

## CAESAR AND THE MEIDUNG

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Apart from the general issues involved in conscientious objection to war, and the specific problem of the Jehovah's Witnesses, there has been perhaps no more notable, or at least no more generally noticed, set of events demonstrating the difficulties of relating the state to minority religious groups than the so-called "Mite" case recently tried in Wooster, Ohio. For its value as thus illustrative of a broader problem, this incident is worthy of study to illuminate the social and religious differences arising from the contrast in basic values and thought-patterns between legal and sectarian-religious philosophies.

The word "mite," which shall hereinafter be scrupulously avoided, is of course nothing but an imprecise anglicization of the Pennsylvania-Dutch *meide*, from the German *meiden*, to shun; and refers to the general Amish practice of avoidance of expelled members, in accordance with Article XVII of the Dortrecht Confession of 1632. The suit under discussion, Wayne County case No. 35747, was brought by Andrew J. Yoder, a former member of the North Valley (Helmuth) District Old Order Amish Mennonite congregation of southeastern Wayne County, Ohio, against the officers of the congregation, because he had been shunned consequent to his transfer of membership to the near-by Bunker Hill Conservative (Beachy) Amish Church.

Most of the facts in the case are well established. Andrew Yoder's infant daughter, Lizzie, needed frequent medical care for which she had to be taken to Wooster, sixteen miles distant. Chiefly for this reason, although there were others in addition, Yoder desired to transfer his membership to the Beachy church, which would permit him to own an automobile. He began to attend the Bunker Hill church about July 1, 1942, and some weeks later purchased a car. Before the purchase, however, Yoder was placed under the ban by the Old Order church from which he had withdrawn. The precise details and chronology of this church action are the only disputed questions of fact, and will be discussed later. The avoidance was practiced quite strictly until the time of the trial in 1947.

The first action toward a resolution of the difficulty was a letter sent from the Bunker Hill church to the Helmuth church in July of 1946, stating that Andrew Yoder and his wife were faithful

members of that church, and had been in good standing for four years. This was accompanied by a covering letter from Abner Schlabach, minister of the Beachy church, to Amish Bishop John Helmuth, expressing his hope that the *Meidung* could be lifted. To these letters there was no reply or acknowledgment. Soon thereafter Yoder began to seek legal aid from Charles C. Jones of Wooster, an attorney who had had previous dealings with the Amish in connection with their difficulties under the state school-attendance law. Jones' first effort, beginning in November, 1946, in two letters and a conference with the Amish church officers, was an attempt to persuade them to lift the ban without litigation, but since no adjustment could be made, action was filed in the Common Pleas Court of Wayne County in February, 1947, asking damages of \$10,000 from each of the four defendants; John Helmuth, Bishop; John Nisley and Isaac Miller, ministers; and Emanuel Wengerd, deacon; and further asking an injunction forbidding further enforcement of the avoidance.

The suit was tried in the Court's September term, November 4-7, 1947, in Wooster. The jury found for Yoder, and the injunction was granted, but the total damages awarded were only \$5,000, one eighth of what had been asked. The defendants made no move toward payment, and consequently Helmuth's farm was sold at Sheriff's sale. The balance of the assessment was then paid by an anonymous friend in John Nisley's name.

This historical outline should serve as sufficient introduction to the discussion which follows, which attempts to find in this case and the issues it raised a further understanding of its relations both to the law itself and to the clash between the law and the church. The intention is not so much to debate the merits of this particular case as by an analysis of it to clarify the law and its implications.

Two elements in the writer's own thought, which might limit the fairness of the presentation, must be admitted. The first is the conviction, grounded upon theology and confirmed by this study, that there is inevitably a clash between the law and any minority church whose beliefs involve ethical commitments. This clash is not due to an accidental misunderstanding but to a basic antithesis between the essential natures and intentions of the two social organisms. And secondly, I believe in avoidance. I cannot approve of this application of the *Meidung* to Andrew Yoder, nor unqualifiedly of the Old Order Amish pattern in general, but it seems utterly logical when an individual chooses to break fellowship with his brethren concerning the most basic possible issues, those dealing

with Christian ethics, that that breach must extend to other types of social intercourse of derivative value.

A great difficulty arises in the legal evaluation of this case because of its very uniqueness. As far as can be ascertained, there have been only two similar cases in legal history. The first, *Liechty vs. Holdeman et al.*, was tried in Williams County, Ohio, in 1878, but was not known at the time this case was tried.<sup>1</sup> The second, very similar to the *Wooster* case, *Gingerich vs. Swartzentruber et al.*, was tried in Holmes County, Ohio, in 1919. The latter was used in this case as a quite significant precedent. In each of those early suits the plaintiff won the injunction requested, and *Liechty* was awarded damages as well. The relevance of the Holmes County case as a precedent in the points of law involved in the *Wooster* case will be further discussed later.

Because of the poverty of legal precedents it was necessary, both in the plaintiff's pleadings and in the Charge of the Court to the Jury, to make use of numerous somewhat remote analogues. This discussion will therefore be forced to deal with such unrelated problems as labor boycotts, benevolent brotherhoods, and Mormon polygamy. As to the relevance of these parallels there is of course much question, but they constitute the closest approach to some of the problems that can be found in the law.

It must first of all be made clear that no questions of law were decided in this case. Matters of law were discussed in the plaintiff's pleadings, but naturally not in anything said by the Amish defendants, who spoke for themselves without legal counsel. The charge and instructions of the court to the jury defined the legal issues involved, paralleling to some extent the plaintiff's interpretation, and the jury decided only whether the defendants did conspire to deprive Yoder of any legal rights, which by the definitions already given was naturally a foregone conclusion. This analysis will therefore not concern itself with the jury's verdict, but will be confined to the legal questions underlying it.<sup>2</sup>

<sup>1</sup> John Holdeman, of Wayne County, founder of the Church of God in Christ, Mennonite, had excommunicated Joseph Liechty from a Williams County congregation which was under Holdeman's jurisdiction, on the charge of drunkenness. Liechty brought suit against Holdeman and several other members and officers of the church because his wife shunned him. He argued that he had already withdrawn from the church before he was excommunicated, and that shunning was not practiced by any Mennonites except Holdeman's "faction." *Williams County Civil Records*, XVII pp. 409ff.

<sup>2</sup> Much assistance in becoming acquainted with this case and its issues has been given by Judge Walter J. Mougey and by Charles C. Jones, to whom great indebtedness must be acknowledged. The fact that this study has led me to conclusions often in opposition to their analyses should in no wise be taken as implying any lack of integrity on their part or of fairness in the conduct of the trial. Although much

## I. Was the excommunication valid?

First in logical order, though not in importance, this issue is the only one concerning which there was an unresolved contradiction as to the actual facts. Yoder held that the church had no legal right to exercise discipline over him, since he had voluntarily transferred his membership before any action was taken.<sup>3</sup>

... at the time of withdrawing his membership in the Old Order of the Amish Mennonite Church he informed the officers and members of said church that the following were his reasons for so withdrawing . . . :

1. That he was opposed to the rule of said church prohibiting the male members from wearing suspenders which contained rubber.
2. That he was opposed to the rule prescribing boycotting . . . .
3. That he was opposed to the rule . . . boycotting members of the church who refused to boycott . . . .
4. That plaintiff desired to purchase and own an automobile to afford transportation and facilitate his farming operations and to permit him to have transportation to take . . . his infant, crippled child for treatment. . . .
5. That by law plaintiff claimed he had a natural and indefeasible right to worship God according to the dictates of his own conscience and he desired to withdraw his membership . . . and that he desired to enjoy religious liberty. . . .<sup>4</sup>

Following his withdrawal, with no warning nor any opportunity to defend himself, he was illegally excommunicated and thereafter shunned.

The story of the defendants differs in one significant detail. They claim unanimously that after Yoder began to attend the Bunker Hill Church and before the act of excommunication they had visited him and requested that he explain his conduct to the satisfaction of the church.

We went and talked to him on the matter of his not coming to church, and as far as I recall he has not given (did not give) us any particular reason.<sup>5</sup>

Now when he was expelled was he given notice to appear and Defend himself?

Yes . . . .

was gained, by way of introduction to the case, from personal interviews with both these gentlemen and with one of the defendants, the attempt has been made to limit this paper, with few exceptions, to material which can be verified from the public record, either from legal documents and court records, copies of which are in the Goshen College Mennonite Historical Library, Goshen, Indiana, or from newspapers.

<sup>3</sup> "Plaintiff says that he was not expelled from membership in the old order of the Amish Mennonite Church, but withdrew his membership therefrom voluntarily, as aforesaid, and therefore says that the defendants had no constitutional or legal right to enforce Article 17. . . ."—*Petition of Plaintiff, First Cause of Action*.

<sup>4</sup> *Ibid*.

<sup>5</sup> John J. Nisley, *Argument to the Jury*.

After the four of you talked together then you decided that one or two or more of you Defendants deliver the notice to Andy?  
That's right.  
That notice was for Andy to appear at this meeting?  
He was asked to come and explain. . . .  
. . . did Andy come to any meeting to defend himself?  
He didn't come. He was called to but didn't come.<sup>6</sup>

When after this request and possibly another notice he failed to appear to defend himself the action of the church was taken. At the time when he was asked for an explanation he mentioned neither that he needed an automobile for his daughter nor that he disapproved of shunning.

. . . what was the purpose of that visit?  
It was our rule to have a conversation with him.  
What did you say to him?  
Well we told him we would like for him to stay with our church. We couldn't see any reason why he left.  
Did he tell you he had to have a car to take his child to the doctor?  
I don't think so.  
Did he tell you then he didn't believe in the "ban" or "shun" or "boycotting" or "miting" other members?  
I don't think so.  
What did he say to you?  
He said he was going and we should just do the best we can and that is what we did.<sup>7</sup>

You were being kind to him when you did not permit him to have a car to take his child for medical care?

I didn't know that. I never heard that until we heard that from Mr. Jones.<sup>8</sup>

Concerning a question of fact only the jury is legally competent to decide, and therefore it must be assumed that their decision for

<sup>6</sup> John W. Helmuth, under examination by George Barnard, Attorney for Plaintiff (associate of Charles C. Jones). Cf. also the Answer of Defendants: "He does not say what is true when he says he voluntarily took his membership away from the Church. He knows that he was asked to explain to the church why he stopped going to church services and no longer did what he was always taught to do by his parents. He knows that when he refused to account for his actions and was asked to explain and he did not say why he did certain things against the church's Confession of Faith that he was expelled from the church. We do not know why he says he was not expelled when he was asked to explain but refused and by regular church council for his misdeeds he was expelled."

<sup>7</sup> Isaac I. Miller under examination by Barnard.

<sup>8</sup> Nisley, *loc. cit.* This statement was repeatedly confirmed in the testimony. It would tend to indicate that the need of the car for the sake of the child, which happened to be the chief emotional element of the public's interest in the case, was not originally made explicit. And in addition, the need of transportation is no proof, among the Amish, of need to own an automobile. Cars may be hired, and if that be too expensive, "He knows that if he needed transportation to take him and his child to the doctor that we would have helped him just like we do in lots of cases. We always help each other because that is what the Bible tells us to do. He knows that is true, so why does he say that he could not take care of his child without owning an automobile." *Answer of Defendants.*

Yoder signifies acceptance of the claim presented in his pleadings, although the jury was not instructed that this was the issue of fact before them. Historically speaking, however, apart from the legal problem, it is not easy to reconcile Yoder's pleadings with his testimony under examination by his own attorney. Admitting that he had been visited by the defendants before purchasing the car, he said "I didn't tell them too much. I figured I was an average member of their church. Schlabach had talked with Helmuth and I took it for granted [from] what Schlabach brought back to me we were in good standing with the church. . . ." <sup>9</sup> This admission is actually extremely damaging to the factual claims made by Yoder in his petition to the court, for he here contradicts himself on the two claims on which his entire case was built; that he had made explicit the reason for his withdrawal, and that he had had no notice of the charges against him, nor opportunity to defend himself.

Beyond the issues of this particular case, the body of law as regards what constitutes a legally valid excommunication is quite extensive, but not completely clear in detail. It is clear that any religious body, acting through its constitutionally authorized tribunal, has final jurisdiction in matters of discipline.

Civil courts have no jurisdiction to review the action of competent church authority in expelling a member.<sup>10</sup>

This applies without much question to the Amish procedure of expulsion by the bishop, with the advice of the ministers, on behalf of the church, for that procedure has unquestionably been a part of the unwritten law of the Amish for over two centuries, and is certainly in that sense an "authorized tribunal." A church's rules need not be explicit in a written constitution to be valid.<sup>11</sup> The

<sup>9</sup> Andrew J. Yoder under examination by Jones. Compare this with what Schlabach himself "brought back." "I drove up to his residence and he was not home and I went to the neighbors where he was to see him personally. I set the question at him, to know the standing of Brother Yoder and to state if they were not in good standing. He didn't answer me when I asked him the first time so I asked him again and he didn't give me an answer and I asked him again, and if I remember right, after he didn't answer I put the pressure on and said I do want an answer to my question. If I recall, he told me if any member wants to leave his congregation he has that against him." Schlabach under examination.

<sup>10</sup> *Simpell v. Escher*, 11 Oh Dec (Reprint) 351, 26 Cinc L. Bul 156. "An organization may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to these rules." 45 Am Jur 731: *Hundley v. Collins* 32 So 575. *Jones v. State* 44 NW 658, 7 LRA 325, *Nance v. Busby* 18 SW 874, 15 LRA 801; *et al. ad infinitum.*

<sup>11</sup> "When the constitution and bylaws of a church do not clearly determine the rights of parties at issue, the interpretation by the church itself, as disclosed by its own acts, will be adopted as the interpretation controlling the issue." 54 CJ 9, *Grupe v. Rudisill* 144 A 874.

requirements of previous notification and opportunity for formal defense, of which so much was made in the plaintiff's pleadings, are drawn from civil law, and apply to church discipline only by analogy and only when the church itself has no established procedure.<sup>12</sup>

There is, however, one limitation on the church's disciplinary autonomy, which was argued in this case, and which definitely exists in the law, even though to define it is very difficult, and even though under analysis it is not so severe a restriction as it at first might seem. That exception is the case where civil or property rights are involved.

A civil court will exercise equitable jurisdiction in a church controversy for protection of a civil or property right, the jurisdiction to adjudge an ecclesiastical matter resulting as a mere incident to the determination of the civil right.<sup>13</sup>

... the courts may grant relief in civil actions where religious practices or acts done pursuant to a religious belief result in a plain infringement upon a right guaranteed by the rules of civil law.<sup>14</sup>

This certainty notwithstanding, the statements of the requisite degree of involvement of such rights and the nature of legitimate legal review are nowhere adequately made explicit. First among the elements of confusion, the property rights concerning which the courts may interfere in church discipline do not give an expelled member any right to his share in the common property of the religious body if he has been legally expelled;<sup>15</sup> so that as far as con-

<sup>12</sup> "Ecclesiastical questions belong to the ecclesiastical tribunals, and their decisions thereon are binding, conclusive, and not reviewable by the civil courts . . . regardless of whether the mode of procedure is in accord with the ordinary course of investigation or trials." 54 CJ 87, *New Concord First United Presbyterian Church v. Young*, 21 OhNPNS 569. "The conduct of a trial before an ecclesiastical tribunal depends upon the articles and bylaws of the society or congregation. In the absence of provisions, . . . a member . . . cannot be deprived of his rights and privileges without a hearing or trial upon adequate notice." 54 CJ 93 "Plaintiff . . . also has the right to withdraw from a church . . . especially in the absence of any rule to the contrary." *Kinhead, Decision* in case of *Gingerich v. Swartzentruber et al.*, 22 OhNPNS 1, 30 ODNP 101. The qualifications in these citations would imply that where there is a rule, it stands.

<sup>13</sup> 56 FD 23, *First English Lutheran Church of Oklahoma City v. Evangelical Lutheran Synod of Kansas and Adjoining States*, 135 F 2d 701.

<sup>14</sup> *Gingerich v. Swartzentruber*. "... but excommunication whether with or without authority cannot affect the expelled person's civil rights." 54 CJ 18. "Judicial interference is therefore warranted only when civil rights are involved and infringed by church action, or members of the church. The civil tribunal tries the civil right and nothing more." 100 Am St 714, Note.

<sup>15</sup> "Generally, rights of religious society's member depend on continuation of membership, and on termination thereof his rights and beneficial interest in society's property cease and he has no standing to sue in relation thereto." 54 CJ 29; *Kittinger v. Churchill* 292 NYS 35, 51, 161 Misc. 3, 249 App Div 703; *et al.*

cerns the right of an individual to obtain judicial reversal of church action, his property rights are not too definitely helpful.<sup>16</sup>

The right to review when civil rights are involved is stated no less equivocally. Many statements of the church's autonomy neglect even to mention this limitation, and the courts will not always interfere to protect civil rights.<sup>17</sup> Nor are these rights themselves well defined. They do include the right to unhampered expression of one's religion so long as it does not harm others, and the right to dispose of property and otherwise carry on business, both of which were argued in this case.<sup>18</sup> They do not, however, include the right to associate in social or economic relations with others who are unwilling so to associate, which was in this case the only sanction employed.<sup>19</sup> It is not easy to see how any action

<sup>16</sup> "Courts are extremely loath to interfere with trustees' conduct of temporal affairs of religious societies at insistence of a small minority, since questions of church policy may be involved." 54 CJ 190, *Koch v. Estes* 262 NYS 23, 146 Misc 249. "Where controversies in the civil courts concerning property rights of religious societies of the associated class are dependent on questions of doctrine, discipline, ecclesiastical law, or church government, as a general rule the decision of the highest tribunal of the organization will be accepted by the courts as conclusive." *Barkley v. Hayes* 208 F 319. *Duwall v. Synod of Kansas of the Presbyterian Church USA* 222 F 669, 138 CCA 217, *Shepard v. Barkley* 38 S Ct 442, 247 US 1, 62 L Ed 939. "... the members are bound by these provisions (conferring power to suspend or expel) and cannot complain of a proper exercise of the power, even though in consequence their incidental property rights are forfeited." 10 CJS 288. Furthermore, the courts so define their power of review as to indicate that they are more interested in protecting the group's ownership of the property than in limiting the group's right to take ownership away from expelled members: "Courts will intervene only to protect the temporalities of such bodies and to determine property rights." 54 CJ 189 *Ellston v. Wilborn*, 186 SW2d 662.

<sup>17</sup> "Courts of law in considering a civil right which is dependent upon an ecclesiastical matter will accept as final the decision of the legally constituted ecclesiastical tribunal having jurisdiction of the matter." 54 CJ 190, *Turbevill v. Morris* 26 SE2d 821. "If no property rights are involved there is no jurisdiction of the court to interfere in church matters." 54 CJ 189, *Odoms v. Woodall* 20 So2d 849. "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." U.S. Supreme Court *Gonzales v. Roman Catholic Archbishop* 280 U.S. 1, 50 S Ct 5, 7, 74 L Ed 131.

<sup>18</sup> "Civil liberty comprehends the rights of every person . . . to acquire and dispose of property by lawful means and for lawful purposes, and to pursue any lawful business, trade, or calling, in such manner as to him shall seem meet, provided only that he does not thereby offend against any superior social right, or the equal rights of other persons." 16 CJS 585. "Every individual has a natural and inalienable right to worship according to the dictates of his own conscience and reason and to be free from molestation or restraint in his person, liberty, or estate in such worship, provided he does not disturb others." 16 CJS 599.

<sup>19</sup> "The purely social relations of citizens are not regulated by the state and federal constitutions. While the Fourteenth Amendment . . . secures . . . equality of rights of a civil or political kind, it does not confer rights of a purely social or domestic nature." 16 CJS 581. "Constitutional guarantees of religious liberty are not violated by provisions in the constitution or bylaws of religious or fraternal societies which provide for the expulsion of members or the forfeiture of their rights for failure to comply with certain requirements as to matters of religious practice." 16 CJS 601. "The purely social relations of citizens cannot be enforced by law." 14 CJS 1161. It must unquestionably be admitted that Yoder's enjoyment of his rights was substantially modified by his severance of relations with the society

which modifies an individual's enjoyment of his rights can be illegal when it is enforced only by the entirely legal withdrawal by others of their intercourse.

This logical difficulty of defining wherein Yoder's civil rights are violated by the freedom of others to ignore him leads to an essential clarification of what the law means by civil rights. They are not primarily a restriction upon citizens; Andrew Yoder's right to buy and sell does not mean that I must sell and buy at his will. Civil rights are guaranteed against violation not by individuals, but by legislatures, and their statement is to guard against governmental interference with personal freedom.<sup>20</sup> There may yet remain grounds in equity (common law) for judicial interference in church discipline, but such grounds can not be found in the constitutional guarantees of civil rights.

There follows the question of what sort of review the civil courts have over matters of church discipline in the rare case where rights are involved. As far as can be ascertained, this right extends only to determination of whether the action of the church was regular and in accordance with the authorized disciplinary procedures of the church. The courts cannot decide whether the grounds for expulsion would be legally acceptable in a civil tribunal, but only whether they followed the rules to which members of the church were committed.<sup>21</sup> Thus the courts have the right to reverse the decisions of church tribunals only if they are in opposition both to the rules of the church and to the member's legal rights.

This extended digression has been inserted because of its bearing on the initial argument of the plaintiff that because his rights were involved the court could therefore rule on the validity of the expulsion. This claim of the plaintiff appears quite weak in

around him, but it can hardly be claimed that his freedom to do business and go to another church was taken away, for he did both those things for five years under the *Meidung*. All that was limited was the number of people with whom he could do them.

<sup>20</sup> "A constitutional right differs from a right conferred by the common law or by statute only in the fact that it is guarded from any attack or interference by the legislature or any other governmental agent of the state." 16 CJS 578. "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted." *Constitution of Ohio, Art. I, Sec. 7*; "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." *U.S. Constitution, Bill of Rights, Art. I, Sec. 1*.

<sup>21</sup> Cf. note #17 above. "A religious organization . . . is purely voluntary and one joining it submits himself to the disciplinary power of the body and his rights as a member are governed by the constitution and bylaws thereof and courts will not interfere unless the church authorities have proceeded contrary to the rules of the association in subjecting him to disciplinary penalties." 54 CJ 24, 163 P2d 44. It seems to be indicated that civil rights can be infringed, legally and without tort, if the infringement be committed according to the church's established procedure.

view of the difficulty of proving that any civil rights were illegally infringed upon, and the additional fact that at any rate the court could have ruled on the expulsion only if it had been contrary to Amish practice. But the entire issue is not strictly germane, since Yoder did not want the expulsion reversed in any case, but desired only to have its enforcement forbidden. Nor was this issue finally put before the jury.

In this regard the position of the plaintiff tends to waver between three arguments which are not strictly consistent. One is that avoidance itself, as practiced by the Old Order Amish, is an illegal violation of civil rights. This claim would of course make unnecessary any discussion of the validity of the excommunication. The second is the contention now under discussion, that the excommunication was invalid because Yoder had not been given the necessary notification and opportunity for defense. This of course would assume that a valid excommunication could legally be enforced by avoidance, thus destroying the first argument. The third approach is that no excommunication could be valid because Yoder had already left the church and there was therefore no disciplinary jurisdiction.<sup>22</sup> By this claim actually both the first two claims are abandoned.

It seems of course quite evident on first sight that once Yoder had left the Helmuth church, that church could hardly meaningfully expel him. The question which the plaintiff's argument failed to deal with, however, is whether Yoder had actually left when he began attending elsewhere. There is legal reason to maintain that a church may define the methods for effecting cessation of membership,<sup>23</sup> and that if the church did not recognize his withdrawal as valid, as obviously it did not, then that withdrawal was not effective as ending the church's jurisdiction over him.

Illumination of this issue can be gained from the precedent case tried in Holmes County a generation earlier. In that case, Eli Gingerich, the plaintiff who was being shunned, had received permission to leave from a preacher of the David Miller church, of which he had been a member, at the time of his withdrawal from that congregation. This preacher was no longer living at the time of the trial, and it is not clear whether he had participated in the

<sup>22</sup> Note # 3 above. ". . . they, and each of them, then well knew that plaintiff had not been expelled from membership but had voluntarily withdrawn his membership from said church for good reasons. . . ." *Petition of Plaintiff, First Cause of Action*.

<sup>23</sup> Note #10 above. "If, however, the rules of the association impose conditions on the right or mode of withdrawal, these must be observed in order to render the withdrawal effective." 10 CJS 288.

institution of the *Meidung*. This permission was made much of in the court's decision, as signifying that Gingerich's withdrawal actually was with the knowledge and consent of the defendants, who therefore had no further jurisdiction over him. The possibility was conceded that had there been some rule to the contrary, the consent of the preacher would have had no weight in constituting permission for withdrawal, and the defendants, retaining ecclesiastical jurisdiction, might then have been justified in application of ecclesiastical sanctions.

In the absence of any rule forbidding a member to withdraw from the church with the consent of the "preacher," it must follow that plaintiff, at the time the ban was placed on him, was beyond the jurisdiction of the defendants. Plaintiff was wholly within his right when he withdrew. . . .<sup>24</sup>

Nowhere in the Holmes County case is the argument made that the *Meidung* is *in ipse* illegal, since the discussion was limited to the legality of this instance of applying it when there was no jurisdiction. This distinction of course markedly decreases the relevance of the precedent decision to the Wooster case, in which Yoder admittedly had no permission to withdraw.

## II. May excommunication legally entail the *Meidung*?

The twin issues at stake in this general problem are perhaps those most truly essential to an understanding of the Amish and Mennonite religious position as dealt with by this case. Primary in the explicit statement by the Amish defendants was their conception of the church as based upon a covenant (one might even say contract) relation with God. If the church is the expression of that relationship, which is irrevocable because of the eternal nature of God as a party to the contract, the church is therefore entitled to act as an agency to enforce the terms of the agreement between each man and God, which in the case of anyone who joins the Old Order Amish church, includes the avoidance of those who leave the fellowship. And thus it was that the defendants, whenever during the trial they had an opportunity, repeatedly called attention to the fact that Yoder had with full knowledge agreed when he joined the group that he should be shunned if he should ever leave, regardless of the circumstances of that withdrawal.

Each time I wanted to get out of this thing I run up against a wall, because when he was down on his knees—when we get down on our knees

<sup>24</sup> Kinkead, *Decision* cited above. "Plaintiff is entitled . . . to withdraw from a church and join another if he pleases, especially in the absence of any rule to the contrary." *Ibid*.

to be baptized, as he said yesterday, we don't go down for the fun of it. If this had been a brother sin between me and Andy Yoder I . . . might have gone half-way and he might have gone half-ways, but this was not promised to me. When he was on his knees he was not down on his knees to me. He was doing it to Almighty God and the church. He confessed all this to be right. We have explained to him. We have rules and regulations in our church . . . when he confessed and when he was baptized he confessed the same thing I did. He confessed to Almighty God, not to men alone. On his confession he was baptized.

. . . I don't feel to talk about the Helmuth Church, I don't feel to talk about this or that church, I am talking about Christianity.<sup>25</sup>

He made a confession—that stands before God. God said, "What you state before men is stated before angels in Heaven. What you reverse before men is reversed before angels in Heaven." He has not kept this saying.<sup>26</sup>

Well the beginning of it, he was not coaxed to join church but came of his own enjoyment. He wilfully came and he agreed to that, and he was given time when the Confession of Faith was read before he made his confession. And after that Confession of Faith was read he was given a chance to sleep overnight. He promised before he was baptized.

Because he joined your church you felt he had not right to leave it? He promised that.

You think that made him a bad member because he wanted to leave? Yes.<sup>27</sup>

Defendants believed him when he accepted the Confession of Faith and he knew when he accepted the rules of the church that if he would sometime do things against the Church and against what he first agreed to do that he would be expelled and the Ban put on him. He was old enough to understand what the Confession of Faith means and the church would never consent to have him leave the church.<sup>28</sup>

Viewed from this perspective, Yoder's action in the suit was therefore an attempt by law to force the church to break the covenant which he had made with God, and which the church was of course powerless to break, since the covenant was not made with the church, but with God. Whatever might be the legal status of such an argument, the fact is clear that it was the central theme of the

<sup>25</sup> Nisley, *Testimony*.

<sup>26</sup> Helmuth, *Argument to Jury*.

<sup>27</sup> Helmuth under examination by Barnard.

<sup>28</sup> *Answer of Defendants*. "We take our members in church as follows, the applicants are under probation for a time, the day before they are baptized all the articles in our confession of faith are read and explained to them, they then have until the following day to meditate thereon, then if they confess that they are willing to live a life according to our confession of faith and church ordinance they are then baptized and taken into church as full members. . . ." *Answer of Defendants* in *Gingerich v. Swartzentruber* case.

" . . . you knew he couldn't have dealings with, drink with, eat with, or have any social or business connection with any member having your belief?"

"I would say that Andy Yoder knew that when he made the confession to the church. If he left our church he knew that. . . . He has promised what he promised and he has confessed the eighteen articles in the Confession of Faith. We have not gone after him. He has come willfully and all that. As I said, he was baptized in the name of the Father, Christ, the Son of God, and the Holy Ghost." Nisley, under examination.



defense of the Amish, and that it was never recognized or dealt with by the court, nor in the plaintiff's pleadings or brief.

There does exist, however, considerable support in law for the parallel thesis that Yoder could have been considered to be bound to an acceptance of whatever the church membership and discipline entailed, due simply to his witting and willing entrance into the obligations and benefits of membership.

... the individual members ... will be held to be bound by the laws, usages, customs, and principles, which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages, and customs, as so many stipulations of a contract between them.<sup>29</sup>

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain conceit and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, *although affecting civil rights*, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.<sup>30</sup>

Therefore to consider the relation of membership as the law must, in contractual terms, Andrew Yoder was suing the church for consistently applying a forfeiture clause in a contract which he had freely made (in awareness of the existence of a forfeiture clause) and had intentionally broken. To speak of spiritual fellowship in these terms is near-sacrilege, but if the law is to deal with such matters the contractual parallel is its only resort.

The second related Mennonite emphasis, not explicitly stated but more deeply implicit in the entire controversy, is the simple insistence that religion must be consistently expressed in life, and that there can be no division between belief and practice. This principle, whose possession in theory is by no means uniquely Mennonite, receives a degree of support by law,<sup>31</sup> but is not, and in fact cannot be, ultimately accepted as a judicial postulate.

<sup>29</sup> 54 CJ 17, *Louisville First Presbyterian Church v. Wilson*, 14 Bush (Ky.) 252.

<sup>30</sup> U.S. Supreme Court, cited in *Turbeville v. Morris* 26 SE2d 821; *Watson v. Jones* 13 Wall 679, 727, 20 L. Ed 666. (Italics mine.) Cf. the quotation in Note #21; *et al.*, including: "When a person becomes a member of a church, he thereby submits to the ecclesiastical jurisdiction in ecclesiastical matters and he has no legal right to invoke the supervisory power of a civil court. . . ." 54 CJ 87, *New Concord First United Presbyterian Church v. Young*, 21 OhNPNS 569. "Person who assumes relation of member of a church voluntarily covenants to conform to its canons and rules and to submit to its authority and discipline." 54 CJ 61, *Marsh v. Johnson*, 82 SW2d 345.

<sup>31</sup> "Although perhaps theoretically it is separated from the affairs of this life, practically religion is not so clearly separated." *State v. Amana Society* 132 Iowa 304, 109 NW 894, 8 LRANS 909. "Morality describes the duties to man, which true

The reason for this is quite evident. The intent of law is to regulate social behavior in the interest of relative stability and justice. Therefore the same government which preserves man's right to think as he pleases must restrict the right to act by the same standard, and the connection of ethics to religion which is mandatory for the Christian is impossible for the law.

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.<sup>32</sup> . . . it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . .<sup>33</sup> . . . religion is a matter which lies solely between man and his God . . . the legislative powers of the government reach actions only, and not opinions. . . .<sup>34</sup>

This conflict is no circumstantial accident, but rather the logically inescapable concomitant of the disparateness of the two levels of human activity.

This valid legal position, however, was supported in the Wooster trial by a parallel whose relevance is open to a degree of question. The case of *Reynolds vs. U.S.* is a classic test case on the extent of religious freedom as opposed to the law. In that case,

religion always influences." *Cline v. State*, 130 P 510, 45 LRANS 108. "Religious Principles; Those sentiments concerning the relation between God and man which may influence human conduct." CJ; *State v. Powers* 14 AmSR 693.

<sup>32</sup> U.S. Supreme Court, *Reynolds v. U.S.*, 98 US 145, 165.

<sup>33</sup> 12 Hen Stat 84.

<sup>34</sup> Thomas Jefferson, 8 *Works* 113. This principle was stated by the judges in both *Meidung* cases. "Courts may grant relief in civil actions where religious practices or acts done pursuant to a religious belief result in a plain infringement upon a right guaranteed by the rules of civil law." Kinkead, *op. cit.*, citing *Matter of Frazee*, 63 Mich. 390, 6 AmSt 310: "There is no legal authority to constrain belief but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law (and civil law) might be practically superseded if, under pretext of liberty [of conscience], the commission of crime is made a religious dogma. It is a fundamental condition of all liberty and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result."

"I am of the opinion the line of legal demarcation as to right of freedom of religion . . . can be ascertained through a proper conception of the nature of both belief and practice . . . a man may believe whatsoever he chooses no matter how crude . . . and may practice such belief so long . . . as he does not affect public welfare or . . . individual civil legal rights of another. When he does so by such practice the law steps in . . ." Walter J. Mougey, Common Pleas Judge, letter to Wm. F. McDermott, columnist in *Cleveland Plain Dealer*, Cleveland, Ohio. ". . . no person or persons have a right to interfere with the civil rights given and guaranteed under the law to any other person and claim immunity thereby under the practice of a religious belief, and it consequently follows in law that when anything is practiced by reason of a religious belief which interferes with or denies the civil rights of the individual given and guaranteed by the Constitution of our Country and State, and their respective laws, such practice is unlawful. . . . Each and every individual is entitled to his own belief no matter what it is, and he may practice it insofar as it affects himself only, but he has no right under the law, to put such belief into practice, even though it be a religious belief, if such practice is against the public welfare or denies to another (his) civil rights. . . ." Mougey, *Charge of the Court to the Jury*.

polygamy was defended as being practiced as a part of the Mormon religion, and the courts held that: (1) the legislature had the constitutional right without violating the Bill of Rights to declare polygamy a crime,<sup>35</sup> and that (2) polygamy being a crime, the commission of it could not be excused on the grounds that it was religiously motivated.<sup>36</sup> The former ruling of course does not apply to this case, as there has never been a law forbidding shunning which is older than the United States; and the applicability of the latter is notably weakened by the fact that it deals with a crime under civil law, whereas the present case is a question of tort under the common law, and even the existence of tort is questionable when Yoder had agreed in advance that it should be committed.

The essential Christian contention that religion must influence life is relevant to the Yoder suit in a more direct way than through its connection to the use of religion as an excuse for crime, for the very philosophy of the *Meidung* itself is an extension of that view. If the Amish religion influences life, and if the members of the church at the same time make up the local society as is the case in a solidly Amish community, then that society is indistinguishable from the church, and the social and economic relations of the members are as religious and as subject to ecclesiastical regulation as their worship relations. When therefore a member severs his relation with the church he at once breaks fellowship with the society, and the institution of the *Meidung* is merely the formal recognition of that breach, as extending into all of life. From this viewpoint it is immaterial by what means the break came about, for it remains, however it may have happened, that Yoder wanted to leave the group, that the group therefore consistently excluded him, that he was offended because they consistently extended the spiritual breach into the material world, and that he therefore sued the church for not being inconsistent. I am led to agree with the Amish that Yoder was free to be a member of the church, and he was free not to be a member of the church, but he cannot claim the freedom to be at the same time both a member (economically) and not a member (religiously); for participation in the Christian social fellowship is not thus divisible.

<sup>35</sup> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. . . . In the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." *Reynolds v. U.S.*, cited above.

<sup>36</sup> "Evil acts dangerous to public and individual welfare, though sanctioned by religious concept may be forbidden, punished, or prohibited." Kinkead, *op. cit.*, citing *Bloom v. Richards*, 2 OS 387.

There is in this argument a healthy corrective to recent democratic super-individualism. For it is inherently fallacious to define individual freedom as unlimited by group obligations. One may choose as he will to be Amish, or a Mason, or a union member, or an American citizen, or not to be; but once that choice is made some other things are settled; one is no longer free to reject the consequences which his choice entails. He cannot be a citizen without the responsibilities therein involved, nor an alien with the advantages of citizenship. And there can be nothing illegal about so purely logical a limitation of freedom, for the postulate that a thing cannot at the same time be and not be is simply a cornerstone of sane thought.

It was this attitude toward freedom that led the Amish so assiduously to avoid admitting under examination that the practice of shunning was mandatory upon members of the Amish church, and that John Hostetler and Sol Schlabach were shunned in turn for their refusal to shun Yoder.

Did you talk to John Hostetler, a member of your congregation, about having dealings with Andy Yoder?

I believe I did. . .

Did you tell him if he kept on having dealings with Andy Yoder you would put the "shun" on him too?

No.

Didn't you after that put John Hostetler out of your church for a while because he did have dealings with him?

No sir.

Do you mean to say that John Hostetler was never put out of your congregation because he had dealings with Andy Yoder?

Not for that.

He was put out?

Yes.<sup>37</sup>

. . . did you order other members of your church to have nothing to do with Andy Yoder?

I could not remember now that I done this just on this account.

Now you four defendants discussed the "banning" of Sol Schlabach?

Yes, but not for that purpose. . .

It was just a coincidence that he was "banned" because he was caught neighboring with Andy?

Not the reason. . .

If Mr. Schlabach and Mr. Hostetler and Dan Yoder . . . say in the course of the trial that you four men told them they should not deal with Andy Yoder in any way, they would be telling the truth, wouldn't they?

We have told the church to keep this "ban," and it is to bring him back. . .

Wasn't it at your home when you told them that now that Andy had sued they must quit dealing with him?

"Must"?

Maybe you said it in German. You told them if they didn't quit dealing

<sup>37</sup> Helmuth under examination.



with Andy you would "ban" them. They told you they wouldn't quit dealing with Andy and you "banned" them?

Not on that account . . . it was absolutely not the main reason.

You did tell your congregation that they had to carry out this "ban"?

Not "had to." That they should—we understand it that way.<sup>38</sup>

Did you go on one occasion to church . . . and this matter of "miting" of Andy was discussed with you?

Yes. . .

What did they say?

They talked it over and tried to explain, and said that if we would see fit, to "boycott" them . . .

Did they ask that you promise that you would "nite" Andy Yoder?

I can't say the words—that was the idea.<sup>39</sup>

This is, in effect, a refinement of what has above been stated: A man is free to choose to become a faithful member of the church; if he so chooses he is of necessity committed to shunning, but that necessity remains ultimately free because of the initial freedom to become a member, and the continuing freedom to cease to be one; if he does not wish to shun, he is free to refrain, but cannot then honestly claim to be a faithful member;<sup>40</sup> and if he is then in turn shunned it is for his decision to cease to be a member, and not for his failure to shun. All of this may perhaps be too philosophically involved for the courts to deal with or the newspapers to understand, but the logic of it seems inescapable, and in no wise a violation of man's essential freedom. The only limit to the exercise of that freedom is that there are strings attached to membership in a group, and without strings there could be no society.<sup>41</sup>

<sup>38</sup> Nisley under examination.

<sup>39</sup> Sol E. Schlabach under examination.

<sup>40</sup> In the case of at least one of these men, there were other offenses involved, in addition to failure to shun. Whether this was true also of the others cannot be ascertained, nor is it important, as the remainder of this paragraph will indicate. "The Amish interpretation is that 'if any one willfully keeps company with such whose company is forbidden in Scripture, to be kept, then we must come to the conclusion that he despises the Word of God, yes, is in open rebellion.' Just as most Christians will not enter a saloon and cut capers with an inbiber so the Amish think that eating with a man such as Yoder would disgrace themselves in the eyes of God and would imply that they approve of inconsistent Christian living. Only those 'Who hear, believe, accept and rightfully fulfil' the teaching of God's Word should mingle with each other." Ford Berg, *United Evangelical Action*, Dec. 1, 1947, VI, #20, p. 7.

<sup>41</sup> An interesting parallel in this connection: "It is hardly worth while to censure communities which were establishing, or seeking to establish, a strong religious state because they were intolerant. Tolerance is not, and never has been, compatible with strong religious states. The Puritans of New England did not endeavor to force their convictions upon unwilling Christendom. They asked only to be left in peaceful possession of a singularly unprolific corner of the earth, which they were civilizing after a formula of their own. Settlers to whom this formula was antipathetic were asked to go elsewhere. If they did not go, they were sent, and sometimes whipped into the bargain—which was harsh, but not unreasonable." Agnes Repplier, *Under Dispute*, pp. 8, 9.

### III. Is the *Meidung* legal?

Whether shunning by a group is by nature lawful, the law has little precedent to determine, except in the analogous problem of boycotts in labor disputes, which cannot by their nature fully apply. Whereas a labor boycott is applied to a party to whom the boycotters' relation is one of conflict, with the intention of prevailing in that conflict at the cost of the party boycotted, in the case of shunning the person shunned is an unfaithful member of the group, who has not always been an economic rival, with the intention of benefiting that member by making him aware of what was involved in his severing of fellowship with the group, and with no intention of coercing him against his will, if he does not honestly change his intention. And whereas in a secondary boycott an unrelated third party is threatened with boycott should he deal with the boycotters' opponent, in the analogical Amish situation the third party is also a former member of the group, and therefore his relation to the group is actually not as a third party but as another second party, whose status is dealt with in its own right and not as a part of the former conflict. Nevertheless, these and other differences notwithstanding, boycott law is the closest point of departure for attacking the problem.

It is universally agreed that any one individual is completely free to withdraw all business or other intercourse from anyone else, at will, without violating any rights.<sup>42</sup> It further follows from this that any number of individuals may likewise freely and independently of one another withdraw their patronage or association as they may wish. The complications arise when that withdrawal is organized and directed toward an intended coercive effect upon the party boycotted. At this level there is an indeterminacy as to whether the words "conspiracy" and "boycott" in themselves refer to illegal acts, or whether such combinations are illegal only when the acts co-operatively committed are themselves illegal.<sup>43</sup> Though these issues remain unresolved, the tendency

<sup>42</sup> ". . . one who is under no contract relation to another may freely and without question withdraw from business relations with that other. This includes the right to cease to deal, not only with one person but with others . . . who by their patronage aid in the maintenance of the objectionable policies. *Parkinson v. Building Trades Council*, 98 P 1038.

<sup>43</sup> Note the disagreement: ". . . even though acts . . . are not actionable when done by individuals they become so when they are the result of combination . . ." 8 OJ 48. "Even though certain acts, considered by themselves, may . . . be regarded as the exercise of the ordinary rights of a citizen, the same acts, when taken in connection with the object and the time, place, and circumstance of the occurrence, may be component parts of a plan or scheme whose unlawfulness permeates every single step of its progress." 24 OJ 671 "Accurately speaking, there is no such

seems to be toward permitting primary boycotts if the methods be legal and the grounds for dispute valid,<sup>44</sup> and toward outlawing secondary boycotts applied to non-interested parties.<sup>45</sup> The entire subject in its present undecided state is best typified in the final citation on the subject in the plaintiff's brief; "Assuming that unlawfulness inheres in the term, boycotts are obviously illegal." Thus nothing more final can be said as to the charge that "the defendants wilfully, intentionally and maliciously entered into a secret combination and conspiracy between them with intent to mite or boycott and injure plaintiff . . ." except that the element of secrecy cannot be proved, and the intent to injure probably not,<sup>46</sup>

thing as a civil action for conspiracy. The action is for damages pursuant to a formed conspiracy." 11 Am Jur 577. "If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act. It is the illegality of the purpose . . . or of the means used in furtherance of the purpose, which makes the act illegal." *Lindsay & Co. v. Montana Federation of Labor*, 96 Tac 130. "On the inherent unlawfulness of the term, however, the courts are not wholly agreed." 24 OJ 669.

<sup>44</sup> "Primary boycotts for legitimate purposes and employing no illegal means are not actionable even though injury results." 15 CJS 1016. "The damage to the business of persons subjected to such a primary boycott, lawfully conducted, is one of the inconveniences for which the law does not afford a remedy." 31 Am Jur 958.

<sup>45</sup> "Whether a labor union may, as a means of bringing pressure to bear on the other party to an industrial dispute, notify third persons that their patronage of such other parties will cause them to lose the services of patronage of the members of the labor organization is a question of considerable difficulty and one upon which there are differences of judicial opinion. The view now prevailing in most of the courts of this country is that the secondary boycott may not lawfully be employed in a labor dispute. And this is the view adopted by the majority of the cases in Ohio." 24 OJ 676.

<sup>46</sup> "In any event, an act lawful in an individual may be the subject of civil conspiracy when done in concert only when a direct intention exists that injury shall result . . ." 11 Am Jur 579; "An essential element of a boycott is an intentional injury to someone." 31 Am Jur 958. "There can be no dispute that defendants ordered the ban . . . in good faith and without malice." Kinkead, *op. cit.* "We know that boycotting is strictly against the laws of our state and let me assure you it is also strictly against the rules of our church. The difference between shunning and boycotting is as big as the difference between day and night. . . . The shunning is not done or meant, for anything mean, but it is only done according to scripture. . . . Please bear in mind that this shunning does Mr. Yoder no harm. We will help him at any time and with anything that he needs help with." Emery Weaver, letter to Wm. F. McDermott.

"What do you call the ruin of a man?"

"The way you claimed we shunned Andy."

"Haven't you ruined Andy?"

"It is just the way of shunning." *Nisley under examination.*

"What they claim we are doing wrong it is not my intention to do him wrong—only that commandment, 'for the good of his soul.' Because it is stated in the Bible—if it was not stated in the Bible I would say *not* because it would be against my flesh to do as it asked for. But if we got down to the real love of members of the church, like them that were expelled from the church we feel it is our duty to do it to bring him to repentance." Nisley, *Argument*. The fact that the intention of the *Meidung* is spiritual benefit for the one shunned is the reason it must continue for life. The alternative intent, which might actually replace the redemptive purpose in practice, and which prevailed in the interpretation of the court and the plaintiff, that of vengeance or punishment, would of course involve time limits. "From my reading of your church regulations and after talking with a good many members of the Amish faith, I feel that your church would have the right to terminate the miting against

and it is not certain whether the rest of what was done was illegal, since certainly no methods illegal in themselves were used, and there was a valid dispute.<sup>47</sup>

#### IV. By whom was the offense committed?

One of the major concerns of citizens whose knowledge of the case was secondhand was that they feared an interference of the state in church matters. This was patently also the contention of the Amish. Both Attorney Jones and Judge Mougey repeatedly reassured questioners by explaining that the suit was not against the church, but against four individuals in the church, and this quieted their fears.

The instant case was not one against a church or a church congregation. It was one against four individuals jointly for their acts in common. It was not one to regulate church ritual or belief in a religious creed, nor did it in any way attempt to interfere with religious worship of the individual.<sup>48</sup>

No effort was made during the trial, however, to refute the Amish contention that the church was involved in the trial as well as in the shunning, and the burden of proof still rests with those who say that the church was not sued.

To sue the leaders of the church is the only method available in law to sue an unincorporated religious body, which an Amish church is.<sup>49</sup> Thus the distinction between a suit against the leaders and one against them in the name of the church is, if not false, at best legally meaningless; for in the plaintiff's petition the leaders were identified by their church offices, and the act for which they were sued was one taken as leaders of the church in the presence of the church on behalf of the church with the authority vested in them by the church, ratified by the church and reversible only with the consent of the church, and would have been meaningless except for its application by the church.

Is there a trial or hearing open to the members of the church where a member about to be expelled may appear and defend himself?

Mr. Yoder at this time. It is the fact that he has been mited now for over five years and it would seem to me that he has been punished more than necessary and has been greatly damaged. . . . Charles C. Jones, letter to defendants, attempting to reach settlement without litigation.

<sup>47</sup> "The courts which regard the boycott as illegal do so on the theory that there is no valid trade dispute, while those courts which regard it as legal do so on the basis that there is a valid trade dispute. For in either event a valid trade dispute is essential to the validity of the boycott." 24 OJ 671.

<sup>48</sup> Mougey, letter to McDermott.

<sup>49</sup> "Unincorporated religious association has no legal existence, and cannot sue or be sued in its own name." 54 CJ 209, *Hunt v. Adams* 149 So 24. "If unincorporated, the individual members may be sued collectively, or . . . one or more may be sued and may defend for the whole, . . ." 54 CJ 99.

Open Council to the church.

... you have an open meeting of the members of the church first, before you expel him?

... Regular church

... the whole church has a meeting to consider it?

Yes. . . .

That was what the four of you decided?

Not just us four, that was in church.

Now you had a meeting first before you sent him the notice, is that right?

Right in the church.

What do you call a Council?

The opinion of the church.

You mean the four men?

No, of the church.

Of your congregation?

Yes.<sup>50</sup>

Now we have done all this through Council of the church.<sup>51</sup>

The only sense in which a distinction such as this between the men and the church would have legal weight would be in its application to an abuse by the leaders of the prerogatives of their office. That might have been argued in this case, but it was not,<sup>52</sup> and had it been argued the place for the trial would be the higher tribunals in the Amish church, which were consulted in both the Yoder and Gingerich cases, and sustained the actions of the bishops in both<sup>53</sup>.

<sup>50</sup> Helmuth, under examination.

<sup>51</sup> Nisley, *Argument*.

<sup>52</sup> Except perhaps in the Charge to the Jury, where it was given as legal explanation rather than as argument. "It will be noted in the said sections of the Confessions of Faith relied on by the defendants, as part of their defense, that nowhere therein is it stated, as shown by the evidence submitted, that the bishops, ministers, deacons, or any other officer of the church congregation are thereby given any authority or power thereunder to enforce said sections of the creed. It appears to be addressed to the conscience of the individual members of the congregations. Such being the case, the officers . . . have no granted right or authority thereunder to exercise control and discipline a member on their own authority. That is left solely in the hands of the members of the church congregation acting as individuals. Therefore, . . . plaintiff had a legal right to withdraw . . ."

<sup>53</sup> "After that (the expulsion) we had things come up in church that were heard. We asked one bishop, and they asked one bishop, and they two choosed one, and this thing about Andy's case came up, and they have not changed [did not change] it. They left it as we considered it." Nisley, *Argument*.

"After the plaintiff had neglected our church, he was placed under the ban. Some few of our church members seemed to be dissatisfied and thought the plaintiff was not treated fairly, so the church with a full vote, agreed to call a committee of three, from Indiana two Bishops and one Elder [sic] to investigate and arbitrate the matter, and the plaintiff and all members were invited to be present and take part if they so desired. Said committee, after hearing both sides, sustained the Ban on the plaintiff, approved with a full vote from the members present.

"On or about Oct. 24, 1917, there was a General Conference held in Holmes County, Ohio, with about eighty bishops, elders, and deacons present, and this same matter of the plaintiff was submitted to the General Conference of the church. After careful consideration it was approved and [decided that] all matters connected with plaintiff and discipline of the church were used by the directors of the church under its rules and regulations, and whatever discipline was imposed on the plaintiff was done in good faith and a matter of duty under the rules and regulations of the church." *Gingerich v. Swartzentruber. Answer of Defendants.*

## V. Additional relevant considerations.

The case of *Gingerich vs. Swartzentruber* cited above was extensively similar to the Wayne County suit in most of the historical particulars. Gingerich had left the Old Order church to attend the Martins Creek Amish Mennonite congregation and later to assist in organizing the Bunker Hill Beachy Amish church which Andrew Yoder joined. Gingerich's brother Menno, who testified in the Yoder trial, is still being shunned for his failure to shun him, and Bishop Helmuth was active in seeing that shunning was carried out when Menno moved into Wayne County.

Damages were not awarded in the earlier case, although monetary relief was prayed for by the plaintiff. This does not, however, signify an adverse decision by the court as to the allowability of damages, since the plaintiff in his testimony, in response to the charge that the trial was a money-getting venture, unintentionally made what amounted to a withdrawal of his plea for damages. The question therefore received no more attention from the court.

The defendants were represented by attorneys Wm. E. Weygandt and George Sharp. There is, however, little evidence of the assistance of counsel in drafting their pleading, which was simply a quotation of the Dortrecht articles XVI-XVII. The only contention dealt with in the decision that gives indication of having been argued by legal counsel is the claim that no evidence existed that anyone had refused to work for the plaintiff. The court denies the weight of this argument, saying "Plaintiff knew full well how useless it would be to ask neighbors . . . to assist him . . .," but the matter is not that easily dealt with, in view of the general agreement of testimony in both cases that it is possible for a shunned farmer to get help if he requests it.<sup>54</sup>

The decision was appealed by the defendants, but the bill of exceptions was so general that it is impossible to tell whereon they would have based their case in a new trial. The appeal was later dropped at their request.

A difference that might be more significant, were the facts available, was that, according to the pleadings of the plaintiff, there was disagreement in the church at the time of the decision to impose the ban on Gingerich. The wording of the petition would by itself give the impression that the use of the ban was an original idea of

<sup>54</sup> "We further say that we do not know of a single member of our church that refused to help or assist the plaintiff in threshing or any such work that a certain amount of help was necessary for a short period. When asked for by the plaintiff we would not allow any of our members to refuse to assist the plaintiff in such work herein mentioned and they would not take any pay for their labor." *Ibid.* "In answer defendants say he knows that none of the members should refuse to help him." *Yoder v. Helmuth, Defendants' Answer.*

the defendants, and Gingerich was shunned because he rejected the innovation. This historically impossible interpretation must have been the result of an attorney's misunderstanding.

One of the grounds for damages in the Yoder case was the contention that the defendants had attempted to break a lease between Andrew Yoder and his father Joseph Yoder, under which Andrew was working his father's farm. Although the evidence does not prove that Joseph was actually commanded to break the lease, the argument seems quite sane. The law, however, does not sustain it. "A civil action for conspiracy will not lie for merely inducing another to break a contract unless direct fraud or coercion is used, and for that the remedy is by action on the contract."<sup>55</sup>

A second basis of the plea for damages was the charge that Yoder's reputation was harmed by his excommunication, since excommunication is accompanied with a sense of social opprobrium. This also seems quite sensible, but if the excommunication was not fraudulent the charge cannot stand. There is no actionable libel in the promulgation of a lawful excommunication. If the excommunication was wrongful there could of course be weight to this charge.<sup>56</sup>

There remains for consideration one idea of Attorney Jones, hinted at by George Barnard in his cross-examination, that because the 1921 "Statement of Fundamentals" of the Mennonite Church mentions "wholesome discipline," Article XVII was thus repealed by implication. Nothing was done with this argument in the trial, and it probably would have carried little weight, since the Garden City conference of 1921 was not connected with the Amish.<sup>57</sup>

<sup>55</sup> 15 CJS 1021. "In trespass against bishops of a church for expelling plaintiff from membership, where damages were sought because such expulsion caused plaintiff's father-in-law to break a contract he had with plaintiff, the injury was not one for which redress could be had in civil court. *Kaufman v. Plank*, 214 Ill A 290. Kaufman had apparently been expelled for relations with "non-Amish," and his father-in-law had consequently felt bound to break the contract. Even if the expulsion had been wrongful, as Kaufman claimed, the court held that the matter was not under its jurisdiction, since no right was involved. The testimony of the defendants in the Wooster case was that they never asked that the lease be broken. "We did not tell him he had to, . . . He volunteered this to us, he said, 'There will be a change made after the contract runs out.'" Miller, *Testimony*.

<sup>56</sup> 54 CJ 18. "Damages cannot be predicted on expulsion in accordance with the rules of the association." 10 CJS 316. "He has no right to recover for loss occasioned by the expulsion *per se*, independently of its wrongful character, such loss being *damnum absque injuria*."

<sup>57</sup> "The repeal of a statute is implied when the intention to repeal is inferred from subsequent legislation . . . difference . . . does not necessarily call for a repeal . . . unless the two are so clearly inconsistent and repugnant that they cannot . . . be reconciled. (It is essential) that the repugnancy . . . be irreconcilable, . . . necessary, clear, obvious, direct, strong, and absolute. . . . Repeals by implication are not favored and have even been declared to be 'abhorred' . . . only obtain where such seems to have been the obvious intention of the legislature." 37 OJ 397ff. The Garden City Conference hardly intended any such irreconcilability between their "Fundamentals" and the Dortrecht Articles.

## RESCUED DOCUMENTS RELATING TO THE HISTORY AND GENEALOGY OF THE MENNONITES OF FORMER WEST PRUSSIA

GUSTAV REIMER

For the sake of public record and on behalf of Mennonite historical scholarship, I submit herewith a report of the documents relating to the history and genealogy of the Mennonites of West Prussia which I was able to bring with me on the flight from Marienburg, West Prussia, to the British Zone of Germany in the late winter of 1945, and which are now in my possession.

### I. Church Records

Some time before our flight I was compelled to surrender to the *Landratsamt* in Tiegenhof, West Prussia, the following *Kirchenbücher* (Heubuden):

Band 1	Geburts-Heirats-und Sterberegister	1772-1815
Band 2	Geburts-Heirats-und Sterberegister	1816-1867
Band 3	Geburts-Heirats-und Sterberegister	1868-1900

If the *Landratsamt* sent these books to the *Kirchenbuchamt* in Danzig, they should be safe somewhere in Germany. Inquiry should be made at the office of the *Danzig Evangelischer Konsistorium* in Luebeck.

Elder Bruno Ewert of the Heubuden Church, (now in Uruguay), buried the following church books before his flight to Denmark: (1) *Taufregister 1770-1944*; (2) *Geburts-Heirats-und Sterberegister 1900-1944*. I have complete copies of these two volumes. The following originals are in my possession: (1) *Gemeinde-Familienbuch*, begun in the year 1888, containing a complete register of members of the congregation with residence, and dates of birth, baptism, marriage, and death; (2) *Geburts-Heirats-und Sterberegister* from 1934 on. (No record was kept 1913-1933). I have a copy of the *Taufregister der Grosswerdengemeinde 1782-1840* (the original of which is in the *Danzig Staatsarchiv Abt. 358, Nr. 183*) together with *Anhang der Lehrer und Diener Wahl*. This book contains records of the congregations now called Rosentort, Tiegenhagen, Ladekopp, and Fuerstenwerder. A portion of this record was published by me in the *Menn. Blaetter* under the title "Ein aufgefundenes Kirchenbuch."