SUPREME COURT OF OHIO.

DECEMBER TERM, 1862.

WILLIAM WISWELL
v.
WILLIAM GREENE,
WILLIAM GOODMAN, and Others.

ARGUMENT FOR THE PLAINTIFF.

This action was brought to restrain the Trustees of the First Congregational Church of Cincinnati from selling its real estate (house of worship) and dividing the proceeds thereof in pursuance of certain resolutions alleged to have been adopted at a meeting of the corporators, April 11th, 1859.

The Church was incorporated by a special act of the General Assembly, passed January 21st, 1830. (Local Laws, vol. 28, pp. 28, 29).

Section first enacts that Elisha Brigham, William Greene, and three others, "and their associates for the time being," shall be a body corporate, with perpetual succession, etc.

Section second authorizes the corporation to sue and be sued, plead and be impleaded, etc.

Section third authorizes it to acquire any estate, real or personal, by purchase or devise, and to hold the same; but the net annual income of all such property, except the house of worship and the parsonage-house, shall not exceed four thousand dollars. "*And provided,* also, that all such

property, with the house of worship and parsonage-house, shall be considered as being held in trust, under the management and at the disposal of said corporation, for the purpose of promoting the interest of their church, defraying the expenses incident to their mode of worship, and maintaining any institutions of charity or education that may be therewith connected: *Provided, moreover*, that when money or other property shall be given, granted, or bequeathed, or devised to said corporation for any particular end or purpose, it shall be faithfully applied to such end or purpose."

Section fourth provides for the election of five trustees, annually, on the first Monday of April.

SEC. 5. "All elections shall be by ballot, and determined by a majority of votes; each member of the corporation being entitled to one vote in this as in all other matters touching the interests of the corporation."

SEC. 6. "That an owner of a single pew, in the house of worship, shall be entitled to all the privileges of membership."

SEC. 7. "That extra meetings of the corporation may be called by the trustees, at any time, on their giving five days' previous notice in any one of the newspapers of Cincinnati."

Section eighth defines the powers of the trustees; but provides "that they shall make no by-law or pass any order for the imposition of any tax, or the sale of any property, on account of the corporation, unless by the consent of said corporation, expressed by a majority of the members present, legally assembled."

The other sections have no especial importance.

On the 23d of March, 1830, Elisha Brigham conveyed to the Church, by its corporate name, for a valuable consideration, the real estate now in controversy, at the southwest corner of Race and Fourth streets, Cincinnati.

On the 19th of July, 1855, the Society adopted a preamble, a constitution, and certain by-laws. (Printed Record, pp. 22, 23.) Very few attendants at the Church omitted to sign these. Agreed Case, clause 12. (Printed Record, p. 15). The constitution, article second, declares:

"In addition to those persons who are qualified to be members under the act of incorporation, all who sign these articles shall become members; but any person may withdraw from the society by filing a notice to that effect with the secretary."

Article fourth declares "the duty of the members and officers to co-operate together in promoting the objects of the society, as specified in the preamble, by a regular attendance on its meetings" and observance of the by-laws.

On the 26th of February, 1859, thirteen members addressed a letter to the trustees (Printed Record, pp. 34, 35) requesting them "to call a meeting of the Society to consider the propriety of a change for another pastor." The petitioners say, in this letter, that they differ "widely" from Rev. Mr. Conway, the pastor in office, with regard to his views of Christian truth, and believe that his influence over them, "for good," as a clergyman and a pastor, is at end.

Thereupon, March 21st, the trustees called a meeting of the "pew-owners and pew-renters" only, for the 28th of March, "to consider the question of further retaining the services of Rev. Mr. Conway as pastor of the church." (Printed Record, p. 25).

At that meeting, March 28th, a resolution was offered, by Mr. Greene, in these words:

"That it is desirable to retain Mr. Conway as pastor of this church, and that his services as such are acceptable."

Pending the discussion of which, a question arose as to the qualification for suffrage; whereupon the chairman, Mr. Hosea, decided that only "pew-owners" could vote. (Printed Record, p. 29).

Mr. Goodman then moved that each "pew rented or sold" should be entitled to one vote; which Mr. Kebler moved to amend by adding that no member should have more than one vote—which amendment was adopted by twenty-one to twelve.

"*The vote was put to* pew-owners *only, by direction of the Chair, against the protest of Mr. Hoadly and others.*" (Printed Record, pp. 29, 30).

The question then recurred upon Mr. Goodman's motion as thus amended, and it was lost (on two trials) by a tie vote.

This question, also, by direction of the Chair, "under protest as before," was put to the *pew-owners* only. (Printed Record, p. 30).

The meeting, after some ineffectual discussion, adjourned until March 30th.

At the adjourned meeting, Mr. Hoadly moved to amend Mr. Greene's resolution by substituting what follows:

"*Whereas*, this Society is so divided in sentiment that the members can no longer work and worship together as one harmonious whole,

"*Resolved*, that ——— be a committee to draft a plan for a just division, and report the same to the annual meeting."

The substitute, after several preliminary votes, was adopted—Yeas, 27; Nays, 9. But, on each vote, the Chair allowed only "pew-owners" to be called, and Mr. Hoadly protested against the limitation.

Four of the defendants, William Greene, George Carlisle, William Goodman, and Jeremy Peters, were appointed the committee to report a plan of division. (Printed Record, pp. 31, 32).

At the annual meeting, April 4th, the Committee "reported, verbally, that it would be advisable to dispose of the church-property, and, if legal, to divide the proceeds in the proportion of the interest of the pew-owners, the proceeds

to be used for the purpose of establishing two churches, but doubts having arisen as to the legality of such a proceeding, they had decided to report their doubts and ask instructions." Whereupon the subject was re-committed to the same gentlemen, with authority to employ counsel and take legal advice. (Printed Record, pp. 32, 33).

At the same meeting, and preliminary to a choice of trustees for the ensuing year, Mr. Greene moved that *pew-renters* be authorized to vote upon all questions. "Carried unanimously." (Printed Record, p. 33).

At an adjourned meeting, April 11th, these resolutions were adopted:

1. "That Messrs. Greene, Carlisle, Goodman, and Peters be appointed a committee with power to sell the Church real estate, at private sale or public auction, or to lease the same perpetually, at their discretion, and that the trustees convey the same by deed of general warranty when sold, or, if leased, that they execute the necessary lease."

2 "That the trustees, after paying the debts of the church, transfer and hand over to a new board of trustees of a new religious society, to be formed by part of the members of this, such a proportionate part of the proceeds of said church-property as fairly may belong to such members forming a new church, reckoning according to the valuation of the pews, including sums now standing to the credit of parties which are not represented by pews."

The vote upon these resolutions was submitted to the "pew-owners" only, and was carried in the affirmative.

"A committee of two [Messrs. Anthony and Kebler] was then appointed," says the record, "to wait on the several pew-owners, and obtain their directions, in writing, as to the corporation to which they desired their respective interests to belong." (Page 37).

At another adjourned meeting, April 25th, the committee in reference to the real estate reported that they had, as yet, been unable either to sell or let the same; where-

upon Mr. Force moved that they be required to advertise it for sale, at auction, on the 16th of May, unless previously sold or let by private contract, and at such terms as the committee might prescribe.

At *this* stage of proceedings, the plaintiff interposed—and the Court of Common Pleas enjoined the trustees then in office (Messrs. Greene, Goodman, Allen, Harrison, and Hoadly) as well as Messrs. Carlisle and Peters, together with the corporation by name, from selling the church-property as proposed.

Meanwhile, a number of the members had formed a separate religious society, "Church of the Redeemer," and adopted a covenant as well as a constitution and certain by-laws for themselves. (Printed Record, pp. 20, 21, 22). These define the qualification of membership in the new society, provide for the election of its trustees, etc.

I. We insist that the resolutions of April 11th, 1859, were not adopted by the First Congregational Church in the mode required by the 8th section of its charter.

The letter of February 26th requested the trustees to call a meeting of the "Society" to consider the question of discharging Mr. Conway from his pastoral office; instead of which, the trustees called a meeting of the "pew-owners and pew-renters" only, and thus, by the terms of their notice, excluded all other members from participation or even attendance.

At that meeting (March 28th) the chairman, Mr. Hosea, directed every question to be put to the "pew-owners" only, and thus excluded a portion of those (pew-renters) whom the trustees had summoned.

It seems that the "pew-owners" present, thirty-two, were divided in opinion, equally, as to the right of "pew-

renters" to vote; and by that equality of division, *in which his own vote was counted*, the mandate of the Chairman became conclusive.

We acknowledge that "pew-owners" were members of the corporation: the 6th section of the charter so declares in express terms. But they were not the *only* members. The corporation was created, *in presenti*, by the first section of the charter:

"That Elisha Brigham, William Greene, Nathaniel Guilford, Jesse Smith, Christian Donaldson, *and their associates for the time being*, be and they are HEREBY created and declared a body corporate and politic, by the name of the First Congregational Church of Cincinnati, and, *as such*, shall remain and have perpetual succession; subject, however, to such future regulations as the Legislature may think proper to make touching their matters of mere temporal concernment."

When this charter was granted, January 21st, 1830, the First Congregational Church had no house of worship: it had none, as appears by the record, until after the deed from Elisha Brigham, March 23d, 1830, and until the present building was erected and completed. There could be, of course, not a single pew-owner. But there was, nevertheless, a body corporate and politic—composed of Messrs. Brigham, Greene, Guilford, Smith, Donaldson, and "their associates" at that time. And this body corporate and politic, "as such," was to remain, and to have *perpetual* succession. It was to consist of all who, from time to time, should be associated, by the name of the First Congregational Church of Cincinnati, for public worship. (Milford and Chillicothe Turnpike Co. *v.* Brush, 10 Ohio Rep. 113, 114; Fire-Department of New-York *v.* Kip, 10 Wendell, 269; Lessee of Frost *v.* Frostburg Coal Co. 24 Howard, 278). It was not merely a corporation in abeyance until a house of meeting had been erected; else how could it receive any title, as grantee, by the deed of Brigham? Nor will its corporate existence be determined, or impaired,

by the destruction or sale of its church-edifice; else how can the resolutions of April 11th, 1859, be any thing less than an act of suicide?

And yet, as all must agree, the destruction of the church-building would extinguish, utterly, the title of the pew-owners. (Price *v.* Methodist Episcopal Church, 4 Ohio Rep. 541; Freligh *v.* Platt, 5 Cowen, 496; Voorhees *v.* Presbyterian Church of Amsterdam, 8 Barbour, 151, 152; Matter of the Reformed Dutch Church, 16 Barbour, 240, 241; Wheaton *v.* Gates, 18 New York Rep. 404, 405; Wentworth *v.* First Parish in Canton, 3 Pick. 346, 347. See, also, Pawson *v.* Scott, Sayer, 177, 178).

The design of section sixth, in the charter, is only to confer upon a pew-owner the privileges (temporal) of membership, without his being a member in fact. It can have no other meaning consistent with legal principles.

As to pew-renters, merely as such, they are not corporators. (Leslie *v.* Birnie, 2 Russell, 114.) The "associates" of the Church, as a religious society, are the persons who hold the corporate character by succession from those named, originally, in the charter. (Robertson *v.* Bullions, 1 Kernan, 247, 248, 249, 250; Wyatt *v.* Benson, 23 Barbour, 327.) And it is for the *Society* to declare, in the form of a constitution or by-law, who shall, and who shall not, enjoy the right of suffrage. Or, if there be no express rule, the question must be determined by a reference to past usage. (The State *v.* Crowell, 4 Halsted, 411.)

But we have, in the present case, an express rule. The constitution adopted by the society, on the 19th of July, 1855, declares that "in addition to those persons who are qualified to be members under the act of incorporation pew-owners) all who sign these articles shall become members."

That leaves nothing to doubt or argument, and even precludes any question of usage. It is said that Messrs. Greene, Stetson, and Walker expressed the opinion, privately, at some time or other, that only pew-owners could

vote; but, with all respect to those gentlemen, their opinions, in this regard, are inadmissible. Opinions do not even tend to prove the usage in such cases. (Attorney-General *v.* Drummond, 1 Drury & Warren, 353).

That the exclusion of a number of members, and especially of a whole class, from voting upon any question where the consent of the corporation, *as such*, is requisite, will avoid the proceeding utterly, seems not to be disputable. (Case of St. Mary's Church, 7 S. & Rawle, 530; *Ib.* 543).

II. It is said, however, that on the 23d of May, 1859, the First Congregational Church adopted other resolutions to the same effect:

"*Whereas*, it is for the interest of this church that its property should be sold, and the proceeds distributed to the two bodies into which the membership is divided, if the same can legally be done,

"*Resolved*, that we consent to a sale of the real estate of the church upon the following terms: one-fourth cash, balance in one, two, and three years, with interest from the day of sale, payable annually, the deferred payments to be secured by mortgage on the premises, the proceeds to be equally divided between this Church and the Church of the Redeemer.

"*Resolved*, that the trustees be instructed to enter their appearance in the Court of Common Pleas, in the suit brought by William Wiswell against them and others, and ask that Court to give judicial sanction to, and to direct the trusts of the charter to be carried out by, such sale and division."

These resolutions constitute no defence to the plaintiff's action: they were not passed, or even proposed, until after the action had been commenced, and the injunction allowed. Can the Court give them any "judicial" sanction?

1. We answer (first) not in *this* form. The act of March 11th, 1853, "to authorize religious societies to dispose of real estate in certain cases," Swan & Critchfield, vol. 1, p. 371, declares:

SEC. 1. "That when any real estate shall have been, or may hereafter be, bequeathed [devised] purchased, donated, or otherwise entrusted to any religious society in this State, or to any of the trustees or officers of any such society, for the use and benefit of any such society, or for any other purpose, and such society shall be desirous to sell, exchange, or incumber, by mortgage or otherwise, any such real estate, it shall be lawful for the Court of Common Pleas of the proper county, upon good cause shown, upon petition of any such society, or some person authorized by them, to make an order authorizing the sale or incumbrance of any such real estate; and said Court may include, in such order, directions how the proceeds of such sale or incumbrance shall be appropriated or invested: provided such order shall, in no case, be inconsistent with the original terms upon which such real estate became invested in or intrusted to such religious society."

SEC. 2. "That where any religious society shall petition as provided for in the preceding section, all persons who may have a vested, contingent, or a reversionary interest in the real estate sought to be sold or incumbered, shall be made parties to said petition, and such parties shall be notified of such petition in the same manner as is or may be provided for in cases of petitions for partition of real estate: provided, that the provisions of this act shall not extend to any grounds used or occupied as burial-places for the dead."

The act to provide for the partition of real estate, passed Feb. 17th, 1831, section third, requires notice, by publication or personal service, for a term of forty days. (Swan & Critchfield, vol. 1, pp. 895, 896).

There are four classes of persons to whom (as defendants) the second section of the act passed March 11, 1853,

may refer: 1. The heirs of Brigham. 2. Pew-owners and lessees. 3. Corporators as such. 4. Mortgagees and other incumbrancers. We need not inquire which of these, or whether all of them, should have been cited; for nobody was cited by the answer or cross-petition, and no process ever issued.

It is not a case in which some of the pew-owners or corporators could, *as defendants*, represent the rest: the statute requires that "all" of them (if any) shall be made parties.

If it be alleged that the corporation could file a petition, *ex parte*, in this instance, as representing all the corporators (pew-owners included) and that the heirs of Brigham have no reversionary estate, and there are no incumbrancers, we answer that such a petition must be filed separately, and proceeded with, as far as possible, according to the terms of the statute.

At all events, inasmuch as they constitute no defence to the original action of the plaintiff, and as they can not be the foundation of a *counter-claim* against him, except as one pew-owner in many, the resolutions of May 23d are wholly beside the present case. (Code, sec. 94. Hill *v.* Butler, 6 Ohio State Rep. 216, 217).

2. The resolutions never were adopted by the *Trustees* of the church.

The Trustees could not sell the property without the consent of the corporators legally assembled; but that is intended by the charter (section eighth) as a restraint upon, and not as a substitute for, their separate discretion. The minority of the Church can not be deprived of the right to have a subject of such importance considered by the trustees, in their distinctive capacity, as the guardians of its temporalities. (The People *v.* Steele, 2 Barb. S. C. Rep. 397, 398).

Nor can the votes of the trustees, individually, given at a meeting of the corporators, and in that character, supply this defect. (Rex *v.* Mayor and Aldermen of Carlisle, 1

Strange, 385, 386. See, also, Commonwealth *v.* Cullen, 13 Penn. State Rep. 133).

3. The meeting of the corporation at which those resolutions were passed (May 23d) had not been legally convened.

It was not a regular meeting, but was called by the trustees, as an "extra" meeting, in virtue of the seventh section of the charter. The usual rule is that *such* meetings require notice to each corporator, personally, as well of the time and place as of the particular business to be considered. (Rex *v.* Langhorne, 6 Nev. & M. 203). We agree that personal notice, in this instance, was unnecessary—the charter having authorized "extra" meetings to be called by an advertisement in one newspaper. But the charter has not dispensed with the necessity of specifying, *in such advertisement*, what particular business is to be considered. (Rex *v.* Mayor of Doncaster, 1 Burrow, 738; Rex *v.* Faversham Fishermen's Co. 8 Term Rep. 356).

A general statement would suffice, perhaps, for the transaction of ordinary business, but not for the election of an officer, the imposition of a tax, the sale of lands, or (especially) the transfer of corporate property to some of the members. (Savings Bank of New Haven *v.* Davis, 8 Conn. Rep. 191, 192).

There is no *presumption* that all the members attended at such a meeting, nor that they understood (except as particularly stated in the notice) what business was to be transacted or proposed. (Wiggin *v.* Freewill Baptist Church in Lowell, 8 Metcalf, 312).

The advertisement (Printed Record, p. 40) was in these words:

"*To the Members of the First Congregational Church of Cincinnati:*

"You are hereby notified to attend an extra meeting of the Church, to be held on Monday evening, May 23d, 1859,

at 8 o'clock, at the church edifice, corner of Fourth and Race streets, *for the purpose of considering the propriety of selling the real estate of the corporation, and for other purposes.*"

The sufficiency of this may be determined by asking whether it contains a suggestion that the proceeds of the sale, if made, would be applied to other than the *ordinary* corporate uses.

That was the essential part of the business which actually transpired. Many corporators may have regarded it as a question of indifference whether the society retained the present church and premises, or sold them and purchased another lot, in some other neighborhood, for the purpose of building a larger house, or of building a smaller house and devoting a larger sum to the maintenance of the pastor, or to the endowment of such "institutions of charity or education" as the charter contemplates; and being indifferent, as between *those* alternatives, may not have cared to vote or attend. But the same corporators would have attended and voted (as we may well assume) if they had been warned that one-half the proceeds of sale, or anything like it, would be given to another religious society, and thus forever placed beyond their control.

In the case of the Mayor and Aldermen of Carlisle, 1 Strange, 385, which was a *mandamus* to restore one Poulter to the office of capital citizen, it appeared that the corporation consisted of a mayor, aldermen, bailiffs, and capital citizens, together composing a common council and having the power of election, but that the power of amotion was in the mayor and aldermen only; that, on such a day, the common council was assembled, and Poulter, being summoned, would not attend; whereupon, for a cause confessedly legal, the mayor and aldermen made an order for his amotion. PRATT, C. J., said:

"An alderman, when he receives a summons to appear at the common council, considers with himself that they are a

great many of them, and probably his single voice will not be wanted, and therefore he stays at home; but when he is summoned to meet with the mayor and other aldermen only, then, says he, there are but twelve of us in all, and therefore my voice and advice (which the others have a right to) may go a great way: besides, the powers lodged in us, as a court of mayor and aldermen, are of an higher nature than our other powers; and therefore, upon both accounts, my presence may be necessary, and I will be sure to be there. All this is natural enough, and is it then reasonable the others should proceed to act as mayor and aldermen only, when they come together in common council? * * * It weighs nothing with me that the cause of removal happened sitting that assembly; for they ought to have broke up, and summoned him again to appear before them in their distinct capacity." *Peremptory* mandamus *awarded.*

In Wheaton *v.* Gates, 18 New York Rep. 395, 396, a case parallel with this, and hereafter to be specially mentioned, the Court observed a wide distinction between the sale of its lands, by a religious society, with intent to employ the proceeds for some corporate purpose, and a sale in order to divide the proceeds among the corporators:

"The scheme of the trustees, conceding that the application to the County Court was made by the authority of the board, was an entire one—to sell the church-lot, and dispose of the proceeds in the manner stated in the petition and in the order. They did not ask to sell in order to pay the debts, and that the balance of the proceeds might remain in the treasury, subject to future appropriation for the purposes of the society. Upon the statement in the petition, the debts amounted to only a small proportion of the value of the property; and if we look to the auction-sale which was actually made, it will be seen that there was a surplus of nearly $9,000 after providing for the mortgage of $2,700; and the remaining debts were trifling, not much exceeding the value of the personal property. It is not

represented, in the petition, that a sale was necessary for the payment of the debts, and the referee has found that such a necessity did not in fact exist. The petition asked that this considerable surplus should be distributed among the pew-holders, and the Court so ordered. *The general scope and object of the proceeding, it appears to me, was the division of the property of the society among the owners of pews.* The sale was sought for *that* purpose, and the payment of the debts was only incidental." (Pages 402, 403).

The answer, in this case, does not pretend there is any necessity of a sale for the payment of debts, nor for any other purpose than a division of the proceeds.

III. The resolutions of May 23d, as well as those of April 11th, are illegal in assuming to direct an application of the proceeds of corporate property to other than corporate uses.

The charter (section third) declares that ALL the property acquired by the corporation, including the house of worship and the parsonage-house, "*shall be considered as held in trust,* under the management and at the disposal of said corporation, *for the purpose of promoting the interest of their church, defraying the expenses incident to their mode of worship, and maintaining any institutions of charity or education that may be therewith connected.*"

The resolutions of April 11th direct the trustees, after paying the debts of the church, to "*transfer and hand over to a new board of trustees of a new religious society,* to be formed by part of the members of this, *such a proportionate part of the proceeds of said church-property as fairly may belong to such members forming a new church,* reckoning according to the valuation of the pews," etc.

Those of May 23d direct the proceeds "to be equally divided between *this* Church and the Church of the Redeemer." And they ask the Court for judicial sanction,

and that, "*by such sale and division*," the "trusts of the charter" may be rendered effectual.

We answer that "such sale and division" will *destroy* the trusts of the charter; and, therefore, no Court can authorize, or even tolerate, the scheme. (Case of St. Mary's Church, 7 S. & R. 558, 559; Milligan *v.* Mitchell, 3 M. & Craig, 83, 84).

The term "*interest of their church*" in the charter (section third) is explained and limited by the words which immediately follow it—"*defraying the expenses incident to their mode of worship, and maintaining any institutions of charity or education that may be therewith connected.*" Copulatio verborum indicat acceptationem in eodem sensu. (Broom's Legal Maxims, 450, 451).

The corporation has no power to hold, or even to acquire, lands or money for the support of any religious society except its own; and, *a fortiori*, can not devote to the separate use of another society, religious or secular, the lands or the money, or any portion of them, acquired for its own use. A single corporator may object, and the assent of all the corporators would not legalize such an act. (Bagshaw *v.* Eastern Union Railway Co. 7 Hare, 114).

Wheaton *v.* Gates, 18 New York Rep. 395, 396, was the case of a Congregational Church which had fallen into disorder, and some members of which had constituted a new society, called a pastor, and separately organized themselves. The trustees of the old corporation agreed, by a vote of two-thirds, with the assent of the corporators, "almost unanimously," after two re-considerations of the subject, to disband its membership, sell the church-property, and apply the proceeds, after payment of its debts, to the use of the several pew-owners. The County Court, under a statute similar to our own, had sanctioned this agreement, and it had been partially carried into effect. But some of the members brought an action to restrain the trustees from any further proceeding in that direction, and to have the entire agreement annulled.

PER CURIAM. "The trustees had no authority to distribute the property of the society among its individual members, *or any class of them.* Their duty was to preserve and administer it in the promotion of the purposes for which the corporation was created. The Court could not, according to the statute, approve of a plan for any application of the moneys arising upon a sale, *except one which was considered to be for the interest of the society as an association which was to continue organized for the purposes of its creation.* There is a sense in which it might promote the interests of the individuals composing this religious organization to dissolve their connection, and establish new relations; but this is not what is meant by the statute. It was not in the power of the trustees, or a majority of the members of the society, or the County Court, or of all these authorities together, to abolish the corporation, or dissolve the society. If every individual having any interest in the matter should concur, it might be done; because there would be no one to question the act. Bnt while any number of the members desire to continue the connection, all the others can not, by their own act, dissolve it. Now, it is not possible that it could be considered to be for the interest of the society, in the legal and proper sense of that expression in the statute, to dissolve it, and distribute its property among its individual members." (Pages 403, 404).

The distribution attempted by the resolutions of April 11th, 1859, was to be "according to the valuation of the pews," and without any regard to the corporators at large. This would be clearly illegal; inasmuch as the owners of pews have no right, as owners, or part-owners, in the land, or in the church-edifice. (Wheaton *v.* Gates, 18 N. Y. Rep. 404, 405; Matter of the Reformed Dutch Church, 16 Barbour, 240, 241; Price *v.* Methodist Episcopal Church, 4 Ohio Rep. 540, 541).

The resolutions of May 23d, 1859, are quite as objectionable. They propose a division of the proceeds, "equally,"

between the members of the Church who remain and those who have seceded from it. That is only a gift of a part of the corporate property to a part of the members, and for their separate and individual use.

Of what consequence can it be, in a legal point of view, that the seceding members intend to endow another church, even of the same persuasion? That might, or might not, be for the interest of religion, but can not be for the interest of the old corporation as such. It diminishes the property of the corporation, and disables the corporators who remain (by so much) to defray the expenses incident to their mode of worship, or to establish and maintain institutions of charity and education.

As truly observed by the Court of Appeals, in Wheaton *v.* Gates, 18 N. Y. Rep. 404, there is no "legal and proper sense" in which it can be for "THE INTEREST" of the First Congregational Church, *as a corporation*, to distribute the proceeds of this land, upon a sale, or any portion of the proceeds, to the members of the Church as individuals, or as divided into two societies; and this whether the members apply their respective shares to secular purposes, or, by applying the means thus obtained to the foundation and maintenance of a "new" religious society, relieve themselves from an expenditure otherwise unavoidable.

The gentlemen who constitute the Church of the Redeemer deny that they have seceded from the First Congregational Church. How can it be otherwise?

We engage in no discussion whether the "views of Christian truth" inculcated by Rev. Mr. Conway be, or be not, in accordance with those entertained by the founders of the First Congregational Church. There is a way to ascertain that, but not in the present action, or upon the pleadings hitherto filed. By the discipline of such societies (Keyser *v.* Stansifer, 6 Ohio Rep. 365) a majority of the members decide all questions of faith and practice—as effectually as, in other religious organizations,

they are decided by bishops, presbyters, and priests, or by convocations, synods, councils and conferences.

The gentlemen who signed the letter of February 26th, 1859, commenced by arraigning Mr. Conway before the proper tribunal; but instead of persevering in that course, and abiding the result, abandoned the Congregational Church and founded the Church of the Redeemer.

It is not material to inquire what differences, if any, can be predicated of the "preamble" in one and the "covenant" in the other. We take the seceders at their own word: that they differed "*widely*" from Rev. Mr. Conway "in his views of Christian truth." They refused, for that reason, to attend upon his ministry, and have organized "a *new* religious society" in which their own sentiments are to be inculcated. No man denies their right to do this; but, in doing it, they can not destroy the identity, nor impair the usefulness, of the Church which remains. (Trustees of the Presbyterian Congregation of Fairview *v.* Sturgeon, 9 Penn. State Rep. 321, 322; *Ib.* 329, 330; Attorney General *v.* Hutton, Drury, 520, 521; Smith *v.* Smith, 3 DeSaussure, 557; *Ib.* 582, 583, 584).

Nor is it material whether the seceders were a majority or a minority of the old organzation. They left it; and that is enough. (Baker *v.* Fales, 16 Mass. Rep. 503, 504; Den *v.* Bolton, 7 Halsted, 214, 215; Cammeyer *v.* Corporation of the United German Lutheran Churches, 2 Sandf. Ch. Rep. 214).

Where dissensions have arisen, and schism follows, although it be decided, judicially, that there is no intelligible difference in doctrine or opinion, those who adhere to the *old* organization are entitled to its property in exclusion of all others. (Craigdallie *v.* Aikman, 2 Bligh, 529; Same Case, on former appeal, 1 Dow's Parl. Cas. 15, 16; Foley *v.* Wontner, 2 Jac. & Walker, 247. See, also, Field *v.* Field, 9 Wendell, 394).

It is said that the members of the Church of the Re-

deemer are yet corporators in the First Congregational Church. Then they ask of the other corporators a right to use, *separately*, one-half the corporate property, and to retain, at the same time, a proportionate interest in the residue. It must be so; or else they regard themselves as no longer connected with the old organization.

Nor is it material whether a *majority* of those who remain have, or have not, consented to such an arrangement, although nothing of that sort appears. It would be none the less illegal, and any corporator has a right to object. (The State *v.* Steele, 2 Barb. 397, 398; Stebbins *v.* Jennings, 10 Pick. 193, 194; Attorney-General *v.* Hutton, Drury, 507).

It may be said that this separation was made necessary by reason of the personal objections which Mr. Conway had provoked against himself, involving questions somewhat more of a social than theological character. Whilst this was, perhaps, an element that entered into the programme of those who withdrew from the church, at the same time it is perfectly obvious that they did not subscribe to the theological doctrines taught by Mr. Conway as the pastor of the First Congregational Church, and that was the controlling motive for the separation on their part. This is shown in several ways: 1st. The paper of the 26th of February, 1859, signed by thirteen of those who were dissatisfied (Printed Record, pp. 34, 35) is designed to effectuate his removal, for the sole reason of their "widely differing from the Rev. Mr. Conway, our pastor, in *his views of Christian truth.*" 2d. The attempt to depose Mr. Conway, without any other accusation against him. 3. The *Covenant* which they adopted when they formed the "Church of the Redeemer." (Printed Record, p. 20).

We do not profess to enter into an examination of the the theological evidences at hand to prove that Mr. Conway taught the *true* doctrines of the Unitarian Church. A

careful examination and consideration of these evidences, to be found in the printed works of such lights of the church as Dr. Chalmers, Clark, Bellows, Martineau, Frothingham, Higginson, Longfellow, Furnace and others, have left us no room to doubt that Mr. Conway preached the Unitarianism of the First Congregational Church, and of those whose munificence founded it, and sustained it for so many years in its infancy, and remained its steadfast friends in all its years of poverty and prosperity. If, then, they went off because they could not agree with the majority who remained, on theological questions, they became *seceders*, and, by retiring, lost all the interest they may have had in the church-property, and the right to participate in the management of the affairs of the church, both secular and ecclesiastical.

If the court will carefully consider the Covenant of the Church of the Redeemer and the other papers (to be found in the Printed Record) which were, from time to time, adopted by the First Congregational Church as declarations of religious principles, and Mr. Conway's pastoral letter, to be found in the Printed Record, commencing on page 26, they will be able to appreciate the theological difference to which we have referred. But as we have said elsewhere, we do not wish to enter upon this discussion.

The error of the defendants consists in supposing that the corporators of the First Congregational Church have some right, *as individuals*, in its property, and, therefore, may disband it, or divide it, in order to obtain their respective shares. They have no right except as corporators; and that must be enjoyed within the corporation, and according to the charter, by-laws, and established usage. It can not be enjoyed as members of another religious society, corporate or unincorporated, nor as individuals. (Methodist Episcopal Church *v.* Wood, 5 Ohio Rep. 287).

Nor is it possible to suppose that two religious societies, with different constitutions and by-laws, each with a board of trustees and a pastor, can co-exist under one form of incorporation. That allegation was made in the same case (Methodist Episcopal Church *v.* Wood, 5 Ohio Rep. 287, 288) but was totally rejected.

It is argued that a division of the corporate property would be for the spiritual welfare of all the members (as well those who remain as those who have seceded) and examples are cited in proof and illustration. That may be true; but, as yet, Courts of civil jurisprudence have not attained such heights of enquiry.

But, whatever the advantage to corporators, temporal or spiritual, we must again specify a distinction between *their* interest and the interest of the First Congregational Church as a body politic and corporate. For the corporation is quite another thing, in law, than the mere aggregate of its members. (Society for the Illustration of Practical Knowledge *v.* Abbott, 2 Beavan, 567; Bligh *v.* Brent, 2 Y. & Collyer, 295). It is an artificial person, and has the faculty of using its own property and funds. The charter requires it to use them, in this instance, for particular purposes, *and under its immediate supervision:*

"All such property, with the house of worship and the parsonage-house, shall be considered as held in trust, UNDER THE MANAGEMENT AND AT THE DISPOSAL OF SAID CORPORATION, for the purpose of promoting the interest of their church, defraying the expenses incident to their mode of worship, and maintaining any institutions of charity or education that may be therewith connected." (Sec. 3).

How can the "trust" be fulfilled, as the Legislature commands, after the First Congregational Church shall have transferred, irrevocably, to the Church of the Redeemer as well "the disposal" as "the management" of one-half its wealth? And yet the Court is asked to "sanction" a sale of the house of worship, at public outcry, and without any other necessity or cause, in order to accomplish a

result so illegal. Baker *v.* Fales, 16 Mass. Rep. 496, 497, deserves to be read in this connection.

Smith *v.* Swormstedt, 16 Howard, 288, contravenes no part of our argument. That was a case of trust for the benefit of individuals — "traveling, supernumerary, and worn-out preachers, and the widows and orphans of such preachers" — and not of trust for an object beside the interest of individuals. The property had been created by the efforts of the beneficiaries themselves, and was wholly subject to their disposition in General Conference assembled. They had agreed upon a plan of administration resulting from their own schism, and yet perfectly in accordance with the original design; to which plan, for the reasons we have just indicated, the Court gave its countenance. (16 How. 304, 305, 306).

The error of the Circuit Court was in confounding such a case with one like the present. (5 McLean, 369, 370).

Nor do we question the authority of Keyser *v.* Stansifer, 6 Ohio Rep. 363, in any particular. That was a bill exhibited by a trustee who, "in a course of discipline," had been expelled from a Congregational society, "Particular Baptists," and other members who had seceded from it, charging the officers and members who remained with certain errors in religious faith and practice. "This claim is not set up," said Judge LANE, "because the minority are excluded, but because it is asserted the majority have deserted the principles under which the association was first organized." (Page 365). The decision would be conclusive in a similar suit by the members of the "Church of the Redeemer" against the First Congregational Church and its adherents.

Much has been said, by opposing counsel, as to the advice of Courts in other religious controversies; but those controversies differed, all of them, in some essential partic-

lar, from the present one. We find no instance in America, nor in Great Britain, where judges have spoken with tolerance of selling a house of worship, "at auction," peremptorily, in order to relieve gentlemen who desire to establish a new church from the usual expense of such an enterprise.

R. M. CORWINE.
GEO. E. PUGH.