

## Supreme Court of the United States

OCTOBER TERM, 1968

Office-Supreme Court, U.S.  
FILED

DEC 19 1968

JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 71

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Presbyterian Church in the  
United States, et al.,

Petitioner;

vs.

Mary Elizabeth Blue Hull  
Memorial Presbyterian Church,

Respondent;

vs.

Eastern Heights, Presbyterian  
Church, et al.,Respondents.  
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Place Washington, D. C.

Date December 9, 1968

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Pt. 1

C O N T E N T S

ORAL ARGUMENTS OF:

P A G E

Charles L. Gowen, Esq., on behalf of Petitioners

3

Owen H. Page, Esq., on behalf of Respondents  
Eastern Heights Presbyterian Church

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X  
4 Presbyterian Church in the :  
United States, et al., :

5 Petitioners; :  
6 :  
7 vs. :  
8 :  
9 :  
10 :  
11 Mary Elizabeth Blue Hull :  
Memorial Presbyterian Church, :  
12 :  
13 Respondent; : No. 71  
14 :  
15 vs. :  
16 :  
17 Eastern Heights Presbyterian :  
Church, et al., :  
18 :  
19 Respondents. :  
20 :  
21 - - - - -X

22 Washington, D. C.  
23 December 9, 1968

24 The above-entitled matter came on for argument at  
25 2:00 p.m.

BEFORE:

26 EARL WARREN, Chief Justice  
27 HUGO L. BLACK, Associate Justice  
28 WILLIAM O. DOUGLAS, Associate Justice  
29 JOHN M. HARLAN, Associate Justice  
30 WILLIAM J. BRENNAN, JR., Associate Justice  
31 POTTER STEWART, Associate Justice  
32 BYRON R. WHITE, Associate Justice  
33 ABE FORTAS, Associate Justice  
34 THURGOOD MARSHALL, Associate Justice

35 APPEARANCES:

36 CHARLES L. GOWEN, ESQ.  
37 434 Trust Company of Georgia Bldg.  
38 Atlanta, Georgia  
39 Counsel for Petitioners

1 APPEARANCES (continued):

2 OWEN H. PAGE, ESQ.  
3 305 Realty Building  
4 Savannah, Georgia  
5 Counsel for Respondents Eastern Heights  
6 Presbyterian Church, et al.  
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P R O C E E D I N G S

CHIEF JUSTICE WARREN: Presbyterian Church in the United States, et al., petitioners, versus Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al., respondents.

Mr. Gowen?

ARGUMENT OF CHARLES L. GOWEN, ESQ.

ON BEHALF OF PETITIONERS

MR. GOWEN: Mr. Chief Justice, may it please the court:

The Presbyterian Church in the United States, the petitioner, is a hierarchy church, sometimes called the Southern Presbyterian Church. The first step in the church government is the session, composed of ruling elders and the pastors of local churches.

Next is the presbytery, which is composed of representatives of local churches in a geographical area, and also the ministers from those churches.

Under the form of government of this church, a pastor of a local church is not a member of the local church, but is a member of the presbytery.

Next is the Synod, which generally, but not always, corresponds to State lines, and which is composed of representatives of the local churches together with the ministers in the included presbyteries.

Next is the General Assembly, which is composed of



1 representatives of the presbyteries divided equally between  
2 ministers and laymen. These also constitute the courts which  
3 govern the church, the General Assembly being the highest court  
4 in the denomination.

5 In April of 1966, the congregation of two local  
6 churches of this church voted to sever all connections with  
7 and remove themselves from all ecclesiastical control, juris-  
8 diction and oversight of the Presbyterian Church in the United  
9 States, and so notified the Presbytery of Savannah.

10 The Savannah Presbytery then appointed an Administra-  
11 tive Commission, under the laws of the church, with full  
12 authority to act in the premises, and with special instructions  
13 to visit the ruling elders of each church, the ruling elders  
14 constituting the sessions which, as I have said, is the govern-  
15 ing body of the local churches.

16 After each elder in each church, save one, reaffirmed  
17 the action, and after the pastor of each church had reaffirmed  
18 his renunciation of the Presbyterian Church in the United States,  
19 the Commission, by resolution -- that is, the Administrative  
20 Commission of the Presbytery -- by resolution declared the  
21 pulpit of each church to be vacant because the ministers had  
22 severed all connection with the church, and assumed original  
23 jurisdiction over these local churches in accordance with the  
24 Book of Church Order, which is part of the record in this case,  
25 and declared the Commission's intention to secure ministers to

1 provide regular services of worship in the sanctuaries of each  
2 of the two local churches for those members who wished to  
3 continue their membership and communion with the general church.

4 Q You are going to point out specifically where,  
5 in the church order, there is any reference to the use of  
6 property with the right of the central church to the real  
7 property?

8 A We will cover that, but the decision of the  
9 Georgia Supreme Court, we think, satisfies that.

10 Q I understand that. I would just like to know  
11 on what basis within the church does the general church have  
12 any claim to local property, of the local church.

13 A On the basis of the implied church.

14 Q Do you mean you have to turn to civil law for  
15 the implied trust?

16 A No, sir.

17 Q The judge-made law?

18 A No, sir. When you join the church, the Book of  
19 Church Order contains the procedure under which the local  
20 churches are maintained. The Book of Church Order says --

21 Q Does it say anything about property?

22 A I don't think it says anything about the property,  
23 but it does say who has the use and the right to occupy the  
24 church when the church ceases to function as a church in the  
25 denomination.

1 Q Where is that?

2 A That is in the Book of Church Order, section  
3 16-7(a), or it may be 17.

4 Q Where is that in the record?

5 A It is not in the appendix. It is in the record.  
6 The Book of Church Order is a part of the record.

7 Q Do you mean it isn't in the printed record?

8 A It is not in the printed record.

9 Q Has it been quoted in the brief?

10 A No, sir; it has not been quoted in the brief.

11 Q That is a rather important matter. After all,  
12 within the canon law of the church there may be some basis for  
13 saying that the elders or bishops of that church, whatever they  
14 were, had the right to the use and occupancy of the property.  
15 Do you have some similar basis in church law as this?

16 A The statement in the church law is that when a  
17 local church ceases to function as a church, the property then  
18 is within the jurisdiction of the general church. Our position  
19 is that these local churches ceased to function.

20 The finding of the Administrative Commission was that  
21 one elder did not constitute a session; that there was no ses-  
22 sion to govern the church and that it had no minister and  
23 that, therefore, the Administrative Commission would take the  
24 occupancy and use of the property for the purpose of carrying  
25 out the dedication of the property, which came about when the



1 local churches affiliated with the general church.

2 Q Is there some place in the record where we can  
3 find the Church Order?

4 A It is in the record.

5 Q Is it in the typewritten record?

6 A The book itself is a part of the record. The  
7 Book of Church Order is a part of the record.

8 Q Overnight, if you can find that in the record,  
9 direct it to us, please.

10 A Yes, sir; I will be happy to do that.

11 Q As you understand it, is that the basis for the  
12 determination that there is an implied trust, or is it the basis  
13 of the -- I am not suggesting this is correct -- or is the  
14 basis of the implied trust the conclusion or the following,  
15 that when the church property was acquired by the purchase or  
16 by gift, that it was acquired by the church corporation subject  
17 to the implied trust, implied from the circumstances that it  
18 would be dedicated to the uses of the Presbyterian Church, and  
19 that meant the central authority of the Presbyterian Church,  
20 and that that was the implication, that was the conclusion?

21 Whether the implication proceeded from the circum-  
22 stances of acquisition or the church laws, I suppose, is not  
23 clear. I know this far in my study of the case, I have seen  
24 nothing that would indicate that the implication arose from the  
25 church laws rather than from the circumstances of the acquisition.

1           A     I think it was from the circumstances of the  
2 acquisition, and also from the general policy of the church  
3 that has existed for 100 years. I think also it has been de-  
4 cided in numerous other jurisdictions that this was the policy  
5 of the Presbyterian Church. We have cited those in our brief.

6           Q     The politic?

7           A     The politic. That is the law and the practice  
8 of the church.

9           Q     Do you mean that the court here makes an infer-  
10 ence of an implied trust from the policies and practices of the  
11 church? I trust and I assume your argument basically is that  
12 this is something that we can leave to the State court. The  
13 State court has found an implied trust and that is that.

14          A     The State court has found it. The local State  
15 court found it. The respondents have never questioned.

16          Q     They don't question it here, do they?

17          A     They don't question it here.

18          Q     Once you get beyond that, the situation gets a  
19 little complicated and vague to me.

20          Q     Are you suggesting any possible way that we can  
21 leave it to the church government itself and not get mixed up  
22 in it?

23          A     I think it has been left to the church govern-  
24 ment because the church government, the Administrative Commis-  
25 sion of the Presbytery, which was appointed in accordance

1 with the Book of Church Order, which is the constitution which  
2 governs the church, made this finding, and the local churches --

3 Q Made a finding?

4 A First, the Administrative Commission of the  
5 Presbytery was appointed to go and see these churches and to  
6 find out and discuss with them the differences.

7 Q How many churches are there that have withdrawn?

8 A Two churches in Savannah.

9 Q Only two?

10 A Only two.

11 Q That is in the United States?

12 A Yes, sir; as far as this record goes.

13 Q So this is between two churches and the rest of  
14 the denomination?

15 A Yes, sir.

16 Q Is it over a religious matter?

17 A We think it is over religious matters.

18 Q I notice it seems to be about Vietnam.

19 A Here is what the differences were.

20 Q Something about civil law and civil disobedience.

21 A The first one was a statement in some Sunday  
22 School literature about civil disobedience. The evidence was,  
23 on the trial of the case, that the local churches didn't even  
24 use the Sunday School literature and were not required to use  
25 it. There was also a statement by the General Assembly of the

1 church on civil disobedience as a final resort to secure indivi-  
2 duals their rights.

3 That statement on civil disobedience is in the record.  
4 The summation of it is on page 58. I think it is a relatively  
5 mild statement of it. It ends up by saying that it regards  
6 civil disobedience as a measure of last resort to be employed  
7 only in circumstances of otherwise irremedial need, and in the  
8 exercise of which the whole concept of law is not denied but  
9 affirmed; and to continue to support and regard with compassion  
10 those who practice civil disobedience when no legal recourse  
11 has been left open to them and who act in Christian conscience  
12 and allegiance to Almighty God.

13 Q Was that submitted to a jury?

14 A Yes, sir; it was submitted to a jury.

15 Q And did the jury pass on that?

16 A Yes, sir; the jury passed on it.

17 Q How did they hold; that it was religious or not  
18 religious?

19 A They held that it was a departure from the tenets  
20 and doctrines of the Presbyterian Church in the United States  
21 as they existed in 1861, and as they existed in 1890, when  
22 one of these local churches affiliated with it -- that is,  
23 civil disobedience -- and the holding is apparently they adopted  
24 the English rule that was rejected by this Court in Watson ver-  
25 sus Jones, and said that you couldn't change the doctrine that

1 existed in 1861, or the time of the church affiliation because  
2 they were bound by it.

3 Q Did the State court decide in favor of the two  
4 local churches?

5 A They decided in favor of the two local churches.

6 Q And they let them keep the churches?

7 A Yes, sir. The Court made the statement that this  
8 statement on civil disobedience, a quote from the Georgia  
9 Supreme Court, "is an absolute defiance of law and order and  
10 is the road to anarchy."

11 Q In the holding that is before us, the one that  
12 appears on page 124 of the appendix, and the opinion of the  
13 Georgia Supreme Court, it says, after saying that there is an  
14 implied trust, the Court says, "We take the view that such a  
15 trust is conditioned upon the general church's adherence to  
16 the tenets of faith and practice existing when the local church  
17 adhered with it, and that an abandonment or departure from such  
18 tenets is a diversion from the trust which civil courts will  
19 prevent."

20 Then it goes on to say that that abandonment or de-  
21 parture doesn't have to be total, but it has to be substantial.  
22 Is that the issue before us?

23 A That is the issue. Our contention is that under  
24 the First Amendment, as construed in Watson versus Jones, and  
25 in Kedroff versus St. Nicholas Cathedral, that this Court has



1 held that under the free exercise and establishment clauses of  
2 the First Amendment, that the civil courts do not have a right  
3 to inquire into those matters, but those matters are for deci-  
4 sion by the ecclesiastical courts.

5 That is the question and the issue, and we think it  
6 has been disposed of by Watson versus Jones, which was not  
7 decided on constitutional grounds originally, but we believe  
8 was raised to constitutional status by Kedroff versus St.  
9 Nicholas Cathedral.

10 Q You are not representing the two churches?

11 A No, sir; I am representing the petitioner, the  
12 central church.

13 Q Who paid for the church? Who bought the churches?

14 A The local congregations bought the churches and  
15 paid for them.

16 Q In whose name are they?

17 A The title is in the local churches.

18 Q The title is in the local churches?

19 A Yes, sir. And the decision of the court, and we  
20 think correctly, was that when these local churches affiliated  
21 or joined the central church, that there was an implied trust  
22 that their church property would be used for the purposes of  
23 the denomination.

24 Q So you rely upon the implied trust?

25 A I think so. I think I can more than show you

1 the specific provisions.

2 Q Can you do otherwise, no matter what you may  
3 show us? As the case comes to us, are we not precluded from  
4 the local property law?

5 A As the case comes to you, I think it is concluded  
6 that there is an implied trust.

7 Q That is right. And I gather that that trust does  
8 not result in your client taking these properties and circum-  
9 stances because, as your Supreme Court said, your body has  
10 departed.

11 A As they say, that defeated the trust.

12 Q Really, what is before us is just that element  
13 of it, the source of the title.

14 A Title isn't involved. The only thing that is  
15 involved is the right to occupy and use, the same thing in-  
16 volved in St. Nicholas Cathedral.

17 Q But in those two cases they found within the  
18 ecclesiastical law itself the right to use the property.

19 A I am sure that we can point out --

20 Q The Court of Appeals of New York found that.

21 A The Court of Appeals in New York, in the Kedroff  
22 case, which involved an act of the legislature which, in effect,  
23 undertook to place the property in the hands of the American  
24 branch of the church rather than the Moscow branch because they  
25 felt that the Moscow branch had been tainted by the Communist

1 government. that existed there and was not capable of managing  
2 it.

3 The Court held that they couldn't do it because under  
4 the rules of the church and under its practice in the orthodox  
5 church, that they had the right to occupy the cathedral, al-  
6 though the cathedral belonged to the local people. There wasn't  
7 any question but what they had the title to it, the State  
8 people.

9 Q We don't have any Communist question here, do  
10 we?

11 A No, sir. Well, I don't know; we do have the  
12 Vietnam War, and we have a statement on faults. One of the  
13 things the local churches found fault with was an amendment to  
14 the church constitution that authorized women to hold church  
15 offices.

16 Q That wouldn't be communistic.

17 A I wouldn't think so. They also found fault with  
18 the central church because the General Assembly refused to en-  
19 dorse an amendment to the Constitution of the United States to  
20 overcome a decision of this Court dealing with bible reading  
21 and prayer in the public schools.

22 Q There was something also about foreordination.

23 A The last one was a statement by the General  
24 Assembly on foreordination. If you will read the statement  
25 of the General Assembly on foreordination, it simply says that

1 in order to be a Presbyterian, you don't have to believe that  
2 certain people are condemned to everlasting death at the time  
3 of their birth, and that that isn't necessary. It doesn't say  
4 you can't believe it if you want to. It doesn't deprive you  
5 or it doesn't deprive the members of these local churches from  
6 believing it if they wanted to. They simply say if I don't  
7 want to believe that, I can still be a member in good standing  
8 in the church.

9 Q Is there anything about predestination or just  
10 foreordination?

11 A Just "fore".

12 Q I was reading the other night where a man in  
13 Scotland was tried for sedition and convicted. His crime was  
14 advocating suffrage for women. Maybe we are on the track of  
15 something very fundamental here.

16 A We think that this Court has held that all of  
17 these matters are matters for determination in the church  
18 courts, or by the court itself, and not by the civil courts.

19 Q Except for the implied trust, the property, which  
20 you think the State law is free to settle the property dispute  
21 within the church.

22 A No, I think this: I think this Court has held  
23 that the only duty of the civil courts is to take the property  
24 in the way that the general church has decided that it should  
25 go.

1 Q So you don't rely on implied trust?

2 A No, sir. The Georgia Court held it and I think  
3 it is in this case.

4 Q When I asked you whether you concluded by the  
5 holding of an implied trust, your answer to me was no, you are  
6 not in the determination here, of whether or not this is a  
7 matter of church law, whether or not it is free of any authority  
8 of the State.

9 A I don't think the State Courts have a right to  
10 determine where the property goes.

11 Q It was true, wasn't it, that there was a pro-  
12 vision in canon law that dealt with this problem, and you are  
13 going to suggest that there is one in the Book of Church Order.  
14 Can you suggest what the provision is that you refer to there?

15 A It is either 16.7(a) or 17.7(a). The copy I have  
16 had 16.7(a), but it is not identical with this one.

17 Q I don't have (a)'s and (b)'s in this one.

18 Did you say that the civil courts are entitled to  
19 interpret the ecclesiastical law and the canon law with respect  
20 to property?

21 A No, sir.

22 A If you don't rely on implied trust, then it seems  
23 to me the Court would have to follow church law to settle the  
24 property, and if it can't do that either, then to dismiss the  
25 case and leave it to a trier of strength.



1           A       That has been suggested. I don't think that is  
2 the law. I think that the law is that after the church has  
3 made the determination, the duty of the civil court then is to  
4 enforce the decision of the ecclesiastical court.

5           Q       Which church? The local church or the central  
6 church?

7           A       The central church, because the local church has  
8 access to the church court. These local churches didn't see  
9 fit to exhaust any remedies in the church court. The local  
10 churches had a right of appeal to the Presbytery. The Presbytery  
11 appointed a commission. The evidence is they refused to par-  
12 ticipate in it or have anything to do with it.

13          Q       What is your basis for civil courts in this  
14 country accepting a determination as to property rights arrived  
15 at by church courts? It can't be because it is canon law or  
16 church law. It has to be because it is relevant to some common  
17 law principle that we can entertain in civil courts, isn't that  
18 right?

19               I don't know of anything in our constitutional system  
20 that would sanction what you say. I was hoping that you would  
21 say that in this case, for the purposes of this case, the  
22 Georgia Court decisions on the existence of an implied trust  
23 have to be taken by this Court. Apparently you don't say that.

24          A       I don't think there has been any appeal from  
25 that decision, but I understood Mr. Justice White to ask me

1 whether or not I felt that if that decision had not been made  
2 by the Georgia Court, that it would have been open for deter-  
3 mination by the Court. I think you are bound by it because the  
4 Court made the decision and there has been no appeal from it.

5 Q The Georgia court.

6 A Yes.

7 Q Does the record show whether there was a revolt  
8 among the local church members?

9 A Yes, sir; and it was unanimous to the extent of  
10 the local church members who were present at the time.

11 Q Which way?

12 A Unanimous in favor of withdrawing from the cen-  
13 tral church.

14 Q You will get us that citation for the record?

15 A Yes, sir.

16 I would like to reserve the balance of my time.

17 CHIEF JUSTICE WARREN: Mr. Page.

18 ARGUMENT OF OWEN H. PAGE, ESQ.

19 ON BEHALF OF RESPONDENTS EASTERN HEIGHTS PRESBYTERIAN CHURCH

20 MR. PAGE: Mr. Chief Justice, and may it please the  
21 court:

22 I think I can put this in a little more correct per-  
23 spective. At the time these local churches withdrew in April  
24 1966, in the resolution of disaffiliation they charged the  
25 denominational church with specific violations of the church

1 doctrine, dogma and discipline.

2 Mr. Justice White, the only reference in the Book of  
3 Church Order to the right of a Presbytery is Chapter 6-3.

4 Q But that works only when the church has been  
5 dissolved or has come to an end, which is not the case here.

6 A Excuse my digression, but I wanted to assist  
7 Mr. Justice White.

8 So the Supreme Court of Georgia rightfully then looked  
9 at the question of the implied trust. They examined it and they  
10 found, under implied trust, of course, in a church property  
11 dispute, you don't go to the words in the grant because we  
12 don't have the expressed trust situation. Therefore, the  
13 Court has to look at the church doctrine and dogma that existed  
14 at the time of the acquisition of the property. That is what  
15 the Supreme Court of Georgia did in invoking the implied trust.

16 Q But where does the civil court have the right to  
17 imply a trust?

18 A Because of the fact that property rights are  
19 involved, Mr. Justice, and this is historically correct in  
20 cases where you have a property dispute involving church and  
21 then the civil courts have the right of oversight. This is  
22 particularly true if, in the final determination, it is a ques-  
23 tion of violation of the church constitution, such as we have  
24 here. These were specifically alleged. Let me make reference  
25 to those parts of the constitution that were particularly

1 presented and alleged to have been violated.

2 Q Before you do that, may I ask you one question?

3 Are you going to suggest any way in which we can get  
4 out of it without having to pass on that church constitution?

5 A No, sir. I believe that question has already  
6 been resolved.

7 Q How would it be? It is still here?

8 A I mean the question of the violation of the  
9 church doctrine and dogma.

10 Q You mean it has been resolved in the court below,  
11 but it is up here now?

12 A Yes, sir.

13 Q What I want to know is are you going to suggest  
14 any way that we can decide this case without having to get  
15 into that?

16 A No, sir. I don't think we are getting into the  
17 questions.

18 I think we are looking at a different question. We  
19 are not involved in faith and dogma. What we have here, and  
20 the courts have looked into this very carefully, and what they  
21 say is when you present the church doctrine and dogma in im-  
22 plied trust such as this, you look at the doctrine and dogma  
23 just to determine -- well, you look at it as though you had an  
24 expressed trust.

25 In looking at the implied trust, you look at the

1 doctrine and dogma that existed at the time the property was  
2 acquired. Then you determine if there has been a violation of  
3 that, to determine if the implied trust has been breached.

4 CHIEF JUSTICE WARREN: We will recess.

5 (Whereupon, at 2:30 p.m. the argument in the above-  
6 entitled matter was recessed, to reconvene at 10:30 a.m.,  
7 Tuesday, December 10, 1968.)  
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