

sidered his probable successor. While it is not and cannot be in any way dispositive of this appeal, being *dehors* the record, it may not be amiss at this point to note that in testimony on May 5th, 1959 before the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, Peter S. Deriabian, a former officer of the NKVD, later known as the Ministry of State Security of the Soviet Government, stated that most of the priests of the church in Russia were agents of the secret police, that the seminarians were systematically recruited for this service, and that Metropolitan Nicholai himself is such an agent of the State Security apparatus.

Against the foregoing, defendants brought out on cross-examination that, as a matter of history, various "loyalty" oaths had been required by political leaders of bishops in various countries, that the Soviet Government had never attempted to alter the *dogma* of the church, and that Soviet law does not require that clergymen be approved by the State. These witnesses, however, stated that "the Soviet State does interfere in the internal administration of the church and that it had "committed the Russian Church to a policy of unconditional fealty and blind support in exchange for precarious recognition." Defendants also put on three clergymen affiliated with the Moscow Patriarchate who testified that they had visited Russia, stayed there for a short period, observed churches open, in good physical condition, well attended on occasion, and religious articles for sale. One witness also stated that no one had suggested that he should make any commitments to the Soviet Government.

With respect to such evidence, attempted comparisons between the present case and historical instances of Church-State relationships in other lands and other times are not determinative of the problem. The situation presented here, created as it was by the Communist revolution, finds no exact parallel in history. Likewise, accounts of apparent religious activity in Russia may show that the church retains existence there but this does not go to the ultimate issue of its domination by the State.

On the whole record, we conclude that the Moscow Patriarchate enjoys at best a nominal and conditional existence, at the sufferance of the Communist rulers of the Soviet State, that the Patriarchate is subject and subordinate to the Soviet Government and required to work for the furtherance of its political aims and objectives in Russia and abroad, and that the administration of the church is in the hands of individuals who, through coercion, through employment, or through conviction, subserve the paramount interests of the State. On this central issue, we are constrained to disregard any contrary findings of the trial justice and as a matter of law act in accordance with the facts as clearly and incontrovertibly demonstrate.

Actually, the Trial Justice himself conceded that the question as to the domination of the Patriarch by the Kremlin had to be found in favor of plaintiff by repeated comment that this condition of subservience now is no worse than that which existed prior to the Communist revolution and under the Czars. Thus, he stated that "the Russian Church as a tool exploited by the State was no new phenomenon." That fact being conceded, he then went on to excuse the condition by adding, "But so it was under the Tsars." He dismissed the Patriarchate's political expressions and activities in support of the Soviet State as "fulminations of an individual"; yet at another point he commented that analysis of the testimony of one of plaintiff's expert witnesses "reveals no greater or even as great a subservience of the church in Russia to the central government as had been acknowledged under the Czarist regimes."

No other view is possible than that the Russian Church is administered as an agency of the Soviet State and we are sure that even our dissenting brethren will agree that no court which sits in judgment on this case can be so naive as to disbelieve, any more than did the Trial Court, by its own statements, the strong proof that the Patriarch is subservient to the Communist dictatorship in the U.S.S.R. If it be conceded, as it thus is, that the Moscow Patriarchate is subservient to the Soviet State and is a tool exploited by the Communist rulers, it is impossible

to excuse that condition on the ground that the former Czar of Russia employed the church as an instrumentality to effectuate the objectives and policies of his government. Common sense tells us that there is an essential and distinguishing difference between the two situations. The Czar did not persecute and harass the church. On the contrary, he was a member of the church, a believer of its doctrines, a supporter of its activities, and the major source of its revenues. The present Soviet Government is frankly and grossly antireligious. It attempted to destroy the church and only tolerates it now because it can be useful.

Moreover, the North American Diocese was founded and composed of immigrants from Russia to whom the concept of a divinely appointed Czar was natural and indigenous. There was no incongruity or incompatibility in his close, active, and interested participation in the administration of the church and in the corresponding reverence and loyalty accorded him by the faithful. But it passes understanding that anyone can rationally substitute the present atheistic Communist rulers of the Soviet for the Czar of Russia in this picture of Church-State relations and conclude that there is no difference between the two. The Czar was sworn to uphold the church; the Communists are committed to its ultimate destruction. There is an obvious distinction between the civil head of an established or State Church sworn to support it, and the appointed agent of the State security system posing as a cleric to effectuate the policies of the State, including the ultimate elimination of the very church he subverts.

By reason of this radical change in the nature and operation of the former central church authority in Moscow, the rule of *Watson v. Jones, supra*, is not applicable with respect to properties of the North American Diocese. As we stated in 306 N.Y. at pages 49-51, and particularly at page 51, there is a basic qualification to the application of such rule. The Court must always be careful to ascertain whether the central church authority really exists or enjoys sufficient freedom of action to be able to function as such. The rule may not be applied when it would result in a perversion of the trust to which local church properties were dedicated when, as here, the highest church authority has departed, in a broad, fundamental, and substantial manner from the customary organization, operation, and doctrine 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" (306 N.Y., page 51).

The described status and situation of the church in Russia has persisted, without essential change, from the period following the Bolshevik Revolution down to the present time. It provided the factual basis for the American declaration of autonomy in 1924 and it provides the factual basis for the continued autonomous administration of the church here with right of local election of bishops.

Under these circumstances, the Archbishop elected by the Metropolitan District as representative of those for whom the property was originally dedicated and as the trustee "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (*supra*, page 10), is entitled to the use and occupancy of St. Nicholas Cathedral. To hold otherwise, at least as long as the present picture persists of Patriarchal domination and interpenetration by hostile and antireligious civil authorities, and to award the Cathedral to an appointee of the Moscow Patriarchate, under present conditions, would involve a violation of the constitutional protection against State interference in the free exercise of religion. As stated in the *Trutza* case, *supra*, "Since this is true as to protection against the interference of an individual American state, we think it should be equally true as to protection against the domination and interference of a foreign state."

The First Amendment would nullify identification of a church with the Government of the United States or of a state. I do not understand on what principle it is supposed to sanctify the identification of a church with