] 679) where the highest church body was concededly free. Here, the Russian Orthodox Church, as presently constituted and dominated, is not free, its administrative agency is not the true body of the church, and is compelled to demand loyalty to the Soviet Government from all the priests of the Russian church abroad.

By our decision, we are not intruding unlawfully into the internal affairs of a religious body, but rather refusing to sanction such intrusion by an atheistic foreign government, so far as it affects property within our jurisdiction. Plaintiff-appellant holds title to the property in suit, in trust, not for the Russian Orthodox Church, but rather for the use of the membership for whom it was dedicated, and, so long as it administers the property for the faithful of the church within the diocese, it is entitled to possession and control. (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 214.) As we there said (pp. 225-226), where the ecclesiastical governing body's freedom of action was unquestioned, "The error which, as it seems to me, pervades the disposition made of this case in the courts below, is the idea that the Presbytery could take away from the Westminster Presbyterian Church of West Twenty-third Street all authority and control of its trustees over its real property, and by hostile action appropriate that property to such uses as it saw fit without any legal proceeding to that end, and wholly by the exercise of the ecclesiastical jurisdiction of the Presbytery." How much more so does this reasoning apply to the instant situation.

I concur in Judge Conway's opinion.

Desmond, J. (dissenting). None of us, of course, deny that the present Russian Government is frankly and grossly anti-religious and irreligious. But judicial recognition of that well-known fact is of no help in deciding this lawsuit. We are dissenting here because we strongly feel that this decision is an unlawful intrusion into the internal affairs of a religious body, contrary to first principles of American government, violative of the First Amendment's guaranty of freedom of religions from such governmental interference, and in conflict with the controlling decisional law as set forth in *Watson* v. *Jones* (13 Wall. [U. S.] 679) and *Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.* (211 N. Y. 214). For the decision about to be made is just this: that the judicial and legislative branches of the Government of this State have the power (and that the New York State Legislature has exercised the power) to oust from the archdiocesan cathedral of the Russian Orthodox Church in New York City, a prelate (defendant Benjamin) who has been appointed archbishop of that archdiocese by the Patriarch of Moscow, supreme head of that church. No other decision reaching such a result can be found in the books.

In aid of clarity we set down these indisputable and uncontested propositions:

1. The Russian Orthodox Church is a "general" or centrally organized church (see *Watson* v. *Jones, supra,* p. 722), under whose law and discipline the Patriarch of Moscow, as its supreme head, has the power of appointing archbishops.

2. Defendant Benjamin was appointed by the Patriarch as archbishop of the Diocese of North America and the Aleutian Islands, and that appointment is now in effect.

3. The Russian Orthodox Cathedral in New York City, is the see church of the archdiocese, and, accordingly, defendant Benjamin, as the duly appointed archbishop, is entitled to possess and occupy that cathedral as his see church.

4. Plaintiff-appellant, a New York corporation, holds title to the cathedral property but, under New York law, that title is in trust for the religious purposes of the Russian Orthodox Church, and for no other purpose (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 214, 223, *supra*).

5. Plaintiff, in seeking to exclude defendant Archbishop Benjamin from possession of the cathedral, is acting under the control of, and in the interest of, a dissident or schismatic group of Russian Orthodox Catholic individuals and parishes, which group, formed at Detroit in 1924, refuses to recognize the authority and primacy of the Patriarch of Moscow.

6. Under the law of New York (see Religious Corporations Law, §5), religious denominations, such as the world-wide Russian Orthodox Church, have denominational control over their constituent churches, parishes or branches, and the constituents cannot escape such control by secession (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church,* 222 N. Y. 305, 315).

7. The appointment of Archbishop Benjamin, as an official act of the highest Russian Orthodox Church authority, was a decision on a denominational matter of internal church government, and as such is final, and absolutely binding on the civil courts of this State (*Watson* v. *Jones,* 13 Wall. [U. S.] 679, 727, 729, *supra*).

The sum of those plain propositions is this: that Archbishop Benjamin's possession of the cathedral is not subject to control by any civil authority or by any judgment of a civil court, and that no civil court may decree to the independent or nonconformist group (which controls plaintiff corporation), possession of that cathedral, hostile to the authority and action of the mother church (*Watson* v. *Jones, supra,* p. 734).

What bases, then, are announced for the direction by this court that a judgment issue which will remove defendant Benjamin from his cathedral? As we understand it, those asserted grounds are two: first, that the Moscow Patriarchate is not in fact functioning as the true central organization of the Russian church but is a mere agency or instrumentality of the Soviet regime; and, second, that article 5-C of the New York Religious Corporations Law has, by legislative fiat, ousted the patriarchal appointee, and turned the cathedral over to the schismatics. The first of those bases amounts to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. The second basis gives to article 5-C a construction not reasonably supported by its language, or by its history, or by any reasonable or discoverable legislative intent—a construction which, furthermore, makes the statute unconstitutional. We now take up these matters in turn.

The finding, or determination, now being made by the majority of this court as a basis for reversal, is that the presently ruling Patriarch of Moscow is not, and should not, be treated as, the true central head of the church, but that he is a mere fellow traveler on the communist road, serving not God but the Soviet Caesar. Interestingly enough, plaintiff itself seems not to cast so cold an eye on the Patriarch, since the record abounds with protestations by the "American", or schismatic Orthodox Russians, of their filial loyalty and devotion to the Patriarch, whom they regard as a virtuous and venerable spiritual leader. Aside from that, and confining ourselves within the strict bounds of our own jurisdiction we, the Court of Appeals, have, of course, no power or right to adjudicate that the incumbent is no true Patriarch but a mere usurper or pretender. We dissenters refuse so to do, not from any mere naïveté as to Russia and communism, but as a necessary conclusion from the record in this lawsuit. At the very most, we have here the attempted determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts.

It is suggested that common sense, or general knowledge, makes it appropriate for us to take judicial notice that Patriarch Alexy is not acting independently but is obeying commands of his communist masters. Perhaps he is, for all we know, but his motivation is no proper subject of judicial notice. Many years ago our predecessors warned us against taking judicial notice in such uncertain fields (see *Baxter* v. *McDonnell,* 155 N. Y. 83, 93). And, even if we could, somehow or other, get sure knowledge that the Patriarch's appointment of this archbishop was made for the most unholy reasons, or because of the meanest accommodation to brute power, we still could not, as a court, strike down the appointment or refuse to give it credit. The Patriarch, like all men, must account for his stewardship, but not to the New York courts.

The long and the short of it is that this is an ecclesiastical matter, to which, be their answer right or wrong, the ecclesiastic superiors have the final answer. "* * * and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals" (*Connitt* v. *Reformed Prot. Dutch Church of New Prospect,* 54 N. Y. 551, 562). We are not talking about the powers of courts or of government to keep from our shores persons dangerous to our institutions, be they churchmen or laymen, or to deal with such persons when and if they violate our laws. No one has testified that Archbishop Benjamin is such a subversive, and, if he were, the New York courts would hardly be the place, or an action of ejectment the method, to arrange for his deportation from our shores. The United States Government has never withdrawn recognition of the Russian Orthodox Church and its Patriarch (see *Ponce* v. *Roman Catholic Church,* 210 U. S. 296, 318).

We turn now to the statute which seems to be appellant's chief reliance. Article 5-C of the Religious Corporations Law, consisting of four sections (§§105-108), was enacted in 1945 (L. 1945, ch. 693) and amended in 1948 (L. 1948, ch. 711). Its language follows the general pattern of several other articles in the same law. On its face there is no indication that it had any purpose other than that of any other special or general law incorporating a religious society or sect or church, that is, "to give an organization for public worship legal rights, and to impose on it legal obligations as a corporate body" (*Van Buren* v. *Reformed Church of Gansevoort,* 62 Barb. 495, 497; *Petty* v. *Tooker,* 21 N. Y. 267, 271). Incorporation of a church is the method by which the municipal law recognizes a church's present existence. Obviously, such a statute cannot be a device for transferring property from one faction to another, or for subjecting centrally organized churches to the control of seceding groups. Neither of those two general statements will be contradicted, and yet we are told that the passage by the New York Legislature, in 1945, of article 5-C, and its amendment in 1948, had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchical head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whole group and all its properties under the control of the new schismatic "Russian Church in America", and, specifically, of mandating the ouster of the patriarchically appointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended or so construed, is plainly unconstitutional.

The first section (105) in article 5-C is headed "Definitions". It is not in form or in meaning a preamble or legislative finding of fact. It defines two terms used elsewhere in the article: "Russian Church in America" and "Russian Orthodox church". The long, one-sentence definition of the first of those terms says that, as used in the article, it means those churches, cathedrals, parishes, etc., which were known as the Russian American Mission of the Russian Orthodox Church from 1793 to 1870, then known as the Diocese of Alaska, etc., from 1870 to 1904, then as the Diocese of North America and the Aleutian Islands from 1904 to 1924, and which have been known as the Russian Orthodox Greek Church of North America since 1924, and which were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until 1917, later the "Patriarchate of Moscow", but which "now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four." A "definition" of a term is a precise statement of its meaning. Nothing could be more precise than the statement (above summarized) which the Legislature thus gave us of what the Legislature meant by the use, in article 5-C, of the term "Russian Church in America". The definition describes, by reciting its history, the particular "group" of churches intended to be affected by the article. So read, the definition cannot possibly mean anything but this: that the "group" of churches or parishes thus recognized by the Legislature under the name "Russian Church in America", were those particular churches and parishes which were formerly part of the unified body called at successive times first the "Russian American Mission", then called the "Diocese of Alaska and the Aleutian Islands", then styled the "Diocese of North America and the Aleutian Islands" and which have been called the "Russian Orthodox Greek Catholic Church of North America" since 1924—in other words, the secessionists. To make that totally clear, the Legislature added to its "definition" a statement that it meant those churches, cathedrals or parishes which, though formerly subject to the Moscow Patriarch, had created themselves into an autonomous metropolitan district (or diocese) in April, 1924. On the trial, the witnesses agreed that not all the American parishes of the Russian Orthodox Church have gone over to the new "American" church. The definition describes those who did so cross over. The second "definition" in section 105 (of "Russian Orthodox church") says that term means a church, cathedral, etc., founded and established with the purpose and intent of adhering to the new metropolitan district.

The next section (106) of article 5-C sets forth the formalities for incorporation of a "Russian Orthodox church", as defined in section 105. Section 107, as amended in 1948, prescribes the method of government, by the new "Russian Church in America" of "every Russian Orthodox church in this state", whether incorporated before or after the creation of the new "autonomous metropolitan district". Appellant seizes upon the words "every Russian Orthodox church in this state" as meaning, literally, every Russian Orthodox parish, church or cathedral, whether or not it has seceded, and whether or not it desires to retain its traditional ties with the Patriarch. Of course, the words must be limited as defined in section 105, which says precisely what they are to mean, when "used anywhere in this article".

Section 108, headed "Reincorporation of existing corporations" authorizes the reincorporation "under the provisions of this article", of any "heretofore incorporated Russian Orthodox church". Such a provision would be useless and meaningless if the Legislature had, by the previous sections of the article, put every Russian Orthodox church and parish, automatically, into the new, dissident, "Russian Church in America". Indeed, if so strange and ruthless a plan had been intended by the Legislature, section 105 itself ("Definitions") would have been meaningless and unnecessary since, with all included, there would be no need for any definition or limitation.

Article 5-C, we think, is so plain and clear as not to need or permit any construction beyond the patent meaning of its simple words (*Matter of Rathscheck,* 300 N. Y. 346, 350). But if construction were permissible, every known canon of construction would lead to the same result: that the Legislature could not have intended this as a statute of outlawry, ouster, or disestablishment. Words in a statute are to receive their natural and obvious meaning; the general purpose and spirit of the law is to be kept in mind; objectionable consequences, injustice and unreasonableness are to be avoided; acts will not be so construed as to accuse the Legislature of a purpose to do harm (see McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], §§94, 96, 141, 143, 146, 148, 151, and cases cited for these propositions). A bad result suggests a wrong construction (*People ex rel. Beaman* v. *Feitner,* 168 N. Y. 360, 366). We find another aid to construction in the very practical idea that the busy New York Legislature which enacted over 1,200 laws in 1945, and which had no committee reports or debates as to article 5-C, was entitled to believe that this law meant what it said, without hidden purposes.

And one of the most urgent of all the canons of construction is this one: that a statute must be construed, when possible, "in manner which would remove doubt of its constitutionality, and possible danger that it might be used to restrain or burden freedom of worship or freedom of speech and press" (*People* v. *Barber,* 289 N. Y. 378, 385). Put another way, the rule is that the construction, if at all possible, must be such as not only to avoid unconstitutionality but to avoid grave doubts thereof (*Matter of Cooper,* 22 N. Y. 67, 87, 88; *Kovacs* v. *Cooper,* 336 U. S. 77, 85; *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259, 267; *People* v. *Realmato,* 294 N. Y. 45, 50; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401). How can there be any dispute but that this article 5-C, if read so as to take this archbishopric from the control of the central church and give it to appellant's group, is unconstitutional? *Watson* v. *Jones,* (*supra*), does not use the precise word "unconstitutional" but the opinion, contrasting American with old world systems (see p. 728 *et seq.* of 13 Wall. [U. S.]), says that "In this country the full and free right to entertain any religious belief, to practice any religious principle" finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally organized church are absolutely binding on the civil power. The modern Supreme Court in *Everson* v. *Board of Educ.* (330 U. S. 1, 13), has cited *Watson* v. *Jones* (*supra*), as authority for the proposition that the First Amendment provides "protection against governmental intrusion on religious liberty" through statutes. It is no answer to this charge of unconstitutionality that there is here in dispute a "property right" only as to the use of a building. " * * * when rights of property are dependent upon the questions of doctrine, discipline or church government, the civil court will treat the determination made in the highest tribunal within the church as controlling" (*Baxter* v. *McDonnell,* 155 N. Y. 83, 101, *supra,* citing *Watson* v. *Jones, supra;* and *Connitt* v. *Reformed Prot. Dutch Church of New Prospect, supra;* see *Gonzalez* v. *Archbishop of Manila,* 280 U. S. 1, 16).

We pause to remark on the notable similarity between the present case and *Watson* v. *Jones* (*supra*). A controversy over slavery split the Presbyterian Church in Kentucky in the 1860's; dissension over communism ideologies and Soviet controls played their part in the internecine warfare which broke out among the American members of the Russian Orthodox Church. A faction withdrew from the central control in the Presbyterian Church; plaintiff's faction here divorced themselves from their supreme hierarch. In *Watson* v. *Jones,* the Supreme Court, holding the Presbyterian controversy to be "a case of division or schism in a church" (p. 717), as is surely true of our case, made the classic statement of law which runs from page 722 to the end of the long opinion. The holding as between the dissenters and the central organization was summarized thus:

"They [the schismatics] now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit" (p. 734).

Going back to the statute (art. 5-C) and its supposed effect here, we have, fortunately, the strongest kind of proof from the Religious Corporations Law itself that the Legislature never intended for article 5-C the meaning and result now ascribed to it. In 1943 (ch. 145 of that year) the Legislature, two years before it set up article 5-C, had enacted a new article XV of the Religious Corporations Law and had, concurrently, amended subdivision 3 of section 15 of the Religious Corporations Law. That 1943 legislation described and recognized a "federation" of the "four primary Orthodox Greek Catholic jurisdictions in America", being the churches, congregations, etc., recognized by the "apostolic historic Orthodox Patriarchates of Constantinople, Antioch, Moscow and Serbia (Jugoslavia)". Among other things, that 1943 law described the processes whereby new congregations adhering to the four historic patriarchates could be newly incorporated or reincorporated as member churches of the federation. The significance for us is this: as late as 1943, the Legislature was thus legislating as to those churches which were under the government of the Moscow Patriarch. The Governor of New York, after signing the bill, made it clear that he so understood its import. In a speech at Buffalo (see Public Papers of the Governor, 1943, p. 550) Governor Dewey said: "For more than 180 years members of the Greek Church have been on what is now American soil. We find in the records that as long ago as 1763 a native of the Aleutian Islands was converted by a devout and hardy missionary from Russia. Nineteen years later the Holy Synod sent a mission of eight monks to Alaska and in 1794 they established missionary headquarters on the Kodiak Island. Three years later the hierarchy of the Greek Church consecrated a Bishop of Alaska, but he perished at sea before he could ever reach his diocese. The living successor of the reverend prelates who succeeded him is The Most Reverend Metropolitan Benjamin of New York. It is an interesting historic fact, particularly in these days, that his full title is Metropolitan of the Archdiocese of the Aleutian Islands and North America."

The Most Reverend Metropolitan Benjamin whom the Governor thus saluted as the successor to the historic line of Orthodox prelates in America was our defendant Benjamin.

Thus we see that in 1943, by article XV and the amendment to section 15, the Legislature dealt with those Orthodox churches which remained loyal to the Patriarch and in 1945 and 1948, through article 5-C, gave its attention and recognition to the new, nonconformist "American Church". There is no slighest sign that the Legislature intended the later statutes to repeal the earlier. We should not strain to discover a repeal by implication but must read these statutes as harmonious parts of a whole and assume that the Legislature in 1945 knew what it had done in 1943 (*Matter of Cooper*, 22 N. Y. 67, 88, *supra;*

Chase v. *Lord,* 77 N. Y. 1, 18; *Matter of Tiffany,* 179 N. Y. 455, 457; *Matter of Timmis,* 200 N. Y. 177, 181; *Betz* v. *Horr,* 276 N. Y. 83, 88; *Morris Plan Ind. Bank of N. Y.* v. *Gunning,* 295 N. Y. 324, 331). "The intent and purpose of the legislative commands must be found from the statutes relating to the same general subject-matter taken as a whole" (*Betz* v. *Horr, supra,* p. 88). "If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted. In other words, if the old and the new law, by any reasonable interpretation, can stand together, there is no repeal by implication" (*Matter of Tiffany, supra,* p. 457). The Legislature in 1943 dealt with the patriarchal church, in 1945 with the American church, and there is no repugnance, inconsistency or overlapping of the two sets of statutes.

A final comment:

In the long run, communist repression and abuse of religion will make religion stronger, for "the blood of the martyrs is the seed of the Church". And so with government interferences with churches in our country. But with us the loser will be a traditional principle of American government: that the inner affairs of religious bodies are no concern of the State.

The judgment should be affirmed, with costs.

Lewis, Dye and Froessel, JJ., concur in opinion by Conway, J.; Lewis, Conway and Dye, JJ., concur in separate opinion by Froessel, J.; Desmond, J., dissents in opinion in which Loughran, Ch. J., and Fuld, J., concur.

Judgments reversed, etc. [See 302 N. Y. 689.]

344 United States 94

KEDROFF *et al.* *v.* SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 3. Argued February 1, 1952.—Reargued October 14, 1952.—Decided November 24, 1952.

* * * * * *

In an action brought in a state court by appellee, a New York corporation, to determine the right to the use and occupancy of a church in New York City, the trial court gave judgment in favor of the defendants, appellants here. 192 Misc. 327, 77 N. Y. S. 2d 333. The Appellate Division of the State Supreme Court affirmed. 276 App. Div. 309, 94 N. Y. S. 2d 453. The Court of Appeals reversed. 302 N. Y. 1, 33, 96 N. E. 2d 56, 74. On appeal to this Court, *reversed and remanded,* p. 121.

PHILIP ADLER argued the cause and filed the briefs for appellants.

RALPH MONTGOMERY ARKUSH argued the cause and filed the brief for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

The right to the use and occupancy of a church in the city of New York is in dispute.

The right to such use is claimed by appellee, a corporation created in 1925 by an act of the Legislature of New York, Laws of New York 1925,

c. 463, for the purpose of acquiring a cathedral for the Russian Orthodox Church in North America as a central place of worship and residence of the ruling archbishop "in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of that church."

The corporate right is sought to be enforced so that the head of the American churches, religiously affiliated with the Russian Orthodox Church, may occupy the Cathedral. At the present time that head is the Metropolitan of all America and Canada, the Archbishop of New York, Leonty, who like his predecessors was elected to his ecclesiastical office by a sobor of the American churches.[1]

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[1] A sobor is a convention of bishops, clergymen and laymen with superior powers, with the assistance of which the church officials rule their dioceses or districts.

There is no problem of title. It is in the appellee corporation. The issue is the right of use. *St. Nicholas Cathedral* v. *Kedroff*, 302 N. Y. 1, 20, 96 N. E. 2d 56, 66-67.

The deed to the Cathedral Corporation required the grantee to hold the property in accordance with the terms of the Act of 1925, set out at the opening of this opinion. As said by the Court of Appeals, 302 N. Y., at 20, 96 N. E. 2d, at 66:

"Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, §105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government."

See also Religious Corporations Law, §5, 50 McKinney's N. Y. Laws §5.

That claimed right of the corporation to use and occupancy for the archbishop chosen by the American churches is opposed by appellants who are in possession. Benjamin Fedchenkoff bases his right on an appointment in 1934 by the Supreme Church Authority of the Russian Orthodox Church, to wit, the Patriarch *locum tenens* of Moscow and all Russia and its Holy Synod, as Archbishop of the Archdiocese of North America and the Aleutian Islands. The other defendant-appellant is a priest of the Russian Orthodox Church, also acknowledging the spiritual and administrative control of the Moscow hierarchy.

Determination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Benjamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches. The Court of Appeals of New York, reversing the lower court, determined that the prelate appointed by the Moscow ecclesiastical authorities was not entitled to the Cathedral and directed the entry of a judgment that appellee corporation be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral. *St. Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1, 33, 96 N. E. 2d 56, 74. This determination was made on the authority of Article 5-C of the Religious Corporations Law of New York, 302 N. Y., at 24 *et seq.,* 96 N. E. 2d, at 68 *et seq.,* against appellants' contention that this New York statute, as construed, violated the Fourteenth Amendment to the Constitution of the United States.

Because of the constitutional questions thus generally involved, we noted probable jurisdiction, and, after argument and submission of the case last term, ordered reargument and requested counsel to include a discussion of whether the judgment might be sustained on state grounds. 343 U. S. 972. Both parties concluded that it could not, and the unequivocal remittitur of the New York Court of Appeals, 302 N. Y. 689, 98 N. E. 2d 485, specifically stating the constitutionality of the statute as the necessary ground for decision, compels this view and precludes any doubt as to the propriety of our determination of the constitutional issue on the merits. *Grayson* v. *Harris*, 267 U. S. 352; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95. The case now has been reargued and submitted.

Article 5-C was added to the Religious Corporations Law of New York in 1945 and provided both for the incorporation and administration of Russian Orthodox churches. Clarifying amendments were added in 1948. The purpose of the article was to bring all the New York churches, formerly subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow or the Patriarch of Moscow, into an administratively autonomous metropolitan district. That district was North American in area, created pursuant to resolutions adopted at a sobor held at Detroit in 1924.[2] This declared autonomy

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[2] 50 McKinney's N. Y. Laws §105:

"The 'Russian Church in America', as that term is used anywhere in this article, refers to that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America was made effective by a further legislative requirement that all the churches formerly administratively subject to the Moscow synod and patriarchate should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district.[3] The foregoing analysis

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and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

"A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chap[t]el, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America."

[3] *Id.*, §107:

"1. Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church follows the interpretation of this article by the Court of Appeals of New York, an interpretation binding upon us.[4]

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in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

* * * * * *

"3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, nineteen hundred thirty-four, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America."

[4] *Hebert* v. *Louisiana,* 272 U. S. 312, 317; *Winters* v. *New York,* 333 U. S. 507, 514.

The court expressed its conclusion in reversing the judgment of the Appellate Division of the Supreme Court, *St. Nicholas Cathedral* v. *Kedroff,* 276 App. Div. 309, 94 N. Y. S. 2d 453, which had affirmed the Trial Term. 192 Misc. 327, 77 N. Y. S. 2d 333. The Court of Appeals held:

"The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable." 302 N. Y., at 29, 96 N. E. 2d, at 71.

Article 5-C is challenged as invalid under the constitutional prohibition against interference with the exercise of religion.[5] The appellants' contention, of course, is based on the theory that the principles of the First Amendment are made applicable to the states by the Fourteenth.[6] See Stokes, Church and State in the United States (1950), vol. 1, c. VIII.

The Russian Orthodox Church is an autocephalous member of the Eastern Orthodox Greek Catholic Church. It sprang from the Church of Constantinople in the Tenth Century. The schism of 1054 A. D. split the Universal Church into those of the East and the West. Gradually self-government was assumed by the Russian Church until in the Sixteenth Century its autonomy was recognized and a Patriarch of Moscow appeared. Fortescue, Orthodox Eastern Church, c. V. For the next one hundred years the development of the church kept pace with the growth of power of the Czars but it increasingly became a part of the civil government—a state church. Throughout that period it also remained an hierarchical church with a Patriarch at its head, governed by the conventions or sobors called by him. However, from the time of Peter the Great until 1917 no sobor was held. No patriarch ruled or was chosen. During that time the church was governed by a Holy Synod, a group of ecclesiastics with a Chief Pro-

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[5] First Amendment to the Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

[6] *Hamilton* v. *Regents*, 293 U. S. 245, 262; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Everson* v. *Board of Education*, 330 U. S. 1, 14-15; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 210-211; *Zorach* v. *Clauson*, 343 U. S. 306, 310.

curator representative of the government as a member.

Late in the Eighteenth Century the Russian Church entered the missionary field in the Aleutian Islands and Alaska. From there churches spread slowly down the Pacific Coast and later, with the Slavic immigration, to our eastern cities, particularly to Detroit, Cleveland, Chicago, Pittsburgh and New York. The character of the administrative unit changed with the years as is indicated by the changes in its name. See note 2. In 1904 when a diocese of North America was created its first archbishop, Tikhon, shortly thereafter established himself in his seat at Saint Nicholas Cathedral. His appointment came from the Holy Synod of Russia as did those of his successors in order Platon and Evdokim. Under those appointments the successive archbishops occupied the Cathedral and residence of Saint Nicholas under the administrative authority of the Holy Synod.

In 1917 Archbishop Evdokim returned to Russia permanently. Early that year an All Russian Sobor was held, the first since Peter the Great. It occurred during the interlude of political freedom following the fall of the Czar. A patriarch was elected and installed—Tikhon who had been the first American Archbishop. Uncertainties as to the succession to and administration of the American archbishopric made their appearance following this sobor and were largely induced by the almost contemporaneous political disturbances which culminated swiftly in the Bolshevik Revolution of 1917. The Russian Orthodox Church was drawn into this maelstrom. After a few years the Patriarch was imprisoned. There were suggestions of his counter-revolutionary activity. Church power was transferred, partly through a sobor considered by many as non-canonical, to a Supreme

Church Council. The declared reforms were said to have resulted in a "Living Church" or sometimes in a "Renovated Church." Circumstances and pressures changed. Patriarch Tikhon was released from prison and died in 1925. He named three bishops as *locum tenens* for the patriarchal throne. It was one of these, Sergius, who in 1933 appointed the appellant Benjamin as Archbishop. The Church was registered as a religious organization under Soviet law in 1927. Thereafter the Russian Church and the Russian State approached if not a reconciliation at least an adjustment which eventuated by 1943 in the election of Sergius, one of the bishops named as *locum tenens* by Tikhon, to the Patriarchate. The Living or Renovated Church, whether deemed a reformed, a schismatic or a new church, apparently withered away. After Sergius' death a new Patriarch of the Russian Orthodox Church, Alexi, was chosen Patriarch in 1945 at Moscow at a sobor recognized by all parties to this litigation as a true sobor held in accordance with the church canons.[7]

The Russian upheaval caused repercussions in the North American Diocese. That Diocese at the time of the Soviet Revolution recognized the spiritual and administrative control of Moscow. White Russians, both lay and clerical, found asylum in America from the revolutionary conflicts, strengthening the feeling of abhorrence of the secular attitude of the new Russian Government. The church members already here, immi-

[7] Fortescue, *supra* (1916); Brian-Chaninov, The Russian Church (1931), c. VIII; Zernov, The Russians and Their Church (1945); French, The Eastern Orthodox Church (1951), c. VII; Danzas, The Russian Church (1936); Anderson, People, Church and State in Modern Russia (1944), pp. 121-140; Bolshakoff, The Foreign Missions of the Russian Orthodox Church (1943), c. IV.

grants and native-born, while habituated to look to Moscow for religious direction, were accustomed to our theory of separation between church and state. The Russian turmoil, the restraints on religious activities and the evolution of a new ecclesiastical hierarchy in the form of the "Living Church," deemed noncanonical or schismatic by most churchmen, made very difficult Russian administration of the American diocese. Furthermore, Patriarch Tikhon, on November 20, 1920, issued Decision No. 362 relating to church administration for troublesome times. This granted a large measure of autonomy, when the Russian ruling authority was unable to function, subject to "confirmation later to the Central Church Authority when it is re-established." Naturally the growing number of American-born members of the Russian Church did not cling to a hierachy identified with their country of remote origin with the same national feeling that moved their immigrant ancestors. These facts and forces generated in America a separatist movement.

That movement brought about the arrangements at the Detroit Sobor of 1924 for a temporary American administration of the church on account of the disturbances in Russia.[8] This was

[8] The attitude of the Russian Church in America will be made sufficiently plain by these extracts from their records of action taken at the Detroit Sobor, 1924:

"Point 1. Temporarily, until the convocation of the All Russian Sobor further indicated in Point 5, to declare the Russian Orthodox Diocese in America a self-governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity, and periodic Sobors of the entire American Church.

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"Point 5. To leave the final regulation of questions arising from the relationship of the Russian and the followed by the declarations of autonomy of the successive sobors since that date, a spate of litigation concerning control of the various churches and occupancy of ecclesiastical positions,[9] the New York legislation (known as Article 5-C, notes 2 and 3, *supra*), and this controversy.

Delegates from the North American Diocese intended to be represented at an admittedly canonical Sobor of the Russian Orthodox Church held in 1945 at Moscow. They did not arrive in time on account of delays, responsibility for which has not been fixed. The following stipulation appears as to their later actions while at Moscow:

> "It is stipulated that Bishop Alexi and Father Dzvonchik, representing the local group of American Churches under Bishop Theophilus, appeared before the Patriarch and the members of his Synod in Moscow, presented a written report on the condition of the American Church, with a request for au-

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American Churches to a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

[9] *Nemolovsky* v. *Rykhloff,* 187 App. Div. 290, 175 N. Y. S. 617; *Kedrovsky* v. *Archbishop and Consistory,* 195 App. Div. 127, 186 N. Y. S. 346; *Kedrovsky* v. *Rojdesvensky,* 214 App. Div. 483, 212 N. Y. S. 273; *id.,* 242 N. Y. 547, 152 N. E. 421; *Kedrovsky* v. *Archbishop and Consistory,* 218 App. Div. 121, 124, 217 N. Y. S. 873; 875; *id.,* 220 App. Div. 750, 222 N. Y. S. 831; *id.,* 249 N. Y. 75, 516, 162 N. E. 588, 164 N. E. 566; *Nikulnikoff* v. *Archbishop and Consistory,* 142 Misc. 894, 255 N. Y. S. 653; *Waipa* v. *Kushwara,* 259 App. Div. 843, 20 N. Y. S. 2d 174; *id.,* 283 N. Y. 780, 28 N. E. 2d 417.

tonomy and a few days later received from the Patriarch the Ukase. . . ."

There came to the Russian Church in America this Ukase of the Moscow Patriarchy of February 14 or 16, 1945, covering Moscow's requirements for reunion of the American Orthodox Church with the Russian. It required for reunion that the Russian Church in America hold promptly an "all American Orthodox Church Sobor"; that it express the decision of the dioceses to reunite with the Russian Mother Church, declare the agreement of the American Orthodox Church to abstain "from political activities against the U. S. S. R." and so direct its parishes, and elect a Metropolitan subject to confirmation by the Moscow Patriarchy. The decree said, "In view of the distance of the American Metropolitan District from the Russian Mother Church . . . the Metropolitan-Exarch . . . may be given some extended powers by the Moscow Patriarchy. . . ."

The American congregations speaking through their Cleveland Sobor of 1946 refused the proffered arrangement and resolved in part:

> "That any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby terminated, retaining, however, our spiritual and brotherly relations with all parts of the Russian Orthodox Church abroad. . . ."

This ended the efforts to compose the differences between the Mother Church and its American offspring, and this litigation followed. We understand the above factual summary corresponds substantially with the factual basis for determination formulated by the Court of Appeals of New

York. From those circumstances it seems clear that the Russion Orthodox Church was, until the Russian Revolution, an hierarchical church with unquestioned paramount jurisdiction in the governing body in Russia over the American Metropolitanate. Nothing indicates that either the Sacred Synod or the succeeding Patriarchs relinquished that authority or recognized the autonomy of the American Church. The Court of Appeals decision proceeds, we understand, upon the same assumption. 302 N. Y., at 5, 23, 24, 96 N. E. 2d, at 57, 68, 69. That court did consider "whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body." It concluded that this aspect of the controversy had not been sufficiently developed to justify a judgment upon that ground. 302 N. Y., at 22-24, 96 N. E. 2d, at 67-69.

The Religious Corporations Law.—The New York Court of Appeals depended for its judgment, refusing recognition to Archbishop Benjamin, the appointee of the Moscow Hierarchy of the Russion Orthodox Church, upon Article 5-C of the Religious Corporations Law, quoted and analyzed at notes 2 and 3, *supra.*[10] Certainly a legislature

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[10] The Court said, 302 N. Y. 1, 96 N. E. 2d 56:

"The Legislature has made a determination that the 'Russian Church in America' was the one which, to use our words in 249 New York at pages 77-78, was the trustee which 'may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114)' by reason of the changed situation of the patriarchate in Russia." 302 N. Y., at 30, 96 N. E. 2d, at 72.

"The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate is free to act upon such information as it may have as to the necessity for legislation. But an enactment by a legislature cannot validate action which the Constitution prohibits, and we think that the statute here in question passes the constitutional limits. We conclude that Article 5-C undertook by its terms to transfer the control of the New York churches of the Russian Orthodox

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directives. The courts have traditionally refused to consider the wisdom or technical validity of such findings of fact, if there be some reasonable basis upon which they may rest." 302 N. Y., at 31, 96 N. E. 2d, at 72-73.

"The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system. The Legislature realized that the North American church, in order to be free of Soviet interference in its affairs, had declared its temporary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts." 302 N. Y., at 32-33, 96 N. E. 2d, at 73-74.

religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Church in America, a church organization limited to the diocese of North America and the Aleutian Islands. This transfer takes place by virtue of the statute. Such a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion. Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes "adopted at a general convention (sobor) held in the City of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto," note 3, *supra*, prohibits the free exercise of religion. Although this statute requires the New York churches to "in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)," their conformity is by legislative fiat and subject to legislative will. Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable.

Although §5 of the Religious Corporations Law[11] had long controlled religious corporations, the Court of Appeals held that its rule was not

[11] "The trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, . . ."

based on any constitutional requirement or prohibition.[12] Since certain events of which the Court took judicial notice indicated to it that the Russian Government exercised control over the central church authorities and that the American church acted to protect its pulpits and faith from such influences, the Court of Appeals felt that the Legislature's reasonable belief in such conditions justified the State in enacting a law to free the American group from infiltration of such atheistic or subversive influences.[13]

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[12] 302 N. Y., at 30, 96 N. E. 2d, at 72:

"As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties."

[13] 302 N. Y., at 13, 96 N. E. 2d, at 62:

"The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church,* 222 N. Y. 305, 315; *Watson* v. *Jones,* 13 Wall. [U. S.] 679, 724-727; Religious Corporations Law, §§4, 5)."

". . . we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN

This legislation, Art. 5-C, in the view of the Court of Appeals, gave the use of the churches to the Russian Church in America on the theory that this church would most faithfully carry out the purposes of the religious trust.[14] Thus dangers of political use of church pulpits would be minimized. Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense. But in this case no problem of punishment for the violation of law arises. There is no charge of subversive or hostile action by any ecclesiastic. Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state. That conclusion results from the purpose, meaning and effect of the New York legislation stated above, considered in the light of the history and decisions considered below.

Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head. In *Watson* v. *Jones,* 13 Wall. 679, they are spoken of in like terms.[15] That opinion has been given considera-

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VOORHIS, below: '. . . In recent public pronouncements the State Department, and our representatives in the United Nations, have frequenly recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. . . .' " 302 N. Y., at 23, 96 N. E. 2d, at 68.

[14] See note 10, *supra.*

[15] "The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." 13 Wall. 679, 722-723.

tion in subsequent church litigation—state and national.[16] The opinion itself, however, did not turn on either the establishment or the prohibition of the free exercise of religion. It was a church controversy in the Third or Walnut Street Presbyterian Church of Louisville, Kentucky, arising out of the slavery conflict and was filled with the acrimony of that period. It was decided here at the 1871 Term. "The government of the [Presbyterian] church is exercised by and through an ascending series of 'judicatories,' known as Church Sessions, Presbyteries, Synods, and a General Assembly." *Id.,* at 681. The opinion of this Court assumed without question that the Louisville church, its property and its officers were originally and up to the beginning of the disagreements subjected to the operation of the laws of the General Assembly of the Presbyterian Church. *Id.,* at 683. The actual possession of the church property was in trustees; its operation or use controlled by the Session composed of elders.[17]

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[16] Zollmann, American Church Law (1933), c. 9. *E. g., Shepard* v. *Barkley,* 247 U. S. 1; *Barkley* v. *Hayes,* 208 F. 319, 326; *McGinnis* v. *Watson,* 41 Pa. 9; *Missouri ex rel. Watson* v. *Farris,* 45 Mo. 183, 197-198; *First English Lutheran Church* v. *Evangelical Lutheran Synod,* 135 F. 2d 701. Cf. *Gibson* v. *Armstrong,* 7 Ben. Monroe (Ky.) 481; *German Reformed Church* v. *Commonwealth ex rel. Seibert,* 3 Pa. 282.

[17] "One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky legislature creating the trustees of the church a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title-holders and custodians of the church property, and other trustees were, or could be elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the con-

Both were groups elected at intervals by the members.

In May of 1865 the General Assembly, the highest judicatory of the church, made a declaration of loyalty to the Federal Government denouncing slavery, and directed that new members with contrary views should not be received. The Louisville Presbytery, the immediate superior of the Walnut Street Church, promptly issued a Declaration and Testimony, refusing obedience and calling for resistance to the alleged usurpation of authority. The Louisville Presbytery divided as did the Walnut Street Church and the proslavery group obtained admission into the Presbyterian Church of the Confederate States. In June 1867 the Presbyterian General Assembly for the United States declared the Presbytery and Synod recognized by the proslavery party were "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America." They were "permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom [the proslavery party] opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky." *Id.*, at 692.

Litigation started in 1866 with a suit in the state court by certain of the antislavery group to have declared their right to act as duly elected ad-

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trol of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable." *Id.*, at 720.

ditional elders "in the management of the church property for purposes of religious worship." *Id.*, at 685. As the Court of Appeals of Kentucky thought that certain acts of the Louisville Presbytery and the General Assembly of the United States, in pronouncing the additional elders duly elected, were void as beyond their functions, *id.*, at 693,[18] it refused the plea of the antislavery group and left the proslavery elders and trustees in control of the Walnut Street Church.

Thereupon a new suit, *Watson* v. *Jones*, was begun by alleged members of the church to secure the use of the Walnut Street Church for the antislavery group. This suit was to decide not the validity of an election of elders fought out in *Watson* v. *Avery*, *supra*, but which one of two bodies should be recognized as entitled to the use of the Walnut Street Presbyterian Church. It was determined that plaintiffs had a beneficial interest in the church property and therefore a standing to sue for its proper use, if they were members. *Id.*, at 697, 714. A schism was recognized. *Id.*, at 717. It was held:

> "The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use." *Id.*, at 720.

[18] *Watson* v. *Avery*, 2 Bush (Ky.) 332, 347 *et seq.*

"But we hold that the assembly, like other courts, is limited in its authority by the law under which it acts; and when rights of property, which are secured to congregations and individuals by the organic law of the church, are violated by unconstitutional acts of the higher [church] courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract, or the fundamental law of a voluntary association." *Id.*, at 349.

They were required to recognize "the true uses of the trust." *Id.*, at 722. Then turning to the consideration of an hierarchical church, as defined in n. 15, *supra*, and, as it found the Presbyterian Church to be, this Court said:

> "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.*, at 727.

As the General Assembly of the Church had recognized the antislavery group "as the regular and lawful Walnut Street Church and officers," *id.*, at 694, newly elected, and the trial court had found complainants members of that group, and had entered a decree adjudging that this group's duly chosen and elected pastor, ruling elders and trustees "respectively entitled to exercise whatever authority in the said church, or over its members or property, rightfully belonged to pastor, elders, and trustees, respectively, in churches in connection with 'The Presbyterian Church in the United States of America,' Old School, and according to the regulations and usages of that church," *id.*, at 698, this Court affirmed the decree.

In affirming, the Court recognized the contrariety of views between jurists as to civil jurisdiction over church adjudications having an effect upon property or its uses, when the civil courts determine the church judicatory has violated the church's organic law.[19] Its ruling is summed up in these words:

> "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. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this 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 any one aggrieved by one of their decisions could appeal to the secular courts and have them 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 ap-

[19] Compare *Watson* v. *Avery,* n. 18, *supra,* at 349, with *Watson* v. *Jones, supra,* at 732 *et seq.*

peals as the organism itself provides for." *Id.*, at 728-729.

This is applicable to "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," *id.*, at 727.[20] This controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America. No one disputes that such power did lie in that Authority prior to the Russian Revolution.

Watson v. *Jones*, although it contains a reference to the relations of church and state under our system of laws,[21] was decided without depending upon prohibition of state interference with the free exercise of religion. It was decided in 1871, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action. It long antedated the 1938 decisions of *Erie R. Co.* v. *Tompkins* and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 64 and 202, and therefore, even though federal jurisdiction in the case depended solely on diversity, the holding was based on gen-

[20] The decision has encountered vivid and strong criticism for the breadth of its statement that where "a subject-matter of dispute, strictly and purely ecclesiastical in its character," is decided, the civil court may not examine the conclusion to see whether the decision exceeds the powers of the judicatory. *Id.*, at 733. See Zollmann, American Church Law (1933), c. 9, p. 291. The criticism does not go so far, however, as to condemn the nonreviewability of questions of faith, religious doctrine and ecclesastical government, *Watson* v. *Jones*, at 729, 732, when within the "express or implied stipulations" of the agreement of membership. Zollmann, *supra*, §§310, 311, 315, 340.

[21] *Id.*, at 727. See pp. 113, 114-115, *supra*.

eral law rather than Kentucky law.[22] The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven,[23] we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.

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[22] *Barkley* v. *Hayes,* 208 F. 319, 334; *Sherard* v. *Walton,* 206 F. 562, 564; *Helm* v. *Zarecor,* 213 F. 648, 657.

[23] *Gonzalez* v. *Archbishop,* 280 U. S. 1, 16-17:

"Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunal on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations."

See *Brundage* v. *Deardorf,* 55 F. 839, where Taft, Circuit Judge, in overruling a demurrer, stated: "Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the supreme court, in Watson v. Jones, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts." P. 847.

Later the case was considered on appeal by the Circuit Court of Appeals; Lurton, Circuit Judge, writing, thought that the facts proven showed conclusively that *Watson* v. *Jones* did control. 92 F. 214, 230.

Legislative Power.—The Court of Appeals of New York recognized, generally, the soundness of the philosophy of ecclesiastical control of church administration and polity but concluded that the exercise of that control was not free from legislative interference.[24] That Court presented forcefully the argument supporting legislative power to act on its own knowledge of "the Soviet attitude toward things religious." 302 N. Y., at 32-33, 96 N. E. 2d, at 74. It was said:

> "The Legislature realized that the North American church, in order to be free of Soviet interference in its affairs, had declared its temporary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate." 302 N. Y., at 33, 96 N. E. 2d, at 74.

It was thought that *American Communications Assn.* v. *Douds,* 339 U. S. 382, supported the thesis that where there is some specific evil, found as a fact, "some infringement upon traditional liberties was justifiable" to effect a cure. 302 N. Y., at 31, 96 N. E. 2d, at 73. On that reasoning it was thought permissible, in view "of the changed situation of the patriarchate in Russia," to replace it with the Russian Church in America as the ruling authority over the administration of the church. The legal basis for this legislative substitution was found in the theory that the Russian Church in America "was the trustee which

[24] *St. Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1, 30, 96 N. E. 2d 56, 72; note 12, *supra.*

'may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114).' " 302 N. Y., at 30, 96 N. E. 2d, at 72. Mindful of the authority of the Court of Appeals in its interpretation of the powers of its own legislature and with respect for its standing and ability, we do not agree with its statement as to legislative power over religious organizations.

In our view the *Douds* case may not be interpreted to validate New York's Article 5-C. That case involved the validity of § 9 (h) of the National Labor Relations Act as amended, 61 Stat. 136, 146, 29 U. S. C. § 159 (h). That section forbade the N. L. R. B. from acting at the suggestion of a labor organization unless affidavits of its officers were filed denying affiliation with subversive organizations or belief in the overthrow of this Government by force or other unconstitutional means. We upheld the enactment as a proper exercise of the power to protect commerce from the evil of disruption from strikes so politically inspired. In so doing we said, "legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights." 339 U. S., at 399. And added, "But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress." *Id.,* at 400. It is an exaggeration to say that those sound statements point to a legislative power to take away from a church's governing body and its duly ordained representative the possession and use of a building held in trust for the purposes for which it is being employed because of an apprehension, even though reasonable, that it may be employed for improper purposes. In *Douds* we saw nothing that was aimed at the free expression of views. Unions could have officers with such affiliations and political purposes as they might choose but the Government was not compelled to allow those officers an opportunity to disrupt commerce for their own political ends. We looked upon the affidavit requirement as an assurance that disruptive forces would not utilize a government agency to accomplish their purposes. *Id.,* at 403.

In upholding the validity of Article 5-C, the New York Court of Appeals apparently assumes Article 5-C does nothing more than permit the trustees of the Cathedral to use it for services consistent with the desires of the members of the Russian Church in America. Its reach goes far beyond that point. By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment. Such prohibition differs from the restriction of a right to deal with Government allowed in *Douds,* in that the Union in the *Douds* case had no such constitutionally protected right. New York's Article 5-C directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy.

We do not think that New York's legislative application of a *cy-pres* doctrine to this trust avoids the constitutional rule against prohibition of the free exercise of religion. *Late Corporation of Latter-Day Saints* v. *United States,* 136 U. S. 1, relied upon by the appellee, does not support its argument. There the Church of Jesus Christ of Latter-Day Saints had been incorporated as a religious corporation by the State of Deseret, with subsequent confirmation by the Territory of Utah. Its property was held for religious and charitable purposes. That charter was revoked by Congress and some of the property of the church was escheated to the United States for the use of the common schools of Utah. This Court upheld the revocation of the charter, relying on the reserved power of the Congress over the acts of territories, 136 U. S., at 45-46. The seizure of the property was bottomed on the general rule that where a charitable corporation is dissolved for unlawful practices, *id.,* at 49-50, the sovereign takes and distributes the property according to the *cy-pres* doctrine to objects of charity and usefulness, *e. g.,* schools. *Id.,* at 47, 50-51. A failure of the charitable purpose could have the same effect. *Id.,* at 59. None of these elements exist to support the validity of the New York statute putting the Russian Orthodox churches of New York under the administration of the Russian Church in America. See notes 2 and 3, *supra.*

The record before us shows no schism over faith or doctrine between the Russian Church in America and the Russian Orthodox Church. It shows administrative control of the North American Diocese by the Supreme Church Authority of the Russian Orthodox Church, including the appointment of the ruling hierarch in North America from the foundation of the diocese until the Russian Revolution. We find nothing that indicates a relinquishment of this power by the Russian Orthodox Church.

Ours is a government which by the "law of its being" allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property.[25] Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.[26] This under our Constitution necessarily follows in order that there may be free exercise of religion.

The decree of the Court of Appeals of New York must be reversed, and the case remanded to that court for such further action as it deems proper and not in contravention of this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring.*

Let me put to one side the question whether in our day a legislature could, consistently with due process, displace the judicial process and decide a particular controversy affecting property so as to decree that A not B owns it or is entitled to its possession. Obviously a legislature would not have that power merely because the property belongs to a church.

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[25] *Ponce* v. *Roman Catholic Church,* 210 U. S. 296, 322.

[26] *Watson* v. *Jones, supra; Barkley* v. *Hayes,* 208 F. 319, 327, affirmed on appeal, *Duvall* v. *Synod,* 222 F. 669; *Shepard* v. *Barkley,* 247 U. S. 1.

* [Joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, see *post,* p. 126—(p. 151, *infra*).]

In any event, this proceeding rests on a claim which cannot be determined without intervention by the State in a religious conflict. St. Nicholas Cathedral is not just a piece of real estate. It is no more that than is St. Patrick's Cathedral or the Cathedral of St. John the Divine. A cathedral is the seat and center of ecclesiastical authority. St. Nicholas Cathedral is an archiepiscopal see of one of the great religious organizations. What is at stake here is the power to exercise religious authority. That is the essence of this controversy. It is that even though the religious authority becomes manifest and is exerted through authority over the Cathedral as the outward symbol of a religious faith.

The judiciary has heeded, naturally enough, the menace to a society like ours of attempting to settle such religious struggles by state action. And so, when courts are called upon to adjudicate disputes which, though generated by conflicts of faith, may fairly be isolated as controversies over property and therefore within judicial competence, the authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to a schism. *Watson* v. *Jones,* 13 Wall. 679. This very limited right of resort to courts for determination of claims, civil in their nature, between rival parties among the communicants of a religious faith is merely one aspect of the duty of courts to enforce the rights of members in an association, temporal or religious, according to the laws of that association. See *Gonzalez* v. *Archbishop,* 280 U. S. 1, 16-17.

Legislatures have no such obligation to adjudicate and no such power. Assuredly they have none to settle conflicts of religious authority and none to define religious obedience. These aspects of spiritual differences constitute the heart of this controversy. The New York legislature decreed that one party to the dispute and not the other should control the common center of devotion. In doing so the legislature effectively authorized one party to give religious direction not only to its adherents but also to its opponents. See *St. Nicholas Cathedral* v. *Kedroff*, 302 N. Y. 1, 24-29, 96 N. E. 2d 56, 68-72.

The arguments by which New York seeks to justify this inroad into the realm of faith are echoes of past attempts at secular intervention in religious conflicts. It is said that an impressive majority both of the laity and of the priesthood of the old local church now adhere to the party whose candidate New York enthroned, as it were, as Archbishop. Be that as it may, it is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads. Our Constitution does assure that anyone is free to worship according to his conscience. A legislature is not free to vest in a schismatic head the means of acting under the **authority of his old church**, by affording him the religious power which the use and occupancy of St. Nicholas Cathedral make possible.

Again, it is argued that New York may protect itself from dangers attributed to submission by thority. To reject this claim one does not have to indulge in the tendency of lawyers to carry arguments to the extreme of empty formal logic. Scattered throughout the country there are religious bodies with ties to various countries of a world in tension—tension due in part to shifting political affiliation and orientation. The consideration which permeates the court's opinion below would give each State the right to assess the circumstances in the foreign political entanglements of its religious bodies that make for danger to the State, and the power, resting on plausible legislative findings, to divest such bodies of spiritual authority and of the temporal property which symbolizes it.

Memory is short but it cannot be forgotten that in the State of New York there was strong feeling against the Tsarist regime at a time when the Russian Church was governed by a Procurator of the Tsar. And when Mussolini exacted the Lateran Agreement, argument was not wanting by those friendly to her claims that the Church of Rome was subjecting herself to political authority.[1] The fear, perhaps not wholly groundless, that the loyalty of its citizens might be diluted by their adherence to a church entangled in antagonistic political interests, reappears in history as the ground for interference by civil the mother church in Moscow to political au-government with religious attachments.[2] Such fear readily leads to persecution of religious beliefs deemed dangerous to ruling political authority. It was on this basis, after all, that Bismarck sought to detach German Catholics from Rome by a series of laws not too different in pur-

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[1] The Encyclopedia Britannica recounts that under the agreement between the Papal See and Mussolini, "The supremacy of the state was recognized by compelling bishops and archbishops to swear loyalty to the government." Encyclopedia Britannica: "Anticlericalism," 62, 62A (1948 ed.).

[2] Such apprehension, at least in part, seems to have underlain two important religious controversies in a nation as devoted to freedom as Great Britain and as recently as a century ago. Both the dispute giving rise to the Free Church of Scotland Appeals and the brief but vigorous anti-Catholic outburst of 1850 are not unfairly attributable to a claim by the State of comprehensive loyalty, undeflected by the competing claims of religious faith. See Laski, Studies in the Problem

port from that before us today.[3] The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority. Religious leaders have often made gestures of accommodation to such pressures. History also indicates that the vitality of great world religions survived such efforts. In any event, under our Constitution it is not open to the governments of this Union to reinforce the

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of Sovereignty, 27-68, 121-210. See also Buchanan, The Ten Years' Conflict (Edinburgh, 1849); *Free Church of Scotland* v. *Overtoun*, [1904] A. C. 515; The Free Church of Scotland Appeals (Orr. ed., Edinburgh, 1904).

[3] Reichs-Gesetzblatt, 1871, p. 442; Reichs-Gesetzblatt, 1872, p. 253; Reichs-Gesetzblatt, 1874, p. 43; Reichs-Gesetzblatt, 1876, p. 28; 5 Gesetz-Sammlung für die Königlich Preussischen Staaten 154, 221, 223, 225, 228, 337, 342; 6 *id.*, at 30, 38, 40, 75, 170; 7 *id.*, at 291. These laws have been thus summarized: "The Falk Laws are an attempt to insist on the universal paramountcy of German influences. The expulsion of the Jesuits removed an order which he [Bismarck] believed to be concerned with the promotion of Polish interests. The refusal of bishoprics to any save a German who has followed a course of study approved by the government has a clear purport . . . of purging the Catholic episcopate of men not likely to be in sympathy with German ideals . . . . The twenty-fourth article went even further and gave the State the right of interference with ecclesiastical functions where it deemed them improperly performed. . . . The law of the twentieth of May, 1874, virtually handed over the control of vacant bishoprics to the State . . . . Catholic Churches on Prussian soil were handed over to the old Catholics [those refusing to adhere to the newly-promulgated dogma of papal infallibility] in such parishes as those in which the majority consisted of their sympathisers, for certain hours of the day . . . ." Laski, *op. cit. supra*, note 2, at 256-258. Bismarck's *Kulturkampf*, of which these laws were a part, is fully discussed in *Goyau, Bismarck et l'Eglise*. A full text of the laws may be found in the appendix to that work.

loyalty of their citizens by deciding who is the true exponent of their religion.

Finally, we are told that the present Moscow Patriarchate is not the true superior church of the American communicants. The vicissitudes of war and revolution which have beset the Moscow Patriarchate since 1917 are said to have resulted in a discontinuity which divests the present Patriarch of his authority over the American church. Both parties to the present controversy agree that the present Patriarch is the legitimately chosen holder of his office, and the account of the proceedings and pronouncements of the American schismatic group so indicates. Even were there doubt about this it is hard to see by what warrant the New York legislature is free to substitute its own judgment as to the validity of Patriarch Alexi's claim and to disregard acknowledgment of the present Patriarch by his co-equals in the Eastern Confession, the Patriarchs of Constantinople, Alexandria, Antioch, and Jerusalem, and by religious leaders throughout the world, including the present Archbishop of York.[4]

These considerations undermine the validity of the New York legislation in that it enters the domain of religious control barred to the States by the Fourteenth Amendment.

MR. JUSTICE BLACK agrees with this opinion on the basis of his view that the Fourteenth Amendment makes the First Amendment applicable to the States.

MR. JUSTICE DOUGLAS, while concurring in the opinion of the Court, also joins this opinion.

MR. JUSTICE JACKSON, dissenting.

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[4] See Garbett, In an Age of Revolution, 207-213; Niemöller, Why I Went to Moscow, The Christian Century, March 19, 1952, p. 338.

New York courts have decided an ordinary ejectment action involving possession of New York real estate in favor of the plaintiff, a corporation organized under the Religious Corporations Law of New York under the name "Saint Nicholas Cathedral of the Russian Orthodox Church in North America." Admittedly, it holds, and since 1925 has held, legal title to the Cathedral property. The New York Court of Appeals decided that it also has the legal right to its possession and control.

The appellant Benjamin's defense against this owner's demand for possession and the basis of his claimed right to enjoy possession of property he admittedly does not own is set forth in his answer to the ejectment suit in these words: "Said premises pursuant to the above rules of the Russian Orthodox Church are held in trust for the benefit of the accredited Archbishop of the said Archdiocese, to be possessed, occupied and used by said Archbishop as his residence, as a place for holding religious services, and other purposes related to his office and as the seat and headquarters for the administration, by him, of the affairs of the Archdiocese both temporal and spiritual." And, says the appellant Benjamin, he is that Archbishop. These allegations are denied, and they define the issues as tendered to the state courts.

I greatly oversimplify the history of this controversy to indicate its nature rather than to prove its merits. This Cathedral was incorporated and built in the era of the Czar, under the regime of a state-ridden church in a church-ridden state. The Bolshevik Revolution may have freed the state from the grip of the church, but it did not free the church from the grip of the state. It only brought to the top a new master for a captive and submissive ecclesiastical establishment. By 1945, the

Moscow patriarchy had been reformed and manned under the Soviet regime and it sought to re-establish in other countries its prerevolutionary control of church property and its sway over the minds of the religious. As the Court's opinion points out, it demanded of the Russian Church in America, among other things, that it abstain "from political activities against the U. S. S. R." The American Cathedral group, along with others, refused submission to the representative of the Moscow Patriarch, whom it regarded as an arm of the Soviet Government. Thus, we have an ostensible religious schism with decided political overtones.

If the Fourteenth Amendment is to be interpreted to leave anything to the courts of a state to decide without our interference, I should suppose it would be claims to ownership or possession of real estate within its borders and the vexing technical questions pertaining to the creation, interpretation, termination, and enforcement of uses and trusts, even though they are for religious and charitable purposes. This controversy, I believe, is a matter for settlement by state law and not within the proper province of this Court.

I.

As I read the prevailing opinions, the Court assumes that some transfer of control has been accomplished by legislation which results in a denial of due process. This, of course, would raise a question of deprivation of *property,* not of *liberty,* while only the latter issue is raised by the parties. And it could be sustained only by a finding by us that the legislation worked a transfer rather than a confirmation of property rights. The Court of Appeals seems to have regarded the statute merely as a legislative reaffirmation of principle the Court would find to be controlling in its absence.

But this Court apparently thinks that by mere enactment of the statute the legislature invaded a field of action reserved to the judiciary. However desirable we may think a rigid separation of powers to be (and I, for one, think it is basic in the Federal Government), I do not think the Fourteenth Amendment undertakes to control distribution of powers within the states. At all events, I do not think we are warranted in holding that New York may not enact this legislation in question, which is in form and in substance an amendment of its Religious Corporations Law.

Nothing in New York law required this denomination to incorporate its Cathedral. The Religious Corporations Law of the State expressly recognizes unincorporated churches (§2) and undertakes no regulation of them or their affairs. But this denomination wanted the advantages of a corporate charter for its Cathedral, to obtain immunity from personal liability and other benefits. This statute does not interfere with religious freedom but furthers it. If they elect to come under it, the statute makes separate provision for each of many denominations with corporate controls appropriate to its own ecclesiastical order. When it sought the privilege of incorporation under the New York law applicable to its denomination, it seems to me that this Cathedral and all connected with its temporal affairs were submitted to New York law.

As a consequence of this Court's decision in *Dartmouth College* v. *Woodward,* 4 Wheat. 518, the Constitution of New York since 1846 has authorized the legislature to create corporations by general laws and special acts, subject, however, to a reservation that all such acts "may be altered from time to time or repealed." New York Const., Art. X, §1. That condition becomes a part of every corporate charter subsequently granted by New York. *Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 87 N. E. 443; *People* v. *Gass,* 190 N. Y. 323, 83 N. E. 64; *Pratt Institute* v. *New York,* 183 N. Y. 151, 75 N. E. 1119.

What has been done here, as I see it, is to exercise this reserved power which permits the State to alter corporate controls in response to the lessons of experience. Of course, the power is not unlimited and could be so exercised as to deprive one of property without due process of law. But, I do not think we can say that a legislative application of a principle so well established in our common law as the *cy-pres* doctrine is beyond the powers reserved by the New York Constitution.

II.

The Court holds, however, that the State cannot exercise its reserved power to control this property without invading religious freedom, because it is a Cathedral and devoted to religious uses. I forbear discussion of the extent to which restraints imposed upon Congress by the First Amendment are transferred against the State by the Fourteenth Amendment beyond saying that I consider that the same differences which apply to freedom of speech and press (see dissenting opinion in *Beauharnais* v. *Illinois,* 343 U. S. 250, 287) are applicable to questions of freedom of religion and of separation of church and state.

It is important to observe what New York has not done in this case. It has not held that Benjamin may not act as Archbishop or be revered as such by all who will follow him. It has not held that he may not have a Cathedral. Indeed, I think

New York would agree that no one is more in need of spiritual guidance than the Soviet faction. It has only held that this cleric may not have a particular Cathedral which, under New York law, belongs to others. It has not interfered with his or anyone's exercise of his religion. New York has not outlawed the Soviet-controlled sect nor forbidden it to exercise its authority or teach its dogma in any place whatsoever except on this piece of property owned and rightfully possessed by the Cathedral Corporation.

The fact that property is dedicated to a religious use cannot, in my opinion, justify the Court in sublimating an issue over property rights into one of deprivation of religious liberty which alone would bring in the religious guaranties of the First Amendment. I assume no one would pretend that the State cannot decide a claim of trespass, larceny, conversion, bailment or contract, where the property involved is that of a religious corporation or is put to religious use, without invading the principle of religious liberty.

Of course, possession of the property will help either side that obtains it to maintain its prestige and to continue or extend its sway over the minds and souls of the devout. So would possession of a bank account, an income-producing office building, or any other valuable property. But if both claimants are religious corporations or personalities, can not the State decide the issues that arise over ownership and possession without invading the religious freedom of one or the other of the parties?

Thus, if the American group, which owns the title to the Cathedral, had by force barred Benjamin from entering it physically, would the Court say it was an interference with religious freedom to entertain and decide his ejectment action? If state courts are to decide such controversies at all instead of leaving them to be settled by a show of force, is it constitutional to decide for only one side of the controversy and unconstitutional to decide for the other? In either case, the religious freedom of one side or the other is impaired if the temporal goods they need are withheld or taken from them.

As I have earlier pointed out, the Soviet Ecclesiast's claim, denial of which is said to be constitutional error, is not that this New York property is impressed with a trust by virtue of New York law. The claim is that it is impressed with a trust by virtue of the rules of the Russian Orthodox Church. This Court so holds.

I shall not undertake to wallow through the complex, obscure and fragmentary details of secular and ecclesiastical history, theology, and canon law in which this case is smothered. To me, whatever the canon law is found to be and whoever is the rightful head of the Moscow patriarchate, I do not think New York law must yield to the authority of a foreign and unfriendly state masquerading as a spiritual institution. (See "The Soviet Propaganda Program," Staff Study No. 3, Senate Subcommittee on Overseas Information Programs of the United States, 82d Cong., 2d Sess.)

I have supposed that a State of this Union was entirely free to make its own law, independently of any foreign-made law, except as the Full Faith and Credit Clause of the Constitution might require deference to the law of a sister state or the Supremacy Clause require submission to federal law. I do not see how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law. If there is any relevant inference to be drawn, I should think it would be to the contrary, though I see no obstacle to the state allowing ecclesiastical law to govern in such a situation if it sees fit. I should infer that from the trend of such decisions as *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487; *Griffin* v. *McCoach,* 313 U. S. 498.

The only ground pressed upon this appeal is that the judgment below violates the religious freedom guaranteed by the Fourteenth Amendment. I find this contention so insubstantial that I would dismiss the appeal. Whether New York has arrived at the correct solution of this question is a matter on which its own judges have disagreed. But they have disagreed within the area which is committed to them for agreement or disagreement and I find nothing which warrants our invading their jurisdiction.

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306 New York 38

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, Appellant, against JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents.*

MOTION to amend remittitur. On appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1950, affirming, by a divided court, a judgment of the Supreme Court, in favor of

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* Motion for leave to file petition for writ of mandamus denied, 346 U. S. 893.—[REP.

defendants, entered in New York County upon a dismissal of the complaint by the court at a Trial Term (BOTEIN, J.; opinion 192 Misc. 327), without a jury, at the close of the entire case, the Court of Appeals, on November 30, 1950, reversed the judgments of the Appellate Division and Trial Term and directed judgment for plaintiff. (302 N. Y. 1.) The decision of the Court of Appeals was reversed by the Supreme Court of the United States. (344 U. S. 94.)

PHILIP ADLER for motion.

RALPH MONTGOMERY ARKUSH opposed.

I. Plaintiff tried the action on a twofold theory (a) that at common law the administrative autonomy of the North American district of the Russian Orthodox Church was originally justified by virtue of the ukase of November 20, 1920, and is still justified by political conditions in Soviet Russia, and (b) that the New York Legislature had recognized these facts and confirmed plaintiff's rights by the enactment of article 5-C of the Religious Corporations Law. II. The courts below erred, as matter of law, in their treatment of plaintiff's common-law theory. III. The decision of the Court of Appeals was based solely on the statute and the United States Supreme Court made no decision on the common-law theory. IV. The United States Supreme Court made no ruling which would bar the courts of this State from adjudicating the case upon its merits and upon established common-law principles. Plaintiff is entitled to a new trial.

Conway, J. The decision of this court in *St. Nicholas Cathedral* v. *Kedroff* (302 N. Y. 1), directing judgment in favor of the plaintiff, i.e., the group known as the "Russian Church in America," has been reversed by the Supreme Court of the United States in a majority opinion written by Mr. Justice Reed, and the case has been remanded to this court "for such further action as it deems proper and not in contravention of this opinion." (*Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 121.) On the basis of such reversal and remand, the defendants-respondents, i.e., the appointees of the Moscow Patriarchate, now move, in substance, for an order directing final judgment in their favor. Adjudication of the motion requires a re-examination of the grounds and rationale of our decision and the extent to which it has been affected by the action of the Supreme Court.

The majority opinion in this court very clearly divided consideration of the case under two heads —one statutory and the other common law. It was held that error, in any event, had been committed below, and that, under common-law principles, a new trial would be required, but that, under the statute, which was deemed controlling, final judgment for plaintiff was mandatory. Amendment of the remittitur was granted to make clear that the ultimate basis for the decision was the statute and that a contention that such statute was unconstitutional had been rejected (302 N. Y. 689). Thereupon the Supreme Court entertained the case and eventually, in an opinion, decided that the statute, as construed and applied by this court, did indeed constitute a violation of the constitutional right to the free exercise of religion, and accordingly, as above noted, returned the matter to us for such further action as we might deem proper and not in contravention of the said opinion. With the statutory phase of the case thus authoritatively eliminated, we are left with the alternative common-law base, which still stands as the basis for future action.

The foregoing is a simplified summary of what we conceive to be the present status of the case. We shall now discuss these views in more detail.

The prevailing opinion in this court, reported in 302 New York at pages 1 to 33, contains an extended review of the origins of this controversy—the history of the Russian Orthodox Church, the founding of the North American Diocese, and the consecration of St. Nicholas Cathedral as the see, the Bolshevik revolution, the persecution, suppression and virtual extinction of the church in Russia by the Soviet Government (pp. 4-9), the patriarchal ukase of 1920 authorizing diocesan bishops to assume full hierarchal power in the event of cessation of the highest church administration in Moscow, subject to confirmation by such authority upon its re-establishment (p. 7), the prior litigations here (pp. 10-15), the renewed activity of the Moscow Patriarchate and the sobor of 1945 (p. 17), the unsuccessful efforts at reconciliation (pp. 17-18), and the commencement of this action (pp. 19-21).

For over twenty years prior to the commencement of this action, St. Nicholas Cathedral—the historical and traditional see of the Russian Orthodox Church in North America—had been occupied by John S. Kedrovsky and his family (302 N. Y., at pp. 4, 12, 16), Kedrovsky was not a cleric of the Russian Orthodox Church, but rather of the short-lived "Renovated" or "Living Church", which had been created and supported by the communists in Russia as a divisive influence in the campaign against religion after the Bolshevik revolution, and which purported to assume control of the church abroad. Everyone now admits and agrees that this "Renovated Church" was uncanonical and had no standing whatever. Nevertheless, by judgment of the Appellate Division in 1925 (214 App. Div. 483), affirmed by this court without opinion in 1926 (*Kedrovsky* v. *Rojdesvensky,* 242 N. Y. 547), Kedrovsky wrested possession of the cathedral from Archbishop Platon, the true head of the North American Diocese who had been appointed as such by Patriarch Tikhon. That decision, incidentally, was supported on the ground that the occupant of the cathedral must be an appointee of the central church authorities in Russia and that Kedrovsky, not Platon, was the current appointee of the authorities then existing, viz., the "Renovated Church". This, we think, is an illustration of the difficulty in applying a mechanical test in such a situation without full examination and proof as to the nature of the so-called "central church authorities". The courts, perhaps, were then too close in point of time to realize what had really occurred in Russia and they did not have access to the facts now available. In retrospect, however, and with the knowledge born of aftersight, it is now apparent that, by virtue of that decision, the rightful occupant was ousted from the cathedral and its administration and possession turned over to a schismatic whose sect actually became extinct after a few years as is admitted by both parties herein.

Faced with this usurpation of the authority of the original patriarchal central church, and with the diocese in chaos and confusion, threatened with the loss of its temporalities to schismatics such as Kedrovsky, Archbishop Platon convened an American sobor and the administrative autonomy of the new North American metropolitan district was declared (302 N. Y., at pp. 11-12). This action was taken in pursuance of Patriarch Tikhon's ukase No. 362 of 1920, a remarkably prescient document, which contained instructions for diocesan bishops in case the activity of the highest church administration should stop and in case the cessation of activity should acquire " 'a protracted or even permanent character' ". In that event, the diocesan bishop was officially empowered to " 'organize the diocesan administration suitable to conditions created' ", with the proviso that " 'all measures that were taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is re-established.' " (302 N. Y., at p. 7.) The American sobor, in establishing the metropolitan district, stated that the " 'final regulation' " of the status of the North American church was to be left to a " 'future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom * * * and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church.' " (302 N. Y., at p. 12.)

Two years after our affirmance in the *Cathedral* case (*supra*) we declined to follow such decision to its logical conclusion. In *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75) we reversed a judgment which had directed Platon and the others in the metropolitan district to turn over to Kedrovsky all the properties and deeds of the new metropolitan district. Realizing that the legitimate claims of the new metropolitan district, whose temporary administrative autonomy had but recently been declared, were entitled to consideration, and "In view of the dissensions that have arisen", we returned the case to our Supreme Court, leaving it to that court, after full consideration of the facts, and in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russian Orthodox Church in this country might continue to enjoy their accustomed religious temporalities under the supervision of trustees who might "be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (pp. 77-78).

Finally, the autonomous status of the metropolitan district, based upon the above-described ukase of 1920, was expressly sustained in *Waipa* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780).

The instant action was commenced by the plaintiff corporation, St. Nicholas Cathedral of the Russian Orthodox Church in North America, as the holder of the record title to the cathedral premises. The corporation was created in 1925 by special act of the Legislature, and was composed of Platon and others of the metropolitan district. It is now controlled by and represents Archbishop Leonty, the successor, in December, 1950, of Archbishop Theophilus, who was elected as Platon's successor as head of the metropolitan district. (The election of Leonty had not taken place at the time of our first opinion which mentioned Theophilus as head of the metropolitan district.) While the corporation continued to hold title to the cathedral down through the years, the cathedral itself was occupied by Kedrovsky (by virtue of the aforesaid judgment in 242 N. Y.

547 which we disregarded in 249 N. Y. 75) until his death in 1934, and the metropolitan district was *enjoined* from interfering with such possession. Kedrovsky's son, Nicholas, remained in and occupied the cathedral from 1934 until 1944, when he too died, at which time possession of the cathedral passed informally to his brother, John Kedroff, whose only status was that of a priest in the concededly extinct "Renovated Church".

Meanwhile, following a period of several years during which the central or patriarchal church had virtually ceased to exist, one Sergius made a compact with the Soviet Government and was appointed acting *locum tenens* of the patriarchal throne in 1927 (302 N. Y., at p. 15). Sergius, in 1934, appointed Benjamin as " 'permanent Ruling Bishop of the Russian North American Diocese' ", *the order reciting* that Benjamin had " 'organized in New York a Diocesan Council and that our North American Diocese has *begun* official existence' " (302 N. Y., at pp. 15-16). During all the period from his appointment in *1934* for the purpose of forming such *new* diocese down to the commencement of the instant action in *1945*, it does not appear that Benjamin asserted any claim to occupancy of the cathedral or took any action to recover possession of it, which conduct may be said to constitute a practical interpretation of his authority as contained in his appointment in forming a new or different diocesan council and North American Diocese.

The present action is in ejectment and was commenced in 1945, as above stated, against John Kedroff, the second son of John S. Kedrovsky, the said Kedroff having taken possession of the cathedral informally on the death of his father and brother *without benefit of appointment by* *anyone.* It being quite obvious that Kedroff, on these facts, would not have been able to retain possession of the cathedral as against the claim of plaintiff and of Theophilus, the then bishop of the metropolitan district, and indeed could not put in any defense, he (Kedroff) *after the commencement of this action* requested reordination as a priest by Benjamin in the latter's new diocese. (302 N. Y., at p. 20.) Following his reordination by Benjamin in the latter's new diocese, Kedroff purported to "give" the cathedral to Benjamin who was then permitted to intervene in this action (302 N. Y., at pp. 20-21). Benjamin then occupied the cathedral from October, 1945, until June 6, 1947, when, in order to obtain an adjournment of this action, *he agreed to give up possession of the cathedral* (302 N. Y., at p. 21). At the time of trial, Benjamin was living at 38 Halsey Street in Brooklyn.

In our opinion we also took note of the general common-law principle developed in the American courts, and notably expressed in *Watson* v. *Jones* (13 Wall [U. S.] 679, 724-727) and in our own case of *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, 315) and our statute, Religious Corporations Law (§§ 4, 5), that in a central or denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (p. 13). Mention was made on page 21 of the controlling effect we were subsequently to ascribe to the new article 5-C of the Religious Corporations Law, and then we stated (pp. 21-22):

"Quite apart from this legislative action with respect to the specific dispute here involved, we think that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian*

Catholic Church (249 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records before us, the conclusion would have been fully warranted that the leaders of the North American metropolitan district are the trustees 'who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust' (pp. 77-78), i. e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

"The courts below, in granting judgment herein to defendants, did not determine, in the exercise of their discretion, whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminster* and *Watson* cases (*supra*), were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore entitled to the possession of the cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox Mission and Diocese prior to 1924 when it became an administratively autonomous metropolitan district."

And later removing any possibility of ambiguity as to our thoughts on this branch of the case, we said (p. 24): "In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee 'who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114).' (*Kedrovsky* v. *Russian Catholic Church,* 249 N. Y. 75, 77-78, *supra.*) That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, *supra*) required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further, for there is another ground requiring reversal here and judgment in favor of plaintiff and the North American metropolitan district which it represents."

Thus, in so many words, we announced that, in the absence of the statute, we would order a new trial at which findings might be made and discretion exercised, concerning the existence and status of the central church authorities in Moscow and their ability to carry out effectively and faithfully the purposes of the religious trust.

Although the prevailing, concurring and dissenting opinions in this court adverted in detail to the constitutional arguments presented in connection with the statutory branch of the case (pp. 29-33, 35, 42-43), it was necessary for defendant to request amendment of the remittitur to make it clear that such constitutional question had been necessarily determined. We were careful in amending the remittitur to limit the constitutional objections solely to the statutory phase of the case. Thus, we said (302 N. Y. 689, 690): "* * * Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: whether article 5-C of the Religious Corporations Law, as construed by this court, violated any rights of the defendants guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States. This court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those amendments to the Constitution of the United States."

After argument and submission of the case, the Supreme Court ordered reargument and specifically requested counsel to include a discussion of whether the judgment might be sustained on State grounds (343 U. S. 972). It was only after both parties concluded that it could not be so sustained (because it depended upon the constitutionality of the statute) that the Supreme Court considered the constitutional issue on the merits. Thus the court said (344 U. S. 94, 97): "Because of the constitutional questions thus generally involved, we noted probable jurisdiction, and, after argument and submission of the case last term, ordered reargument and requested counsel to include a discussion of whether the judgment might be sustained on state grounds. 343 U. S. 972. Both parties concluded that it could not, and the unequivocal remittitur of the New York Court of Appeals, 302 N. Y. 689 * * * specifically stating the constitutionality of the statute as the necessary ground for decision, compels this view and precludes any doubt as to the propriety of our determination of the constitutional issue on the merits. *Grayson* v. *Harris,* 267 U. S. 352; *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95. The case now has been reargued and submitted."

We mention this because it makes clear that the only basis for the appeal to the Supreme Court of the United States was our conclusion that the statute had controlling effect and that it was not unconstitutional.

Mr. Justice Reed, delivering the opinion of the court, made express mention of our alternative, nonlegislative basis for decision. He pointed out that we had considered " 'whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body' " and he noted that we had "concluded that this aspect of the controversy had not been sufficiently developed to justify a judgment upon that ground. 302 N. Y., at 22-24" (344 U. S., at p. 106).

He then proceeded upon the *assumption* that the prerevolutionary authority and paramount jurisdiction of the Moscow Patriarchate over the American church has continued without change and without interruption down to the present day. In the light of this assumption, Justice Reed then considered the narrow question of the legislative power of New York to enact article 5-C of the Religious Corporations Law, as that statute was construed by us. His opinion throughout refers to this *legislative* aspect of the controversy. Thus, he says that our determination "was made on the authority of Article 5-C" (p. 97), that "Article 5-C is challenged as invalid" (p. 100), that this court "depended for its judgment * * * upon Article 5-C" (p. 106) and he concluded for the Supreme Court that "we think that the statute here in question passes the constitutional limits" (p. 107), that "Such a law violates the Fourteenth Amendment" (p. 107), and that it constituted "a transfer by statute of control over churches" (p. 110). Later, in the concluding and determinative portion of the opinion entitled *"Legislative Power"*, he rejected our conclusion as to "legislative power over religious organizations" (pp. 117, 118), he distinguished the *American Communications Assn.* v. *Douds* case (339 U. S. 382) (pp. 118, 119) and repeatedly returned to the theme that the statute in question, article 5-C, was beyond the legislative power of the State of New York and violated the Constitution rule against prohibition of the free exercise of religion (pp. 120, 121).

Thus, we feel that the Supreme Court, in its decision, did *not* determine the constitutional validity of the alternative common-law disposition of the case previously announced by this court, viz., that, apart from the statute, a new trial would be ordered so that our State Supreme Court, under proper instructions, might ascertain all the facts of the controversy and render appropriate findings and exercise of discretion thereon.

Accordingly, we adhere to our prior decision, apart from the statute, to order a new trial upon the issues here involved. Since we have previously, publicly and categorically expressed our considered conclusion that such action would be required in the absence of the statute, and since the statute has been expunged from the case, it would be unreasonable to take a different position now, unless we were compelled to do so by the action of the Supreme Court. We have already shown that the actual decision of that court relates solely and exclusively to the constitutional validity of article 5-C and does not, in terms, affect our conclusions on the nonstatutory aspect of the controversy. Mr. Justice Reed, however, did include in his opinion an extended discussion (pp. 110-116) of the case of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*) which introduced into the law of America the principle that in a central, denominational or hierarchal church, the decision of the highest church authority or tribunal, will be accepted as final and conclusive by the civil courts. He conceded that the principle, as announced, was not a constitutional pronouncement, and could not have been (p. 115). He continued with the comment that (p. 116): "* * * The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to* *select the clergy, where no improper methods of choice are proven,* we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.''

It can hardly be said that this passing comment, unnecessary to the actual decision of the court upon the validity of article 5-C, has the effect of elevating the rule of *Watson* v. *Jones* (*supra*) to the dignity of a constitutional mandate binding upon all the courts of the land. There is no indication that the Supreme Court, by its decision herein, intended to make a pronouncement of such major proportions.

Nevertheless, whether *Watson* v. *Jones* (*supra*) be viewed as a common-law or constitutional rule, there is still some area in which the civil courts can and must operate in controversies submitted for adjudication. Justice REED himself implied as much with his qualification that the rule is operative only ''where no improper methods of choice are proven'' in the selection of the clergy, of whom, of course, Benjamin is one.

Whatever other limitations have been or will be placed upon the rule of *Watson* v. *Jones* (*supra*), there is one basic qualification to its application. That is that the highest church authority or tribunal, whose decision is to be accorded final and conclusive effect, must in truth and fact be capable of functioning freely with its activities directed by churchmen in the interests of the church and in accordance with the organic law of the church. In other words, where a *property right* turns upon a decision of the church authority, the civil court is under a duty, if such issue is raised, to ascertain whether the purported authority is duly constituted and functioning. The court is not required, without investigation and in unquestioning obedience to a legal formula, to give conclusive effect to the determinations of any group which purports to exercise authority, particularly as against the contention that the claimed authority is being subverted to secular and irreligious ends.

In the instant case as we noted in our original opinion (302 N. Y., at p. 22): "We know that a nominal church organization exists in Russia, but that is not enough", in view of the position steadfastly maintained by the plaintiff that the central church authority "has been absorbed by the Russian Government and its action deprived, during the period of such domination, of any religious significance." (P. 24.) To reject the claim of the plaintiff in this regard, without hearing and weighing all the evidence, would be grossly unjust and would constitute an infringement of their right to free exercise of religion. Uncritical acceptance of the principle of *Watson* v. *Jones* (*supra*) without qualification, as to "improper methods of choice" of clergy (344 U. S., at p. 116) under the circumstances here involved, does not advance the end of religious liberty but rather retards it, for in effect the court would be requiring the communicants of the metropolitan district to acknowledge the administrative rule of persons whom they believe are mere puppets of a monolithic and atheistic secular power, if such communicants wish to continue to use the religious temporalities they have so long enjoyed.

With respect to the new trial now to be had, there can be no doubt that the plaintiff *corporation* which holds *title to the cathedral premises* is entitled to *possession* thereof. Likewise, we think, there can be no doubt that the trustees of the corporation, who are now members of the North

American metropolitan district, are charged with the duty of caring for and maintaining the property. There is also no doubt that the said trustees must administer these temporalities in accordance with and subject to the "denominational" usage whatever that may be held to be, and for the beneficiaries for whom the trust was originally created.

Section 5 of the Religious Corporations Law provides that the "trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject * * *."

For the purpose of the case at bar, the question of the proper administration of the cathedral trust by the trustees of the plaintiff corporation comes down to which of two clerics—Leonty or Benjamin—is to be put into possession of the edifice.

A line of cases in this court supports the proposition that the civil courts of this State have jurisdiction in equity to inquire into and determine whether trustees of a religious corporation owning realty are properly administering the real property in accordance with the terms of the trust.

We stated in *Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.* (211 N. Y. 214, 224-225): "Upon the trial of the action the plaintiff proved all the facts necessary to make out a *prima facie* case in ejectment. It proved title, possession and ouster by the defendant. * * * The plaintiff having legal title to the property was entitled to the possession thereof so far as appeared from any evidence properly in the record. If, as the defendant asserts, the trustees of the plaintiff corporation are not administering the property in accordance with denominational usage, the Presbytery [defendant] has an adequate remedy in equity to compel them to do so * * *."

This principle of civil jurisdiction to review the administration of religious trusts was mentioned again in *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, 318, *supra*), and again, in the above-noted case of *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75, 77-78) a prior litigation affecting the cathedral and similar issues. In the latter case, we stated (pp. 77-78): "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier,* 226 N. Y. 114)."

In the case at bar, it appears obvious that the cathedral was dedicated for the use and benefit of the faithful in the old North American Diocese of the Russian Orthodox Church. Prior to the death of Patriarch Tikhon, the last Patriarch who had unquestionable authority in every respect, the proper administration of the trust demanded that the trustees permit the cathedral to be occupied and governed by the appointee of the Patriarch. But, in view of the undeniable break in the patriarchal succession and the virtual extinction of the Patriarchate after the Bolshevik revolution, in view of the patriarchal ukase of 1920, the circumstances under which it was issued and the creation of the North American metropolitan district in reliance thereon, in view of the strong probability that the Patriarchate, though nominally re-established, cannot function except as an arm or agent of an antireligious civil government, in view of what appears to be the overwhelming adherence of the faithful in America to the clergy of the metropolitan district rather than to the new diocese organized by Benjamin; in view of all this, it is incumbent upon the courts of this State to move cautiously and carefully in this difficult field, to gather all the evidence possible, to entertain the views of expert church scholars, to analyze the available documents and the canon law, to make findings of fact and to exercise sound discretion thereon, building up a record which is suitable for intelligent review and adjudication by the appellate courts.

The action of the court, based upon appearances rather than facts which were then difficult to ascertain, and based upon a conventional legal formula uncritically accepted without reappraisal in the light of special circumstances, resulted in a judgment in 1926 which led to the occupancy of the cathedral for over twenty years by persons who had no right to be there, *a fact which is now conceded by both parties.* It would be most unfortunate if this court, with so graphic a warning at hand, permitted such a mistake to occur again.

Moreover, since the public policy of the State of New York with respect to this controversy was so strongly pronounced in 1945 and 1948, there is some obligation, we think, upon the courts of this State to attempt, if at all possible within the framework of legal rules, statutes and the Constitution, to finally adjudicate in our State courts the questions posed by this litigation so that we may determine them under State decisional law as the United States Supreme Court hoped could be done when it ordered reargument and which it was prevented from doing because of our "unequivocal remittitur" which had been amended at the request of the defendants so as to enable them to test out in the Supreme Court the constitutionality of our State statute as distinguished from our State decisional law (302 N. Y. 689).

In this connection, as bearing upon our settled public policy in passing the legislation of 1945 and 1948, and as confirmation of the interpretation which the majority of this court placed upon such legislation, we note the letter of Governor Thomas E. Dewey, dated December 22, 1950, to Archbishop Leonty of the North American metropolitan district, which appears in plaintiff's brief in the Supreme Court of the United States but which was not submitted to us on the appeal here. In that letter, Governor Dewey stated:

"I have your gracious telegram conveying greetings from the Eighth All American Sobor of Russian Orthodox Greek Catholic Church of North America. I was happy to be able to sign the Acts of the New York State Legislature in 1945 and 1948 which confirmed the members of the Russian Orthodox Greek Catholic Church in the possession of Saint Nicholas Cathedral in New York City, thus freeing it from the evil and sacrilegious influence of representatives of the Soviet.

"I join you in looking forward to the time when all worshippers of the Orthodox Greek Church in the world will be free from the clutches of the Soviet Government.

Sincerely yours,

THOMAS E. DEWEY"

The motion to amend the remittitur should be granted to the extent that a new trial is ordered and the case should be remitted to the Supreme Court, New York County, for trial in accordance with the opinion herein.

DESMOND, J. (dissenting). We dissent. Our authority is the clear, positive and binding pronouncement, by the United States Supreme Court, in its opinion in this very case, of the law of this identical controversy (*Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94). The sole question in the litigation was, and is, this: May intervening defendant Fedchenkoff, holder of an admittedly valid appointment by the Patriarch of Moscow, world head of the Russian Orthodox Church, as archbishop of the North American Diocese, be prevented by the State of New York from occupying as his see church the archdiocesan cathedral in New York City? This court, when the case was here before (*St. Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1) barred the archbishop from the cathedral, and decreed possession thereof to the Russian church in America, a separatist movement. This court's reliance for that holding was on article 5-C of the New York Religious Corporations Law, judically construed as transferring the cathedral from control by the mother church in Russia, to control by the "American Church", on a supposed legislative determination that the Moscow Patriarchate was a mere instrumentality of the Communist regime in the U. S. S. R., and so incapable of carrying out the religious trust. But the United States Supreme Court, reaffirming *Watson* v. *Jones* (13 Wall. [U. S.] 679) held flatly that the *Watson* rule gave constitutional protection, under the First Amendment, to the filling of ecclesiastical offices by the appointive power of the church (see *Gonzalez* v. *Archbishop of Manila,* 280 U. S. 1).

The *Watson* v. *Jones* (*supra*) formulation of a fundamental American doctrine of religious freedom (old in New York, see *Connitt* v. *Reformed Prot. Dutch Church of New Prospect,* 54 N. Y. 551) is simply this: that, as to a subordinate body of a general church organization, the civil courts must accept, as finally binding, the decisions of the supreme judicatory of the general organization in all matters of discipline or belief, or ecclesiastical custom or law. Since, said the Supreme Court in its opinion in our case, the Russian Orthodox Church is hierarchical in government, the power to appoint, and the choice of, its archbishops is a matter of ecclesiastical government, as is the right of that appointee, as such, to occupy the cathedral. Therefore, the question sought to be litigated in this suit was one with which the civil courts had nothing whatever to do. Any State interference with such choice of a prelate, or such occupancy, would be violative of freedom of religion under the Federal Constitution. The Supreme Court, therefore, reversing this court's reversal of the lower New York courts, sent the case back to us for further proceedings "not in contravention of" (344 U. S., p. 121) the Supreme Court's opinion. Since the sole purpose of the suit was to obtain an adjudication, contrary to that of the Orthodox Church's highest judicatory, on a pure question of ecclesiastical government and discipline, the only possible consistent course for this court to take, after that reversal, was to order the complaint dismissed. Instead, action most inconsistent is being ordered, in the form of a trial as to the motivations of the Patriarch of Moscow, and as to the qualifications of Archbishop Fedchenkoff. The ordering or holding of such a trial, or any determination therein, either way, on either of the two questions, has been banned in advance, we say, by the Supreme Court, as an unconstitutional intrusion by the State of New York into the inner affairs of a church. Actually, the interference in this, its second form, is more to be condemned than was the first attempt. Our first decision here was based on a New York statute and, perhaps, there was some duty in the New York courts to try to salvage that statute. Yet, now that the statute has been stricken down as unconstitutional, we are licensing a trial in a civil court to find a fact which, if found, could be no basis for any constitutionally valid judgment.

If unconstitutionality under the First Amendment were not so plain here, we would state more fully the impropriety, as a matter of New York practice, of ordering a new trial, on this record. Here, we are told, there are two fact issues to be tried: as to the domination of the Patriarch by the Kremlin, and as to the fitness of his archiepiscopal appointee. But, at the first trial, plaintiff frankly conceded in open court that it could never hope to prove the "domination" by common-law evidence, and asked, instead, that judicial notice be taken. After this court gave plaintiff judgment on an assumption that the Legislature had acted on knowledge of that supposed fact of patriarchal subjection to the communists, the United States Supreme Court said that, even if such were the fact, State action based thereon could not be valid, in an ecclesiastical matter. So, the trial we are ordering, insofar as it concerns the workings of the Patriarch's mind and the purity of his motives, is unjustified by the record, and, by concession, foreordained to futility. As to any question of the fitness of the intervening defendant for the archbishopric, no such contention was made at the first trial.

Pressed on us now as some sort of authority for this new trial order are *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547) and *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75). If either of those decisions deny the right of the Patriarch of Moscow to appoint the archbishop of New York, then they were overruled on November 24, 1952 (344 U. S. 94, *supra*). The long and short of it is that the order which this court now hands down violates not only the Supreme Court's mandate, and the First Amendment, but long and thoroughly settled New York law (*Jarvis* v. *Hatheway,* 3 Johns. 180 [1808]; *Dieffendorf* v. *Reformed Calvinist Church,* 20 Johns. 12 [1822]; *Dutch Church in Albany* v. *Bradford,* 8 Cow. 457 [1826]; *Connitt* v. *Reformed Prot. Dutch Church of New Prospect,* 54 N. Y. 551 [1874], *supra*). And those old cases of ours were in the direct line of descent from fundamental American thought much older than the Constitution itself (*vide,* Roger Williams in the seventeenth century: "The government of the civill Magistrate extendeth no further than over the bodies and goods of their subjects, not over their soules, and therefore they may not undertake to give Lawes unto the soules and consciences of men" quoted in Rossiter's Seedtime of the Republic [1953], p. 197).

The complaint should be dismissed.

Lewis, Ch. J., Dye Froessel, JJ., concur with Conway, J.: Desmond, J., dissents in opinion in which Fuld, J., concurs; Van Voorhis, J., taking no part.

Motion granted, etc. [See 306 N. Y. 572.]

346 U. S. 893

No. 235, Misc. *ex parte Kedroff, et al.* Motion for leave to file petition for writ of mandamus denied. Mr. Justice BLACK and Mr. Justice DOUGLAS would issue a rule to show cause why leave to file should not be granted. *Philip Adler* for petitioners.