SUPREME COURT OF OHIO.

DECEMBER TERM, 1862.

WILLIAM WISWELL *against* WILLIAM GREENE, *et al.*

Reply to the Argument of H. C. Whitman, Esq., Counsel for the Church of the Redeemer.

Counsel for the defendants admit that if those members who went off because of their "widely differing" with the pastor in his religious views, are seceders, they lose all legal right to the Church property. But he says they are not seceders, because they did not go off of "their own motion." Here he has mistaken the facts. Let us see how they are. When this suit was brought, there was no agreement to divide and separate. There was no second or independent organization formed, but Messrs Hosea and associates, refused to attend the preaching of the pastor, and kept up a constant clamor for a sale and division or the unconditional deposition of the pastor. *After* this suit was brought, they organized another religious society, called the Church of the Redeemer. Notwithstanding the injunction herein granted, and the pendency of this suit, they continued to agitate *in the Church* until they succeeded in getting the resolutions of 23d of May passed.

Did they go off with the consent of those who remained? Was it intended that they should constitute a branch of the First Congregational Church, governed by its Trustees, the funds to be invested by them and the new organization controlled by them? Was it a society organized *within* the jurisdiction and under the control of those trustees? Was the First

Congregational Church to control and manage it in any way whatever? The record answers all these questions in the negative? Again: those members went off before there was any division, some before the litigation and some after it was commenced. No sale could be had until the Court sanctioned it, and yet long before they filed their answer in this case, the Church of the Redeemer was organized, an antagonism of the old Church, and to all intents and purposes they ceased to be members of the First Congregational Church. They were not driven out of the Church, but left of "their own motion." They voluntarily withdrew, organized another, and independent society, without respect to the one they withdrew from, proclaimed a new covenant or creed and completely ignored the First Congregational Church, the doctrines therein taught having become heresies to them. If this is not seceding, it is difficult to understand what state of case will make it out.

II. Counsel for the Church of the Redeemer admits that if this is a case of a division of the Church property among individual members, it would not be valid, but he denies that it is such a case. Let us see.

1st. When this suit was brought to restrain the sale of the property, there was no separate organization. 2d. When the resolution of the 11th of April was adopted there was no such organization. The demand on the part of these gentlemen, who went off, that Mr. Conway should be dismissed, because they could not accord to his religious views, coupled with the threat, which they instantly executed, that they would no longer worship under his administration, all took place before they procured the passage of the resolutions of the 23d of May. These were steps taken by them, as *individuals*, as pew-owners, and predicated of what they called their personal rights as such, viz.: their ownership in the Church property as pew-owners. They desired to retire from the First Congregational Church, and to take with them their respective shares of the property as measured by the value of their pews.

They did nothing afterwards that was not predicated of this claim. Counsel speaks of an equitable rule of division, *i. e.*, that the property should be equally divided. That rule was

proposed by these dissatisfied gentlemen because they claimed their pews in value represented about one-half of the value of the whole church property.

III. I am not able to perceive the force of the counsel's proposition, that the cause of religion in this Church will be promoted by granting the prayer of his clients to divide this property. He speaks of the impossibility of his clients longer remaining in that Church, because if they do it will be filled with "discord and strife." To avoid this, he eloquently appeals to the Court to let them take one-half of the property and "depart in peace." How far this condition of things accords with what the counsel says at another place in his brief, when speaking to the proposition of secession, it is not worth while here to speak: nor do I stop to inquire who is responsible for this "discord and strife." I may remark that this state of things is not exactly consistent with religious teachings. It may be inquired if a division is made, how the First Congregational Church is to be benefitted, or the cause of religion, in that Church, promoted, by giving these gentlemen, who will, counsel fears, "agitate" if they stay, one-half of the property to go away.

The resolutions do not contemplate, nor do the parties expect, that they are in any way to be held accountable by the First Congregational Church, for the disposition they may make of the funds so to be paid over to them. They claim to and they will take the money, by force of their ownership as pew-owners, and will do with it whatever they may choose, which may be to build up another Church, or divide it among themselves, and use it for any other purpose. The moment the Church property is divided, the trust contemplated by the Charter and the founders of the Church ceases to control such of it as is given to these seceders.

IV. Counsel claims that it would promote the interest of the First Congregational Church, to give these dissatisfied pew-owners one-half of the property, and let them go off and form another Society. Not being able to see that, I inquire whether it can seriously be claimed that this Church can divide up its property, and give one-half of it to establish another Society, for the promulgation of different religious tenets and doctrines

than those taught in the Church? Nay, more: is it claimed that this property can be used to establish another Society, outside of this one, beyond its control, having no connection with it? Counsel is not very explicit in this; *occurrent nubes;* and yet the case shows that these gentlemen want the property to set up an independent Society, beyond the jurisdiction of and having no connection whatever with, the First Congregational Church. I know he claims that unless it is done. there will be "bitter feelings," and a wreck of the Church. How can that be? These malcontents have left it, have formed another Society, and, it is to be hoped, are in the full fruition of that peace and calm which they could not find with their late co-worshipers in the old Church. Of course they would not return to "stir up the strife," which drove them from it. How, then, can such dreadful things befall the "old church." "Peace and concord" reign there now. I will not say it is because these gentlemen have left the "old church." However that may be, I am not prepared to believe that they will voluntarily return there, if they apprehend a renewal of the terrible scenes which the counsel so elegantly depicts and so mournfully deplores.

I have examined the cases cited by counsel for the Church of the Redeemer.

The case in 21 Conn. does not sustain the point for which it is cited.

There is no such case as that of Uckerly *v.* Leyer, cited as being in 2 Serg. & Rawle, 38.

The case referred to in 2 Wendell has no bearing whatever on the proposition for which it is designed to use it; and the paragraph particularly referred to is wholly outside of the case, and the mere *obiter dictum* of the judge who drafted the opinion.

The case in 23 Barb. is directly adverse to the proposition for which counsel cites it. So, too, of the case of the Methodist, Church *v.* Remington, 1 Watts, 227; and, also, the case in 1 Watts & Serg.

MOTION TO DISMISS.

I call the attention of the Court to the motion to dismiss this suit. It will be observed that the suit was instituted to prevent a sale of the Church property as was contemplated by the resolutions of the 11th of April and the 23d of May, 1859.

It will also be observed that the Church has *repealed* those resolutions, and all others, which were designed to provide for a sale of the Church and a division of its property. It likewise appears that the trustees who filed an answer in the case, in the Common Pleas, by their counsel, Messrs. Taft and Perry, have requested their answer to be withdrawn, as they no longer desire to sell the Church property. I, also, file the letter of Messrs. Taft and Perry, requesting the answer to be withdrawn; also the notice served on the counsel of the Church of the Redeemer, and Taft and Perry, advertising them that this motion would be made by the plaintiff. Copies of the Church resolutions and the order of the Trustees, were served on the counsel of defendants. This motion is made, because there now remains no necessity for pursuing this suit further. The object being to restrain the sale of the Church property, now that there will be no sale, the further prosecution of this suit is rendered superfluous. The right to dismiss a pending suit, before final action, I suppose will not be questioned, unless new rights have supervened, and that will not be seriously contended in this case. In the first place, supposing the resolutions to divide the property had been legally passed, and gave any of the parties a right which they did not enjoy before this suit was brought, having been passed "*lis pendens,*" they can claim nothing through these resolutions. In the second place, the power of the Church which passed the resolutions, to elect to repeal them, and to decline to sell the property, can not be questioned. That power is reposed in them, to be exercised only within the Charter. Supposing that the Chureh may sell and divide, they may elect to sell or not sell, at a particular time, according to their discretion. But if it can be

done at all, it can be done only by the sanction of the Court. 2 Kent's Com. 314; 3 Barb. Ch. 122. At common law it could not be done at all, and it is by no means clear that it can be done in Ohio, except upon the precedent consent of all the members, under the statute of March 11th, 1853, Swan, 247, which must be strictly pursued. It is very clear that the Court will not *require* the corporation to sell its property. 16 Barb. 241; also, 23 Barb. 335.

If these gentlemen, who claim to be participants in the fund, acquired any new rights by the resolutions of the 23d of May, it was to enjoy them when the property is sold, but they can not compel a sale against the judgment of the Church and the Trustees. The sale is one thing and the division of the proceeds another and very different thing.

There is no decree or judgment in this case. The one rendered by the common pleas was vacated by the appeal, and the case comes into the court by reservation. It is, as if this suit was now to be heard for the first time.

The case of Wyatt *v.* Benson, 23 Barb. Sup. C. R., 339, decides that no intervening or precedent action of the Church or the Board of Trustees can impair the plaintiff's right to question the validity and legality of any order of sale made by them. The order of sale and the declaration as to the disposition of the proceeds, are yet *in fieri*, not having been executed, and no rights having been acquired under them, it is not only in the power of the corporation to rescind such order of sale, etc., but the Court will refuse to act when the Trustees ask to withdraw their application for a sale. The application can be made by none but the Society itself, or by some one authorized by *them*. Swan, 248. The supplemental answer now filed by the Trustees takes away from the Court all power to order a sale.

R. M. CORWINE,

Attorney for the Plaintiff and the Trustees.

SUPREME COURT OF OHIO.

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Reply to some of the Points made by Messrs. Whitman & Collins, in their Oral Argument.

1st. Counsel for defendants say that the opinion of the lawyers given to the Trustees, (Printed Record, page 36), was followed in the passage of the resolutions of the 23d of May. This is a mistake. An examination of that paper will show that they advised that the division should be made in such a way as that the charter should be complied with: that is, that no second organization could be made, except it was a part of the First Congregational Church. That is the fair interpretation of it. See the last paragraph in that opinion, and note its guarded language.

2nd. On the application to withdraw the answer of the Trustees, counsel say that the court should not entertain it, because the resolutions of the 26th May, 1862, were not passed by a legal body, and because they were passed after this case was reserved. I answer, if that is true, it does not help the resolutions of the 23d of May, 1859, since they were past after this suit was brought. The one is no better than the other, so far as this objection is concerned.

3d. The resolutions of the 23d of May do not pretend to dispose of the question, but leave the whole matter to the Court, to whom it is referred for "*Judicial Sanction.*" How could those members, who withdrew, after their adoption, claim that they gave them any rights, or conferred upon them

any privileges until the court *sanctioned* them? The whole question was purposely left in abeyance. They could have taken no steps in the purchase of property predicated of these resolutions. It is not, therefore, a case of vested rights, as the counsel suppose. No legal rights could intervene by reason of what these resolutions contain. The Corporation could do nothing in the way of disposing of the property, or dividing the proceeds without the sanction of the Court. So that the whole thing was immature—was *in fieri*.

R. M. CORWINE.