VII

no room for compromise

AGAINST THE VIEW that the law is immutable, however, another major objection has been raised: "Many orthodox rabbis and congregations have accepted mixed pews."

It is true that a number of rabbis who consider themselves orthodox, and are even members of orthodox rabbinical organizations, hold positions in synagogues with mixed seating. This has often been quoted as proof that mixed pews are permissible. However, it must be realized that these rabbis themselves do not so maintain; as pointed out before, they actually cannot do so if they want to be recognized as orthodox rabbis, for they would then be contradicting the law which they are supposed to apply. To quote again:

"No rabbi, however great in scholarship and moral

integrity, has the authority to endorse, legalize, or even apologetically explain, this basic deviation. Any rabbi or scholar who attempts to sanction the desecrated synagogue, *ipso facto* casts a doubt on his own moral right to function as a teacher or spiritual leader in the traditional sense of the word" (Rabbi Joseph B. Soleveitchik, chapter II, source 13).

The orthodox rabbis serving in synagogues with mixed pews readily admit that it is wrong to have mixed seating; they will strongly object to synagogues changing to mixed pews; and they will defend the right of orthodox worshipers not to be interfered with in their desire to worship in an edifice of prayer that will not do violence to their conscience with its seating arrangement. They will merely stress the fact that "a generation tragically unschooled in Jewish teaching . . . suffers the illusion that mixed pews form a touchstone to a supposed 'modernization,' and fails to perceive that traditional Jewish practices are each an integral part of the great pattern whose total is Judaism" (Rabbi Morris Max, chapter VI, source 9). These rabbis accept synagogues with mixed pews only with the hope to lead the errant congregation back to proper orthodox authority and practice.

Their argument carries some weight. *Jewish Action,* April-May 1957, lists fourteen synagogues which recently reinstalled *mechitzoth.* It cites a statement by the Rabbinical Council of America that this development shows "a reversal of that trend toward abandonment of Torah standards . . . infiltration of influence foreign to Judaism . . . adulteration of Jewish worship and of the Jewish concept of life. . . . Among the congregations which had suffered deviations in Jewish practice, a steadily increasing number are rising again to re-affirm the sovereignty of Halachah in

Jewish life, and the sanctity and indestructible unity of our sacred Jewish tradition" (1).

However, the policy of accepting positions in deviating synagogues, even for a limited period of time, has been strongly challenged by many authorities who feel that even the most idealistic considerations cannot permit countenancing a violation of the Law of the separation of the sexes in a House of Worship. "Some congregations do attempt to combine mixed seating with otherwise traditional Jewish forms of service, and the status of these congregations, having undertaken a grave religious deviation, is very much in question" (Union of Orthodox Jewish Congregations).

In any case, even if we concede any merit to the view of those rabbis who have accepted posts in deviating synagogues, and even if their number were much larger than it is, the legal position would not be altered: "We must remember that an ethical or Halachic principle decreed by God is not rendered void by the fact that the people refuse to abide by it" (R. Joseph B. Soloveitchik, chapter II, source 13). This applies to the lack of a *mechitzah* as well as any other improper practice that congregations may adopt, and clearly establishes the obligation of an orthodox Jew to reject deviation.

Jewish ACTION

Published by: THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

APRIL-MAY, 1957 — VOL. XL, No. 1 — NISAN-IYAR, 5717

14 Synagogues Install Mechitzoth; Viewed as Marking Upward Trend

Fourteen congregations during the past year have re-erected or newly installed mechitzoth, the separation between the men's and women's seating sections required for public worship by Jewish law, a study by UOJCA headquarters has disclosed. The congregations which have effected the change to Jewish seating practice are located in various parts of the country and vary widely in size and in historic background.

A list of the synagogues, together with the names of their rabbis and presidents, is printed in an adjoining column.

The development is viewed by the country's Rabbinic and lay leaders as a significant manifestation of the mounting tempo of the Torah-ward current in American Jewish life. A statement by Rabbi Solomon J. Sharfman, president of the Rabbinical Council of America, said:

Symbol of Re-birth

"This inspiring development testifies to a reversal of that trend towards abandonment of Torah standards which in the past has posed so ominous a threat to American Jewry. Entire congregations, as well as great numbers of individuals, have been the victims of that trend.

CONGREGATION	RABBI	PRESIDENT
Cong. Anshe Emes of Williamsbridge, Bronx, N. Y.	Hyman E. Bloom	
B'nai Abraham of E. Flatbush, Brooklyn, N. Y.	Solomon Shapiro	Aaron Levine
Cong. Ahavath Sholom, Orange, N.J.	Eli Traube	Louis Margolies
Beth Hamedrosh Hagodol, Brooklyn, N.Y.	Jacob Zaldman	Nathan Tannenbaum
Jewish Center of Hyde Park, Brooklyn, N. Y.	Joseph Frankel	Joseph Traeger
Cong. Agudath Israel, Brooklyn, N.Y.	Solomon Kornfeld	
Cong. Adath Jeshurun, Bronx, N.Y.	Moloch Schachter	Morris F. Woolley
Ozone Park Jewish Center, Ozone Park, N. Y.	Samuel Zander	Harvey Freiwald
Beth Jacob Cong., Miami Beach, Fla.	Tibor H. Stern	David Whitman
Baron Hirsch Cong., Memphis, Tenn.	Isadore Goodman	Philip Belz
Homestead Hebrew Center, Homestead, Pa.	Hyman Shapiro	
Springfield Gardens Jewish Center, Springfield Gardens, N.Y.	Jack Adler	
Tifereth Israel, University City, Mo.	Charles Hartman	Herman B. Hadden
Beth Jacob Cong., Columbus, Ohio	Solomon Fuchs	Milton Lennon

The synagogues cited above have either reerected or newly installed mechitzoth — the separation of the men's and women's section. According to Rabbi Solomon J. Sharfman, President of the Rabbinical Council of America, the development is viewed as "a reversal of the trend towards abandonment of Torah standards."

"The removal of mechitzoth was the symptom of the infiltration of influences foreign to Judaism, and its inevitable accompaniment has been the adulteration of Jewish worship and of the Jewish concept of life. In no case has this deviation — however well-meaning may, in some instances, have been its motivation — achieved its supposed aim of increasing synagogue attendance. The very contrary has been the inevitable result.

"Today, thank the Almighty, we see the rise of a truer understanding, we see many who had been estranged turning to a reawakened appreciation of the Jewish heritage and a determination to uphold and fulfill it. Among the congregations which had suffered deviations in Jewish practice, a steadily increasing number are rising again to re-affirm the sovereignty of Halachah in Jewish life and the sanctity and indestructible unity of our sacred Jewish tradition. The erection or restoration of mechitzoth in the synagogues is a symbol of a profound re-birth."

... tablishment of a separate Publications Division. All UOJCA periodicals and literature, other ...

... is also Editor of JEWISH LIFE, with M. Judah Metchik serving as Assistant Editor.

On Other Fronts

... sion call for intensified tempo in these fields, with regional gatherings blueprinted on a coast-to-coast basis.

Feuerstein Urges U.S. to Ensure Freedom of Transit in Suez Canal

Moses I. Feuerstein

source for chapter VII

1

A News Report on New Mechitzoth

FROM "JEWISH ACTION," APRIL-MAY, 1957

14 SYNAGOGUES INSTALL MECHITZOTH; VIEWED AS MARKING UPWARD TREND

Fourteen congregations during the past year have re-erected or newly installed *mechitzoth,* the separation between the men's and women's seating sections required for public worship by Jewish law, a study by the headquarters of the Union of Orthodox Jewish Congregations of America disclosed. The congregations which have effected the change to Jewish seating practice are located in various parts of the country and vary widely in size and in historic background. . . .

The development is viewed by the country's Rabbinic and lay leaders as a significant manifestation of the mounting tempo of the Torah-ward current in American Jewish life. A statement by Rabbi Solomon J. Sharfman, president of the Rabbinical Council of America, said:

SYMBOL OF REBIRTH

"This inspiring development testifies to a reversal of that trend toward abandonment of Torah standards which in the past has posed so ominous a threat to American Jewry. Entire congregations, as well as great numbers of individuals, have been the victims of that trend.

"The removal of *mechitzoth* was the symptom of the infiltration of influences foreign to Judaism, and its inevitable accompaniment has been the adulteration of Jewish worship and of the Jewish concept of life. In no case has this deviation—however well-meaning may, in some instances, have been its motivation—achieved its supposed aim of increasing synagogue attendance. The very contrary has been the inevitable result.

"Today, thank the Almighty, we see the rise of a true understanding; we see many who had been estranged turning to a reawakened appreciation of the Jewish heritage and a determination to uphold and fulfill it. Among the congregations which had suffered deviations in Jewish practice, a steadily increasing number are rising again to re-affirm the sovereignty of Halachah in Jewish life and the sanctity and indestructible unity of our sacred Jewish tradition. The erection or restoration of *mechitzoth* in the synagogues is a symbol of a profound re-birth."

VIII

conclusion: the case in court

IT WAS on the basis of the facts presented in this book that the Mount Clemens case was fought. The defenders of authentic Jewish tradition could not accept the introduction of mixed pews. However, it should be on record that they made every effort to avoid a conflict in the civil courts. They offered to take the entire issue before a Jewish religious court competent to rule on Jewish Law. Only when this was refused, and the trustees of the congregation proceeded with the introduction of mixed seating, was the case reluctantly taken to the civil courts with a Bill of Complaint (1), supported by a Brief (2), in our search for an injunction to stay their hand.

The basis for civil action readily emerges from the present book. This synagogue was built by its founders

in the strictest accordance with established Jewish law and practice, and in definite contradiction to the procedures of Reform synagogues, which were then already well established.

When these founders stated in the congregation's Constitution that its object shall be "the furtherance of Jewish religion," they very obviously meant the historically established Jewish religion. They wanted to further it in those ways which, by Jewish law, are incumbent upon a congregation: by the provision of a place of worship and a place of study such as the Synagogue has traditionally been.

Thus the leaders of the congregation were obliged to make available these services according to the rules of Jewish law. This is borne out by the fact that the synagogue did, in fact, follow orthodox practices and fulfill all obligations of Jewish law. Any change from this course of action, such as an alteration in seating arrangements, which would force an orthodox member either to leave the congregation or to do violence to his religious principles, represents a violation of the fundamental purposes for which the congregation was founded. (It should be noted that, when a form of ecclesiastical support was sought to defend the change in mixed pews, it was a Conservative clergyman who was called upon.) It furthermore deprives the conscientious orthodox members of their established property rights. Not even a majority of members, at any given time, can do that.

It is not sufficient to argue that the congregation will remain orthodox despite the changed seating arrangements. Orthodoxy does not depend on statements of allegiance but on actual compliance with the Law. Since there will be no such compliance, conscientious orthodox members

have no other source of relief but the courts in order to protect their established rights and the purposes for which the congregation was established, just as they did in the New Orleans case, referred to in chapter I (see source 3 there).

To our regret, the case led to unfortunate statements in print which only served to add confusion and rancor to an issue already emotionally beclouded. For the record we have included one typical statement in the sources (3), along with a courageous and heartwarming answer by a stalwart defender of our faith, of the younger generation, Rabbi David Hollander (4).

Meanwhile, the initial Bill of Complaint, with its supporting brief, failed in its purpose; it was necessary to appeal to the higher court for a reversal of the unfavorable decision. Toward this end the plaintiffs, through their attorneys, presented a fuller brief, marshalling the facts more cogently, and documenting them more thoroughly(5). Mr. Samuel L. Brennglass, vice-president of the Union of Orthodox Jewish Congregations of America, and a brilliant attorney, prepared another, most effective brief, which the Rabbinical Council of America and the Union presented as *amici curiae,* "friends of the Court."

It is only left to record, with humble gratitude, that by the grace of God, a favorable decision was rendered by the Supreme Court of the State of Michigan. It is reprinted here in full (7), together with the decree which the Court issued subsequently (8).

This decision establishes a bulwark in Michigan State law to defend orthodox Jewish faith against inroads by would-be "modernizers" and "reformers." We can but hope that it will also help our brethren in other states of the Union by setting a significant precedent.

But it is with no sense of victory or triumph that we receive this decision. It is with the hope and the prayer that as Jewish religious practice continues unchanged in the synagogue, it may lead our fellow-Jews away from a modern jet-age of speed, confusion and emptiness to a glimpse of man's ability to commune with the Divine beyond the reaches and ravages of time.

sources for chapter VIII

1

The Bill of Complaint

IN THE MOUNT CLEMENS CASE

[*No. 25233*] *presented in the Circuit Court for the County of Macomb, State of Michigan, in Chancery, by Walsh, Walsh, O'Sullivan, Stommel & Sharp, Attorneys for Plaintiff, September 7, 1955.*

MEYER DAVIS, SAM SCHWARTZ and BARUCH LITVIN, Members of Congregation Beth Tefilas Moses, Plaintiffs, vs. J. N. SCHER, MORRIS FELDMAN (Dr.), SAM LEVINE, SAM GORDENKER, MAX SCHWARTZ, HARRY MALBIN, MAX ELKIN, BERNICE LITVIN, ALICE FARBER, REVA CHAITMAN, SAM GINSBURG and SAM LEVINE, Members of the Board of Trustees of Congregation Beth Tefilas Moses, an Orthodox Jewish Congregation, Defendants.

The plaintiffs above named respectfully aver unto this honorable court as follows:

I

That plaintiffs are members of the Congregation of Beth Tefilas Moses, an Orthodox Jewish Congregation, organized and existing under the laws of the State of Michigan and located in the City of Mt. Clemens in the County of Macomb and State of Michigan.

II

That the defendants are the duly elected and constituted members of the Board of Trustees of said congregation and purport to with respect to the within controversy in their representative capacity.

III

That defendant trustees, in accordance with the constitution of Congregation Beth Tefilas Moses, have the full and complete physical control and direction of the activities and property of the Congregation including the synagogue or place of worship of the Congregation; but do not have power or authority under ecclesiastical or civil law to abrogate or change the form of worship of said Congregation.

IV

That the real property of the Congregation on which is located the synagogue and its appurtenances was conveyed to the Congregation by instruments of conveyance described in schedule A attached hereto and made a part hereof.

V

That defendant trustees hold the title to the synagogue and its appurtenances by virtue of their office, as trustees for the purposes for which the Congregation was formed and dedicated, to wit: as a place of worship of an orthodox Jewish congregation.

VI

That the synagogue was built in the year 1921, and thereafter other improvements were added to the real estate presently held by the defendant trustees aforesaid; therewith the holdings have a present value of upwards of forty thousand dollars; that the synagogue and other improvements were built from the

funds and contributions of orthodox Jews of the Mt. Clemens community as well as from the funds and contributions of orthodox Jews who have come to Mt. Clemens from time to time to the health resorts of that community; that the funds and contributions of orthodox Jews, including the plaintiffs herein, have maintained the synagogue and its appurtenances down to the present time.

VII

That the Jews' religion is based upon the *Halachoth,* or authoritative statements of the rules of conduct as guides to the exact fulfillment of the Divine commands found in the Talmud, the chief body of Jewish tradition, which in turn is based upon the interpretation of the Hebrew Scriptures, particularly the Torah or great body of Mosaic law.

VIII

That in accordance with the *Halachoth,* it is forbidden to pray in a synagogue where men and women sit together, as such synagogue under the orthodox Jewish tradition has no *kedushah* or congregational sanctification; that the separation of the sexes has been strictly adhered to in the orthodox Jewish practice for upwards of three thousand years, and orthodox Jews, such as the plaintiffs herein and those whose funds and contributions built and maintained the synagogue of Congregation Beth Tefilas Moses, cannot conscientiously worship contrary to orthodox custom and tradition in a synagogue where the sexes are not separated.

IX

That on or about the 28th day of July, 1955, at a special meeting of the members of the Congregation of Beth Tefilas Moses, certain members constituting a reform movement, so-called, within the Congregation, voted by a majority vote to

introduce mixed seating within the synagogue, and the defendant trustees, as plaintiffs are informed and have reason to believe, are making arrangements to carry out the dictates of the aforesaid vote; that the plaintiffs are informed and have reason to believe that said mixed seating will be put into effect in the synagogue for the High Jewish Holidays approaching, namely, Rosh Hashanah occurring on September 16, 1955, Yom Kippur occurring on September 26, and the Feast of the Tabernacles commencing on October 5, 1955, as well as at other times.

X

That if mixed seating is established or permitted by the defendants as aforesaid, the plaintiffs and the members of the Congregation who adhere to the orthodox Jewish tradition and practice will be deprived of the beneficial use of the synagogue, particularly during the High Holidays approaching, and at all other times; that there is no other orthodox synagogue in the Mt. Clemens community, and the plaintiffs and other adhering members of the Congregation will be forced to leave the city and seek a place of worship elsewhere; and that the contemplated acts of the defendants aforesaid in instituting or permitting mixed seating will deprive the plaintiffs and the adhering members of the Congregation of their property rights in the synagogue and its appurtenances as adhering orthodox members of the Congregation, as it was organized and as it existed down to the time of the vote aforesaid and the contemplated action of the defendant trustees based upon said vote.

XI

That the action of members constituting the reform group, so called, of the Congregation is radically and fundamentally opposed to the doctrines, customs, usages and practices of Congregation Beth Tefilas Moses and orthodox Judaism recognized,

accepted and practiced by the Congregation prior to the reform movement referred to herein.

XII

That the amount in controversy exceeds the sum of $100.00 and the plaintiffs have no adequate remedy at law.

Wherefore, the plaintiffs pray:

1. That the defendants may, without oath (all answers upon oath hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged.

2. That the plaintiffs may have an order directing the defendants and each of them to show cause on a day certain sufficiently in advance of the commencement of the High Jewish Holidays mentioned in Paragraph IX of this bill of complaint so as to protect the property rights of the plaintiffs therein, why a restraining order should not issue enjoining and restraining the defendants from instituting or permitting mixed seating in the synagogue, particularly during the said High Jewish Holidays and at all other times pending the hearing of this cause.

3. That the court find that the action of the Congregation in voting mixed seating was contrary to the established practice of orthodox Judaism as recognized by the Congregation from the date of its organization to the time of said vote.

4. That the true congregation of Congregation Beth Tefilas Moses are the plaintiffs and those who adhere to the established tradition and practice of orthodox Judaism as recognized by the Congregation prior to the vote aforesaid.

5. That the vote of the Congregation in favor of mixed seating was not the vote of the true Congregation and constituted an illegal interference with the property rights of the plaintiffs and the other adherents of orthodox Judaism.

6. That the defendant trustees be enjoined and restrained from instituting or permitting mixed seating in the synagogue of Congregation Beth Tefilas Moses or otherwise carrying out the vote of those members who by their action do not constitute the true Congregation aforesaid.

7. That the plaintiffs may have such other and further relief in the premises as shall be agreeable to equity.

Meyer Davis, Sam Schwartz, Baruch Litvin

2

Brief

IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

PLAINTIFFS HEREIN, by Walsh, Walsh, O'Sullivan, Stommel and Sharp, their Attorneys, respectfully submit the following brief in support of their application for a preliminary injunction in this matter.

CONTENTS

A. The facts as shown by the Bill of Complaint.
B. The issue presented.
C. The applicable law.
D. The defendants' Motion to Dismiss fails to set forth any legal or equitable basis for dismissal or for refusing the granting of the preliminary injunction.
E. The relief prayed.

THE FACTS AS SHOWN BY THE BILL OF COMPLAINT

The undisputed material facts shown by the sworn Bill of Complaint in this matter are:

1. The Congregation was founded as a Jewish Orthodox Congregation over 30 years ago.

2. The real property upon which the Synagogue and the other appurtenances were built was conveyed to a congregation that was Jewish Orthodox.

3. The Synagogue was built over 30 years ago and was dedicated to the Jewish Orthodox form of worship.

4. That in an Orthodox congregation, the men and women do not sit together in worship, and mixed seating is a desecration, and orthodox Jews cannot, in conscience, worship in a synagogue where mixed seating is allowed.

5. That the plaintiffs and others adhere to the orthodox practice and ritual.

6. That the defendant trustees have no power of authority under ecclesiastical or civil law to abrogate or change the form of worship of the congregation.

7. That in the congregation is a group that favors a form of worship not in accordance with orthodox Jewish practice and doctrine; that through the efforts of this group, the defendant trustees have been directed and plan to establish mixed seating during the High and solemn Holidays of Rosh Hashanah, Yom Kippur, the Feast of the Tabernacles and the other holidays now approaching.

8. That the plaintiffs and others who adhere to the orthodox Jewish practice and doctrine will suffer irreparable injury as a result thereof in that they will be deprived of the opportunity to worship during said holidays in the synagogue of the congregation and will be compelled to go elsewhere.

THE ISSUE PRESENTED

The issue here is not a question of the right of a majority of a church organization to exercise its prerogative upon a matter of church policy within its jurisdiction. Instead, it is a

question of whether a majority of a church congregation can institute a practice within the church fundamentally opposed to the doctrine to which the church property is dedicated, when a minority of the congregation adhere to the established doctrine and practice.

THE APPLICABLE LAW

The right of a member of a congregation to the beneficial use of the church property as a place of worship is a property right, and the judicial determination of property rights as between two church groups claiming church property does not constitute an unlawful interference with the ecclesiastical affairs of a church. *See: United Armenian Church vs. Kazanjian,* 322 *Mich.* 651.

Such judicial determination is not the adjudicating of the right of any person to a religious belief or practice contrary to a state constitution or the first amendment of the constitution of the United States. *See: Reid vs. Johnson, 85 SE 2nd 114; Supreme Court of North Carolina, decided December 15, 1954.*

The weight of authority is to the effect that the majority faction of an independent or congregational society, however regular its action or procedure in other respects, may not, as against a faithful minority, divert the property of the society to another denomination *or to the support of doctrines fundamentally opposed to the characteristic doctrines of the society, although the property is subject to no express and specific trust. See: 8 ALR 113; 70 ALR 83; Bear vs. Heasley, 98 Mich. 279; Fuchs vs. Meisel, 102 Mich. 357; Borgman vs. Bultema, 213 Mich. 684; Hanna vs. Malick, 223 Mich. 100; United A. Church vs. Kazanjian, 332 Mich. 651; Cong. Conf. vs. U. Church of Stanton, 330 Mich. 561;* to the same effect see: *45 American Jurisprudence Religious Societies, sec. 55; 76 Corpus Juris Secundum, Religious Societies, Sec. 71; The rule is well stated*

in the Reid vs. Johnson case, 85 SE 2nd 115 (citing the above authorities and others.):

"A majority of the membership . . . may not, as against a faithful minority, divert the property of the church to another denomination, or to the support of doctrines, usages, customs and practices radically and fundamentally opposed to the characteristic doctrines, usages, customs and practices of that particular church recognized and accepted by both factions before the dissension, for in such an event the real identity of the church is no longer lodged with the majority group, but resides with the minority adhering to its fundamental faith, usages, customs and practices, before the dissension, who though small in numbers, are entitled to hold and control the entire property of the church."

The conveyances of the land to the original trustees and to the congregation in this case, by implication of law, conveyed the land in trust for the purposes for which the congregation was formed; namely, a Jewish Orthodox place of worship. *See: Reid vs. Johnson, 85 SE 2nd 115; Fuchs vs. Meisel, 102 Mich. 357.*

In *Fuchs vs. Meisel, 102 Mich. 357,* the Michigan Supreme Court said: "A conveyance or bequest to a religious association or to trustees for that association, necessarily implies a trust." With respect to such a trust, the rule is well established: "Where property has been dedicated by way of trust for the purpose of supporting or propagating definite religious doctrines or principles, it is the duty of the courts to see that the property is not diverted from the trust which has been thus attached to its use. So long as there are persons who are qualified within the original dedication, and are also willing to teach the doctrines prescribed in the act of dedication, and so long as there is anyone so interested in the execution of the trust as to have a standing in court, a diversion of the property or fund to other

and different uses can be prevented. . . . It is not within the power of the congregation, by reason of a change of views on religious subjects, to carry such property to the support of a new and conflicting doctrine; in such case, the secular courts will, as a general rule, interfere to protect the members of an ecclesiastical organization who adhere to the tenets and doctrines which it was organized to promulgate, in their right to use the property, as against those members who are attempting to divert it to purposes utterly foreign to the organization, and will enjoin its diversion from the trust." *45 American Jurisprudence, Religious Societies, Sec. 61.*

THE DEFENDANTS' MOTION TO DISMISS FAILS TO SET FORTH ANY LEGAL OR EQUITABLE GROUND FOR DISMISSAL OF THE BILL OF COMPLAINT OR FOR REFUSING THE GRANTING OF THE PRELIMINARY INJUNCTION.

The first three grounds of the defendants' motion to dismiss, namely, that the bill does not state a case of action, the court is without jurisdiction because it is claimed that no property rights are involved, and finally, that the case involves the application of ecclesiastical doctrines with which the court is without right to interfere, would appear to be without merit: first, because they are not in accordance with the Applicable Law of the case; and secondly, they are in the nature of a demurrer and admit the truth of all the allegations of fact well pleaded in the bill of complaint. *Hatch vs. Wolack, 316 Mich. 258; Det. 1. 1. Ex. vs. Det. M., 337 Mich. 50; Prawdzik vs. City of G.R., 313 Mich. 376; Bishop vs. Hartman, 325 Mich. 115.*

The fourth ground of the motion, namely, that the action taken is not radically and fundamentally opposed to the doctrines of a Jewish Orthodox Congregation, is improperly pleaded in that it is the allegation of a matter in the nature of a special

demurrer not within the rule of practice governing motions to dismiss, and even if it were, it is unsupported by affidavit and is properly a matter of answer and proofs.

RELIEF PRAYED

A preliminary injunction will not deprive the defendants and the majority of the congregation of any right of worship or enjoyment of the property they have not had for the past thirty years and upwards.

A preliminary injunction is necessary to preserve the status quo of the property until a hearing on the merits of the case. Granting it will not harm the defendants and the majority of the congregation, failure to grant it will cause the plaintiffs and others who adhere to the orthodox practice forbidding mixed seating irreparable injury in being deprived of the beneficial use of their place of worship during the said solemn holidays approaching.

In *Niedzialek vs. B. Union, 331 Mich. 296,* our Supreme Court quoted with approval the following:

"An injunction pendent lite should not usurp the place of a final decree, neither should it reach out any further than is absolutely necessary to protect the rights and property of the petitioner from injuries which are not only irreparable, but which must be expected before the suit can be heard on its merits. Only those issues will be determined which are necessary factors in granting or denying a temporary restraining order. It is not necessary that the complainant's rights be clearly established, or that the court find that complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity, and in order to prevent irremediable injury to the complainant, before his claims can be investigated, it is necessary to prohibit any

change in the conditions and relations of the property and of the parties during the litigation."

In the same case, the court further said:

"In granting or withholding injunctive relief pendent lite . . . it is highly proper and quite essential for a court to consider whether the rights of the respective litigants will best be subserved by granting temporary injunctive relief if sought. If the personal rights or property rights involved will be best preserved by granting temporary injunctive relief in a suit presenting issues of controverted merit, such relief should be granted."

It is respectfully submitted that a preliminary injunction should be granted in this case pending a hearing on the merits thereof as prayed in the Bill of Complaint.

3

The Mount Clemens Story

The following appeared as an editorial in the Jewish Spectator, *January, 1957, written apparently by its editor, Dr. Trude Weiss-Rosmarin.*

FOR SOME TIME the Jewish community of Mt. Clemens, Mich. has been convulsed by a bitter struggle over the conversion of their Orthodox congregation into a house of worship following what goes by the name of Conservative Judaism. The preponderant majority of the Congregation has voted for following the Conservative ritual, but a small and vociferous minority insists that this change would be unconstitutional and must not come to pass. They argue that the Congregation was incorporated as an Orthodox house of worship and this, they insist, obligates the successors to the original founders to abide by the

Orthodox pattern. Moreover, the Orthodox minority maintains, in Jewish religious matters it is not the consent of the majority that matters but the authority of the Torah. The Torah, however, is unconditionally binding, the Orthodox group of Mt. Clemens, Mich. declares. And as the Torah, as interpreted by Orthodox Judaism, outlaws such deviations as Conservative Judaism and considers them heresy, it is clear that the opinions and preferences of those subject to the Torah should carry no weight.

All Jews, the Mt. Clemens zealots argue, must submit to the Torah as interpreted by Orthodoxy and order their lives in accordance with its laws. Determined to prevent heresy and the desecration of an Orthodox synagogue, the Mt. Clemens zealots, defeated in their own community, are now appealing to national Orthodox organizations and to Orthodox Jews everywhere to strengthen their hands so as to enable them to *force* their will upon the majority of the community who have voted for transforming the Orthodox synagogue into a Conservative house of worship. For some time now the Yiddish press and some Orthodox magazines printed in English have published appeals for funds to support "the holy war" of the Mt. Clemens Orthodox minority, so that they may be able to carry their case into the secular courts and sue for an injunction to prevent the majority of the Mt. Clemens Jewish community from committing "the heinous rape" of an Orthodox synagogue by "the camp of Conservative sinners."

As the main argument of the Mt. Clemens Orthodox minority is that the Divine authority of the Torah does not depend on the consent of those governed by it and that democratic principles are suspended in the religious sphere, it is indicated to probe whether these views, which are diametrically opposed to the democratic convictions of virtually all American Jews, are authenticated by the Torah. Our inquiry leads us first of all

to the Pentateuchal passage: *Thou shalt not follow a multitude to do evil, neither shalt thou bear witness in a cause to turn aside after a multitude to pervert justice* (Exodus 23:2). By means of interpretation, the Sages derived from this passage the principle that the majority decision is binding in all cases of doubt about what the law is. By delimiting the validity of majority opinions to that which is *not* evil and does *not* pervert justice, the Pentateuch pursues the same line of common sense as modern democracy in stipulating that the prohibition of crying "fire!" in a crowded hall is not a delimitation of free speech.

Jewish law throughout the ages was developed by upholding the principle of the power of the majority decision. The differences of opinion between the various "schools" during the Talmudic period were resolved by the democratic procedure of deciding doubtful questions of the Law in accordance with the opinion of the majority. It is significant that whenever a minority opinion attempted to soar to victory on the wings of the invocation of Divine authority, the spokesmen for the majority invoked the Pentateuchal passages: *For this commandment which I command thee this day, it is not too hard for thee, neither is it far off. It is not in heaven . . .* (Deuteronomy 30:11, 12). Even when "heaven," as it were, testified on behalf of a minority interpretation of the Law, the Sages, committed to the democratic principle of the rule of the majority, refused to be swayed. The unswerving loyalty of the Makers of the Talmud to the traditional interpretation of the universal sway of freedom in the interpretation of the Torah, predicated on democratic procedure, is strikingly attested by Rabbi Eliezer's experience with some of his Rabbinic colleagues who refused to accept an interpretation of his. The Talmud (Baba Metzia 59b) relates that "once Rabbi Eliezer adduced all possible arguments to prove his opinion, but the Rabbis did not accept it. Then he said: 'If I am right, may this carob tree move a hundred yards from

its place.' And it did move. But the Rabbis said: 'No proof can be adduced from a tree.' Thereupon Rabbi Eliezer caused the waters of the canal to flow backward and the walls of the House of Study to bend inward, but still the Sages refused to go along with him. Finally, Rabbi Eliezer cried, 'If I am right let the heavens prove it!' And sure enough, a Heavenly Voice (*Bath Kol*) was heard proclaiming: 'Why do you oppose Rabbi Eliezer? The *Halachah* always backs him up.' " But even when the very heavens supported Rabbi Eliezer, the Sages would not be moved from their democratic convictions. "Rabbi Joshua rose and said: 'It (the Torah) is not in heaven'; this means, as Rabbi Jeremiah said: 'The Law was given us from Sinai. We pay no attention to a heavenly voice. For already from Sinai the Law said, *By a majority you are to decide.*' "

Speculating on God's reaction to this declaration of independence from Heaven, the *Aggadah* has it that, following this incident, Rabbi Nathan met Elijah the Prophet and asked him what God did in the hour when the Sages rejected His support of Rabbi Eliezer's minority opinion. Elijah answered: "He laughed and said, 'My children have conquered Me.' " (Baba Metzia 59b.)

The authoritative Jewish sources, especially the Hebrew Bible, prove conclusively that the free consent of the governed and the principle "by a majority you are to decide" are the twin pillars on which the Torah is built. It is instructive to ponder that according to the authoritative text of the Bible, and not only according to the folklore of the Aggadah, did God accede to the will and decision of the people. When the tribes of Israel demanded, *Give us a king to judge us* (I Samuel 8:6) it was not only Samuel whom "the thing displeased." God Himself was "displeased," and yet He told Samuel: *Hearken unto the voice of the people in all that they say unto you, for they have not rejected you, but they have rejected Me, that I should not be*

king over them. According to all the works which they have done since the day that I brought them out of Egypt even unto this day, in that they have forsaken Me, and served other gods, so do they also unto thee. Now therefore hearken unto their voice (I Samuel 8:7ff.).

Israel rejected the "Kingship of God" and demanded a king of blood and flesh; and God not only "submitted" to this demand of the people for the duration of the life-span of that generation but "authorized" the change to a monarchical form of government on principle, to wit, the Prophets' visions of the renewal of the kingship under the House of David.

The Orthodox minority of Mt. Clemens, Mich. is not only opposing the majority of the community but the letter together with the spirit of Jewish law in arguing that "the majority does not count" in deciding what forms of religious worship should be followed. Jewish history conclusively proves that Jewish law and religion have followed an orientation which goes far beyond the equation of the Voice of the People with the Voice of God.

As we see it, the Orthodox minority of Mt. Clemens, Mich. has no case. By no stretch of the imagination can it be argued that the espousal of Conservative Judaism is tantamount "to do evil . . . and to pervert justice," which would justify the literal application of Exodus 23:2 to the situation. We hope that should the Orthodox zealots of Mt. Clemens go through with their planned *hillul hashem* and bring their case before a secular court for litigation, the earthly judge will be guided by the rulings of the Heavenly Judge, as recorded in Bible and Talmud.

4

In Answer to an Editorial

BY RABBI DAVID B. HOLLANDER

DEAR DR. ROSMARIN:

In the January 1957 issue of the *Jewish Spectator,* under the heading, "The Mount Clemens Story," you begin with premises in Jewish law that are unfounded and, hence, you arrive at conclusions which have no basis either in logic or Jewish law.

I shall seek in these following lines to prove the validity of the stand of the Mount Clemens "zealots" and to disprove the validity of your stand in the article referred to above. I realize fully that in presenting my views through your magazine, I must address myself primarily to your readers rather than to you, the author of the article. This is due to the fact that your presentations are a mixture of objective reporting in the opening paragraph and possibly also in the third paragraph on the one hand, and blind (I hope not wilful) prejudice on the other; and they are climaxed by a "prayer" that the *hillul hashem* (desecration of His Name) involved in bringing their case before a secular court for litigation, may be averted by that same court's rejection of the case.

In order to avoid the tempting pitfalls of answering you in kind, I shall limit myself to several factual refutations of the points you make.

You state that "Jewish law throughout the ages was developed by upholding the principle of the power of the majority decision"; therefore the main argument of the Mount Clemens minority that "in Jewish religious matters it is not the consent of the majority that matters but the authority of the Torah," is, according to you, "not only opposing the majority of the community, but the letter together with the spirit of the Jewish

law." Your position is made utterly untenable by the very sources you adduce to sustain your point. Of course the majority of the *Sages* were able to overrule the opinion of Rabbi Eliezer (Baba Metzia 59b), but that was a case of a dispute *among* Sages, among experts on Jewish law, among Rabbis of unquestioned scholarship and fear of God. In such a case we have clear instruction in Torah and Talmud that the majority opinion of the Sages prevails. Also, you talk of a dispute, but there is no dispute of law in the case of mixed seating. Regardless of what anyone might say or write, these facts are clear: 1) There is no orthodox rabbi in the world of *any* recognized standing in the eyes of existing orthodox rabbinical bodies, who will state that mixed seating is *not* a violation of Jewish law. 2) From the President of Yeshiva University to the heads of so-called ultra-orthodox *yeshiboth* in the United States and Israel, these leaders will not worship in any synagogue if it has mixed seating. 3) The Chief Rabbi of Israel, on his visits to the United States, has carefully refrained from entering a synagogue with mixed seating arrangement. Therefore, it does not matter how many (and I believe that there are not too many) Rabbinical Council or other orthodox rabbinic members have synagogues with mixed seating. The rabbi may be guilty of violating the law, the law remains binding on all.

But is it not utterly ridiculous to equate the Mount Clemens case with that of a dispute among Rabbis of the Talmud (or even with a dispute among rabbis of our times)? In the Mount Clemens case we have a majority of men and women who do not even claim to be either learned or pious in the observance of the Sabbath, *taharath ha-mishpahah* (family ritual purity), etc.; it is they who voted the change in a clear rejection of the oral and written pleas made to them by every orthodox Rabbinic body in the U.S.A. (I, in my capacity as president of the Rabbinical Council went there and met with a small committee of

perhaps ten people, and pleaded with them not to insist on going through with the violation of the Torah.) My plea was only a faint echo of the much more authoritative request of the world orthodox Rabbinate, who in turn merely reaffirmed the elementary principles of Jewish law in this matter of mixed seating; all were rejected, not by rabbis, nor even by learned and/or pious laymen, but by men and women who, as I said before, laid no claims to adherence to the *Shulhan Aruch,* even aside from the question of mixed seating.

And while I am on this phase of the subject, may I just make a short reference to another article in your magazine written by some one from Mount Clemens and signed by the pseudonym, *Rodef Sholom* (why does not the writer reveal himself?) where I came personally under attack. I am not worried about that because God knows whether those words are sincere or not, and His knowledge is enough for me. Still, in keeping with the principle of *vihiyithem nekiyyim mehashem umiyyisra'el—ye shall be clear before the Lord and before Israel* (Numbers 32:22), I wish to state that it is not true that I was invited to address the congregation in Mount Clemens. I was permitted to meet with a small committee in someone's private home, and was told that "the die was cast." (Two days later a large meeting was held which I might have been able to crash, but I was certainly unwelcome.)

Moreover, I was told that the fact that Mr. Baruch Litvin brought me down to Mount Clemens would militate against me and my stand. True, Mr. Litvin is a "controversial figure"; (I wish to God there were more unpopular controversial figures who are sincere in seeking to uphold the truth, whether in Judaism or Americanism;) but is there "guilt by association"? Shall an *issue* suffer in the eyes of the "just and democratic majority" of Mount Clemens because of "controversial figures" like Litvin or the present writer? There were also complaints about "out-

siders" coming in to interfere in the local matter. These mutterings smacked of the complaint made in certain cities when lawyers from the North came to defend those who stood accused before a hostile and prejudiced majority.

* * *

You make much of the will of the majority being ignored by a minority. But the fact remains that religious and moral principles are superior to all majorities. The majority may, and does have more *power* than the minority, but that does not make it *right*. The whole fuction of religion is to get the majority to voluntarily submit to the authority of religion. The minority is not right by virtue of *being a minority*, but neither is it wrong *on that account*.

It is dangerous to speak of the "rightness" of the majority where religion, ethics, and justice are involved.

We, the Jewish people who suffered from so much persecution, and are still as individuals and as a group the victims of prejudice and "double standard" justice, can hardly find refuge in the position that the majority is *right*. Unfortunately, only small minorities, nationally and internationally, were friendly to the Jews—the majority was *not*. The whole concept of the majority being right *because it is aligned against a minority* is a repudiation of both the Jewish and American conception of justice. The current court decision on rights of Negroes is probably not in keeping with the majority opinion of the people *in* the cities and states where these decisions are applicable; shall we say that *therefore* the court is wrong and the democratic majority (with a small "d") are right? It is interesting in this connection that those who denounce the court, do so behind the convenient but deceptive facade of *constitutional* government; I am afraid I see a parallel between that approach and the one which says that "a small and vociferous minority" wants to retain orthodoxy in Mount Clemens, and by so insisting,

they, the orthodox, are guilty of *hillul hashem* (desecrating His Name). According to this topsy-turvy logic, they who defend the law desecrate the Torah, and by implication, those who reject the law sanctify the name of God.

* * *

You speak with resentment about this issue going to a secular court. On this point I wish to answer: 1) Before going to a secular court, every effort was made, as I stated above, to persuade with *only* peaceful means, by pleading and begging, to get the rebels against the authority of Jewish law to repent, and to permit the synagogue to proceed in consonance with its orthodox beginnings. 2) The decision was by a majority of men and women themselves not qualified by learning or piety to *pass on,* let alone *change* Jewish law; do they constitute a *religious* court? Are they not infinitely less authentic than an American secular court full of the prejudice of a majority, which did not want to listen publicly to the orthodox point of view offered by a Detroit member of the Rabbinical Council of America and myself, but did listen to a spokesman of the conservative United Synagogue? 3) The term *hillul hashem* in connection with going to a secular court signifies, of course, that we would thus tell the non-Jewish community of our religious differences. I never believed that the non-Jewish American was so naive that he did not realize that we have "grown up," and from *one* Judaism we now have in addition to classical orthodoxy two denominations, Reform and Conservative. Do you believe that the Christian American is unaware that usually there are three types of Jewish houses of worship and rabbis in small and large cities? And finally, is not *hillul hashem* at its worst, the demonstration by Jews that they desecrate the Sabbath, patronize *trefe* restaurants and hotels, permit their synagogues to be empty of worshipers, and then on top of that arbitrarily and without even a *semblance* of Halachic approval

alter the traditional character of the synagogue? It is *that* kind of *hillul hashem,* which we demonstrate in the streets and public places for non-Jews to see—that we, the People of the Book, reject the teachings of the Book—which ought to disturb us. But how can it, when we are so busy pinning that label of *hillul hashem* on those who sanctify His Name bearing all the ridicule and insults of a practically "one-party" Anglo-Jewish press in order to salvage some Judaism from the flood of invective and ignorance that has inundated our community.

* * *

Finally, I would turn to those to whom the issue of *introducing* mixed seating has become no less an "ideal" than to preserve traditional seating is to the truly orthodox. I turn to them in a plea in these difficult times not to flout the law of the Torah, not to take the personal and collective risk involved in raising one's hand against the Torah. Suppose you succeed in changing the seating arrangement; will that save *Judaism?* Is it not a fact that non-orthodox rabbis are complaining that their temples, even at the late Friday night service (which itself is bound up with many features of Sabbath violation) are pitifully empty unless some kind of special "gimmick" is employed which "attracts" the people, but not on the basis of the compelling sanctity of religion. Hence, when the "gimmick" is not there, the people are not there, and this despite all the concessions that the temple has made to the *imagined* yearning of the American Jew. Parking lots, mixed choirs, organs, mixed seating—all these have not brought the people to the temple. Those that do come are primarily children of those who still were attached to the orthodox synagogue. The children of parents who themselves were members of Conservative and Reform temples are conspicuous by their absence.

Also, did you ever consider the moral and American aspects—aside from the religious—of changing the traditional

character of the synagogue? 1) It is morally wrong because we are interfering with the plans of those who are now dead, but who during their lifetime built the synagogue to be orthodox. These dead people cannot vote, but it is a case where "the blood of thy brother cries out to thee from the earth." Can we turn a deaf ear to their clear intention as spelled out in their lives and in the concrete structure of the synagogue? (Except for the last ten years or so, when many Conservative temples were built anew, the majority of Conservative temples have been "created" through voting power, which changed the orthodox character of the synagogue.) Are the living fair to the dead who worked and sweated to build those edifices, when we by a vote dissipate and squander that "easy" heritage?

2) It is especially un-American where, as in Mount Clemens, there is only one synagogue. Surely no advocate of mixed seating will say that it violates his religious conscience to attend an orthodox synagogue (many Conservative and Reform Jews and rabbis attend the *yahrzeit* of their Orthodox parents *only* in an *Orthodox* synagogue). At best the advocate of mixed seating can argue that it violates his sense of esthetics or convenience. But the Orthodox Jew has no choice. His religion tells him that he must pray at home without a *minyan* (religious quorum for group prayer) rather than attend a synagogue with mixed seating.

Dr. Soloveitchik, in his convention message to the Rabbinical Council convention of July 1955, states clearly that even on High Holidays one must miss *teki'ath shofar* if necessary, rather than attend such a synagogue. Therefore, in a choice between violating one's convenience or one's religious conscience, American fair play will undoubtedly require that the religious conscience must be given priority.

This above point is especially valid when you consider that numerically the orthodox produce a greater number of

worshipers, pro rata at least, than the Conservative and Reform. It is interesting that of the "majority" that voted *for* mixed seating in Mount Clemens only a *small minority* attended the synagogue throughout the year, while of the minority that voted for traditional seating, the majority attended synagogue daily and on the Sabbath.

As you may know, I have recently returned from an historic tour of Russia and other countries where religion has had a stubborn struggle of a different nature than we know that struggle to be elsewhere. There is a substantial minority that has held fast. I ask all fair minded people to judge whether, if these Jews had been reared on a non-orthodox religious diet, they would have displayed the same obstinate quality of "holding on to the Torah" that they now do. I leave that answer to fair-minded people, because they must conclude that when the "chips are down," when real *mesirath nefesh* is required, only those who accept the yoke, discipline and authority of the Law will hold on to the tree of life, the Torah.

5

Brief for Plaintiffs and Appellants

presented in the Supreme Court of the State of Michigan, in appeal from the Circuit Court for the County of Macomb, in chancery; Hon. Edward T. Kane, Circuit Judge.

STATEMENT OF QUESTIONS INVOLVED

I. *May a majority of a church congregation institute a practice within the church fundamentally opposed to the doctrine to which the church property is dedicated, as against a minority of the congregation who adhere to the established doctrine and practice?*

The lower court answered the question "Yes".

Appellant contends the question should be answered "No".

II. *What is the established doctrine or practice claimed to be violated?*

The violation would appear to be undisputed inasmuch as no proofs were offered by the appellees and the trial court made no finding on the question.

III. *Is the act attempted by the defendants violative of that doctrine or practice?*

The violation would appear to be undisputed inasmuch as no proofs were offered by the appellees and the trial court made no finding on the question.

IV. *Would the action, unless restrained, deprive the plaintiffs of a valuable property right?*

The lower court answered the question "No".

Appellant contends the question should be answered "Yes".

STATEMENT OF FACTS

The plaintiffs-appellants are members of Congregation Beth Tefilas Moses, an Orthodox Jewish Synagogue located in the City of Mt. Clemens in Macomb County, Michigan. The defendants-appellees constitute the Board of Trustees of the Congregation.

The Congregation was founded in the year 1911 and was incorporated in 1912 under Act 209 of the Public Act of Michigan of 1897 as an ecclesiastical corporation. The Charter of the Corporation lapsed for failure to file reports in 1934 and the Congregation has continued as an unincorporated association down to the present time.

The original Constitution was adopted in 1918 and was printed in Yiddish, the traditional language of Orthodox Juda-

ism. The land on which the Synagogue was built in 1921 was acquired by the Congregation between 1912 and 1919. When the Synagogue was built, it was constructed with a women's balcony, which has remained and has been used as such to the present controversy.

Under the Orthodox practice, the men and women do not sit together during prayer. Until the mixed seating practice attempted by the defendants, this was the established and practiced seating of the Congregation. The men sat in the main portion of the Synagogue; the women in the balcony. At all times, the Congregation was served by Orthodox Rabbis.

Plaintiff Litvin is a businessman and has been a member of the Congregation for over twenty years. He served at one time as financial secretary of the Synagogue and later as its president. In or about the year 1954 agitation for mixed seating arose in the Congregation. A vote was called by the proponents of the matter and thirty-three members voted against the proposal and thirty members for it. A year later the group in the Congregation advocating mixed seating procured the appointment of a committee which called a meeting on July 14, 1955 for the purpose, among others, of considering the practice of mixed seating.

Plaintiff and other members of the Congregation opposed the move, pointing out that the Orthodox practice forbade mixed seating, and references were made to the literature on the subject. However, the majority of the Congregation voted for mixed seating, which the defendants-appellees thereafter proposed to carry out. Mr. Schwartz, the President of the Congregation, and Mr. Litvin, plaintiffs herein, did not participate in the vote and Mr. Schwartz then resigned the presidency in protest.

After the pending litigation was instituted and during the pendency of the temporary injunction restraining mixed seating,

some instances of mixed seating were attempted and the plaintiffs, consistent with the requirement of Orthodox Jewish practice, were forced to leave the Congregation and worship in an Orthodox Synagogue in Detroit.

The major alignments of Jewry in the United States are Orthodox, Conservative and Reform. There are theological differences between these groups, but the major one is that the Orthodox Jew believes in Divine Revelation, namely that the Torah given to the Jewish People on Mt. Sinai represents the dedicated Word of God and is not subject to change, although its application might be varied by the duly authorized Rabbinical Authorities. The Orthodox Jew firmly believes in Divine Revelation; the Conservative and Reform groups have rejected the full authority and binding character of the Jewish Law. The written law and the oral law and the later commentaries on these constitute the Torah or *Halachah*. Halachah is the binding decision of Jewish Law. In that sense, Torah and Halachah are synonymous. The law is immutable, and all Jews who describe themselves as being faithful to their religion must accept its authority.

In the Orthodox view, only a properly qualified Rabbi may apply Jewish Law. The Rabbi must be a scholar ordained by the proper authority, and he must himself be pious and accept fully and without reservation the full authority of the law.

The Rabbinical Council of America, comprising approximately seven hundred members serving Orthodox congregations throughout the United States and Canada, and of which the Rabbi serving Beth Tefilas Moses is a member, has issued various declarations on the subject of mixed seating affirming the immutable Jewish Law prohibiting prayer in a Synagogue where men and women pray together without the proper separation.

The prohibitions against mixed seating are found in the sacred scriptures (testimony of Rabbi Hollander and testimony of Dr. Weiss). The prohibition does not infer or suggest an inferiority of women in the Jewish religion. It suggests that men are not capable of keeping attention on the Almighty and the prayer directed to the Almighty in the presence of women; since prayer demands complete attention and devotion to the Almighty, the presence of women is considered distracting, and the separation is intended to achieve the desired dedication and devotion.

An Orthodox Jew cannot in conscience worship in a Synagogue where mixed seating is permitted. In such case the Synagogue with mixed seating loses the character of a Synagogue, and no Jew who believes in the authority of the Torah is permitted to pray in such a Synagogue. Contrarywise, an adherent of the Reform or Conservative Movements may worship in an Orthodox Synagogue without violating his religious principles.

Where mixed seating is practiced, no Orthodox Rabbi may serve such a Synagogue without the consent of the Rabbinical authorities. This authority is sometimes permitted after a proper analysis of the Congregation in an attempt to bring the Congregation back into the accepted practice. The purpose of permitting temporary assignments of a Rabbi to a mixed pew congregation is to regain the congregation. From the Rabbinical standpoint, the only one who worships in such a congregation with permission in such a case is the Rabbi, as he is there to effect the separation of the sexes.

The Reform and Conservative movements practice mixed seating. Upon entering a Synagogue, the immediately observable thing would be that the men and women in the Orthodox Synagogue are required to be separated and in the Conservative and Reform Synagogue they would not. Where a balcony is

not used and a partition is substituted in its place, the partition in Jewish Law is called a *mechitzah.* A *mechitzah* may consist of any substance as long as it achieves the purpose of the law to give the men and women the attitude of mind necessary to concentrate entirely on the sacredness of the worship. Men and women worshipping together in a congregation where no physical spacing separated them would constitute mixed seating. In the earlier Synagogues, the mechanical way of achieving the separation was to build a balcony. In more recent years new architectural designs and concepts have succeeded in separating the aisle of men from women. The law is regarded as adhered to where there is a physical separation even without a balcony.

The reference in Article 2 of the present Constitution of the Congregation to the purpose of "furthering the Jewish religion" refers to Orthodox Judaism. In the Orthodox view, the term "Judaism or Jewish religion" without the qualifying adjective (Orthodox), which is of recent vintage, must necessarily refer to Orthodox Judaism. The practice of using the term "Orthodox" has been more recently adopted to distinguish it from the Reform and Conservative movements.

The reference in the original Constitution of the Congregation stipulating that praying should follow the Rite of the Ashkenaz Jews refers to Orthodoxy. The Ashkenazic Rite refers to Eastern European countries, Poland, Russia, Germany, Hungary and other countries where a certain form of prayer was used as distinguished from that of the Jews of Spain. Mixed seating under this Rite was not allowed.

The defendants-appellees presented no proof in the case, and upon the close of the proofs, the lower Court made a finding that the Congregation was autonomous, and its Rites would be governed by a majority of its members. From a Decree dismissing the Bill of Complaint, the plaintiffs-appellants respectfully take this appeal.

ARGUMENT

I. *A majority of a church congregation may not institute a practice within the church fundamentally opposed to the doctrine to which the church property is dedicated, as against a minority of the congregation who adhere to the established doctrine and practice.*

Preliminarily, it may be stated that this case does not involve a question of the right of the governing body of a church to exercise its prerogative upon a matter of church policy within its own organization. Instead, the question is whether a majority of a church congregation can institute a practice contrary and fundamentally opposed to the doctrine recognized by both factions prior thereto as against a minority of the congregation who adhere to the established doctrine or practice.

The Bill of Complaint and the proofs in this case clearly show the appellees' attempt to institute mixed seating in this Synagogue in which the appellants are members. The proofs clearly show that such practice is contrary to the Orthodox practice and that the appellants and others who adhere to the Orthodox practice cannot worship in a Synagogue where mixed seating is permitted. It is the position of the appellants that the action of the appellees deprives the appellants and those who adhere to the established practice of a valuable property right, to-wit: the use of the Synagogue to worship in accordance with the established doctrine of the Congregation.

The action of the appellees in practical effect is a diversion of the Synagogue of this Congregation to the use of a reform group whose tenets, rites and practices are as fundamentally opposed to those of Orthodox Judaism as those of other denominations.

Does the membership of a congregation have the right to effect, by vote of a momentary majority, a change in religious

practice, not conformable with the origin and historic character of the Congregation as against those who faithfully adhere to the characteristic doctrine of the Congregation?

The weight of authority is to the effect that the majority faction of an independent or congregational society, however regular its action or procedure in other respects, may not, as against a faithful minority, divert the property of the society to another denomination *or to the support of doctrines fundamentally opposed to the characteristic doctrines of the society, although the property is subject to no express and specific trust. 8 ALR 113; 70 ALR 83; Bear v. Heasley,* 98 Mich. 279; *Fuchs v. Meisel,* 102 Mich. 357; *Borgman v. Bultema,* 213 Mich. 684; *Hanna v. Malick,* 223 Mich. 100; *United A. Church v. Kazanjian,* 322 Mich. 651; *Cong. Conf. v. U. Church of Stanton,* 330 Mich. 561; *76 Corpus Juris Secundum, Religious Societies,* Par. 71, Page 853.

To the same effect see: *45 American Jurisprudence, Religious Societies,* sec. 55; *76 Corpus Juris Secundum, Religious Societies,* sec. 71. The rule is well stated in *Reid v. Johnson,* 85 SE 2d 115 (citing the above authorities and others):

"A majority of the membership . . . may not, as against a faithful minority, divert the property of the church to another denomination, *or to the support of doctrines, usages, customs and practices radically and fundamentally opposed to the characteristic doctrines, usages, customs and practices of that particular church recognized and accepted by both factions before the dissention, for in such an event the real identity of the church is no longer lodged with the majority group, but resides with the minority adhering to its fundamental faith, usages, customs and practices, before the dissention, who though small in numbers, are entitled to hold and control the entire property of the church.*"

The lower Court's finding that a Jewish Congregation is

autonomous does not militate against the rule of law that the property interest of a member of a Jewish Congregation upon the continued maintenance of a house of worship adhering to the fundamental principles of the founders is paramount.

II. *The prohibition against mixed seating in the Orthodox Jewish practice was clearly established.*

The appellees' attempt to obtain a dismissal of the appellants' cause of action in the lower Court upon the Bill of Complaint and the evasive answer and amended answer of the appellees together with their failure to offer proofs in the case rather clearly emphasizes the inability of the appellees to defend the practice of mixed seating.

Congregation Beth Tefilas Moses was founded as an Orthodox Jewish Congregation. Its Synagogue was constructed and maintained from the time of its founding by Orthodox Jews whose contributions improved the property as a place of worship for all those who adhered to the Orthodox practice.

The distinguishing feature of the Orthodox ritual as compared to that of the Reform and Conservative movements is separate seating for the men and women. The most concrete evidence of the Orthodox practice in Congregation Beth Tefilas Moses is its women's balcony which has been consistently used from the time of the founding of the Congregation down to the present controversy.

The Orthodox Jew believes in a continuous Judaic tradition based upon a divinely revealed Bible. The Orthodox Jew regards the observance of the rituals and ceremonies as basic to the values of Judaism. The prohibition against mixed seating found in the scriptures has been carefully observed in the ritual of Orthodox Judaism for over three thousand years. Diametrically opposed to the Orthodox practice is that of the Conservative and Reform groups which practice mixed seating and other

ceremonies which these groups do not regard as Divinely required because they do not believe in the principle of Divine Revelation as accepted by Orthodoxy.

In *Fisher v. Congregation B'Nai Yitzhok* (Penn.) 110 A 2d 881, the Orthodox practice of not permitting mixed seating is well indicated. In that case the plaintiff was an ordained Rabbi of the Orthodox Hebrew faith and was engaged as a cantor for High Holiday services for an agreed compensation. Shortly before the Holidays the congregation moved into a new Synagogue in which, instead of separating the men from the women, they set aside four rows for the men, the next four rows for the women and the remaining rows for mixed seating. The plaintiff took the position that he could not serve as a cantor for the defendants as long as the men and the women were not sitting separately as this would be a violation of his beliefs. He did not officiate and subsequently sued the congregation for his contract price. The opinion states:

" . . . up to the time of the execution of the contract, the defendant congregation conducted its religious services in accordance with the practices of the Orthodox Hebrew faith. On behalf of the plaintiff there is evidence that under the law of the Torah and other binding authority of the Jewish law, men and women may not sit together at services in the Synagogue. In the Orthodox Synagogue, where the practice is observed, the women sit apart from the men in a gallery, or they are separated from the men by means of a partition between the groups."

"Judge Smith accepted the testimony of three Rabbis learned in Hebrew law, who appeared for plaintiff, to the effect: 'That Orthodox Judaism required a definite and physical separation of the sexes in the Synagogue.' And he also considered it established by the testimony that an Orthodox Rabbi cantor, 'could not conscientiously officiate in the *trefeh* Synagogue, that is, one that violates Jewish law.' And it was specifically

found that the old building which the congregation left 'had separation in accordance with Jewish Orthodoxy.' "

III. *The acts attempted by the appellees were clearly violative of the established Orthodox Jewish law and practice.*

The prohibition against mixed seating being such a characteristic practice of Orthodox Judaism and having its origin in the scriptures which the Reform and Conservative groups do not regard as binding, clearly points up a basic difference between the groups.

While a Reform or Conservative Jew might worship in an Orthodox Synagogue with his conscience unaffected by the seating arrangement, on the other hand, an Orthodox Jew cannot, in conscience, worship in a Synagogue where mixed seating is permitted. Indeed, he is prohibited by Rabbinical directive from so doing. Consequently, the action of those in charge of the temporal affairs of a congregation in instituting a practice so fundamentally and radically opposed to the characteristic doctrine, usage, custom and practice of an Orthodox Congregation, certainly violates that characteristic doctrine, usage, custom and practice.

The testimony of the learned Rabbi Hollander and Dr. Weiss established without question the basis in scripture of the prohibition against mixed seating, the binding effect of Rabbinical directives upon Orthodox Judaism and the effect of a violation of the prohibition, namely, that a Synagogue in which mixed seating is permitted, cannot be used for prayer by an Orthodox Jew.

IV. *The violation of the established Orthodox Jewish law and practice resulted in a deprivation of the property rights of the appellants who adhered to the established doctrine and practice.*

The direct result of the action of the appellees is that the Orthodox Jew must leave his Synagogue and worship in a Synagogue that has the *kedushah* or congregational sanctity required under the Orthodox practice. Thus, he is as effectively deprived of the use of the property of his Congregation as though he were evicted therefrom.

The right of a member of a congregation to the beneficial use of the church property as a place of worship is a property right and the judicial determination of property rights as between two church groups claiming church property does not constitute an unlawful interference with the ecclesiastical affairs of a church.

"In the case at bar property rights are involved, namely, which group has the exclusive use and control of the church property." *Holt v. Trone,* 341 Mich. 169 at Page 174.

"Judicial interference in the purely ecclesiastical affairs of a religious organization is improper. Property rights, however, are the concern of the courts." *United Armenian Church v. Kazanjian,* 320 Mich. 214 at Page 217.

"Such judicial determination is not the adjudicating of the right of any person to a religious belief or practice contrary to a state constitution or the First Amendment to the Constitution of the United States." *Reid v. Johnson,* 85 SE 2d 114 (North Carolina).

The conveyances of the land to the original trustees and to the congregation in this case, by implication of law, conveyed the land in trust for the purposes for which the congregation was formed; namely, a Jewish Orthodox place of worship.

"A conveyance or bequest to a religious association or to trustees for that association, necessarily implies a trust." *Fuchs v. Meisel,* 102 Mich. 357 at Page 369.

"Property held for an unincorporated religious association

must be held by trustees." *Trustees First Society, ME Church of Newark v. Clark,* 41 Mich. 730.

With respect to an express trust, the rule is well established.

"Where property has been dedicated by way of trust for the purpose of supporting or propagating definite religious doctrines or principles, it is the duty of the courts to see that the property is not diverted from the trust which has been thus attached to its use. So long as there are persons who are qualified within the original dedication, and are also willing to teach the doctrines prescribed in the act of dedication, and so long as there is anyone so interested in the execution of the trust as to have a standing in Court, a diversion of the property or fund to other and different uses can be prevented . . . *it is not within the power of the congregation, by reason of a change of views on religious subjects, to carry such property to the support of a new and conflicting doctrine; in such case, the secular courts will, as a general rule, interfere to protect the members of an ecclesiastical organization who adhere to the tenets and doctrines which it was organized to promulgate in their right to use the property, as against those members who are attempting to divert it to purposes utterly foreign to the organization, and will enjoin its diversion from the trust.*" *45 American Jurisprudence, Religious Societies,* Sec. 61, Pages 771, 772.

"No one disputes, where property is dedicated to the use of a religious denomination it cannot thereafter be diverted to the use of those who depart from that faith, but must remain for the use and benefit of those who still adhere to the faith." *Borgman v. Bultema,* 213 Mich. 684 at Page 689.

In *Protestant Reformed Church v. DeWolf,* 344 Mich. 624, this Court said:

"It is obvious that the real dispute in this case between the Hoeksema church group and the DeWolf church group has for

its objective the ownership of the church property and the *right of its possession and control. While Courts do not interfere in matters of church doctrine, church discipline, or the regularity of the proceedings of church tribunals, and refuse to interfere with the right of religious groups to worship freely as they choose, the question of property rights of the members is a matter within the jurisdiction of the Court and may be determined by the Court."*

The Court further quoting from *Calvary Baptist Church of Port Huron v. Shay,* 292 Mich. 517, said:

"The judicial determination of property rights as between two church groups claiming church property does not constitute an unlawful interference with ecclesiastical affairs of a church."

"A church organization cannot change its fundamental faith or religion for the promotion of which it was organized and devote its property to a different faith without the consent of all its members. The property which it owns is charged with a trust, though not expressed in the instrument by which it is acquired. It is to be devoted to the fundamental faith or doctrine of the church, and cannot be changed as against the protest of a single member." *Blauert v. Schupmann,* (Minn.) 63 NW 2d 578.

The purchase of land and the erection of a Synagogue by a Jewish Orthodox Congregation followed by years of use of that property by succeeding generations practicing the Orthodox Rite shows beyond any doubt a dedication of that property to that Rite. The founders and succeeding membership of the Congregation who adhered and continue to adhere faithfully to Orthodox Judaism and whose funds built and maintained the Synagogue over these many years have a property right in that property which a Court of equity will protect as against the irreparable injury the act of the appellees will cause.

RELIEF SOUGHT

The Decree of Dismissal entered by the lower Court should be reversed and a Decree granting the injunctive relief prayed in the Bill of Complaint be ordered.

Respectfully submitted,

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July 30, 1958.

Brief Amici Curiae

OF THE RABBINICAL COUNCIL OF AMERICA AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

presented in the Supreme Court of the State of Michigan, in appeal from the Circuit Court for the County of Macomb, in chancery; Hon. Edward T. Kane, Circuit Judge.

STATEMENT OF QUESTIONS INVOLVED

I. *Was Congregation Beth Tefilas Moses of Mt. Clemens founded as an Orthodox Jewish Congregation and its property dedicated to the doctrines of Orthodox Judaism?*

The lower court by its decision answered the question "No".

The Amici Curiae contend the question should be answered "Yes".

II. *Do the doctrines of Orthodox Judaism proscribe mixed seating and may an adherent of such faith in conscience worship in a synagogue where such practice is permitted?*

The lower court by its decision answered "No" to the first question and "Yes" to the second question.

The Amici Curiae contend the first question should be answered "Yes" and the second question "No".

III. *Can the majority of a congregation, as against a faithful minority, institute a practice radically and fundamentally opposed to the characteristic doctrines to which the congregational property is dedicated?*

The lower court by its decision answered the question "Yes".

The Amici Curiae contend the question should be answered "No".

IV. *Do civil courts have jurisdiction to determine the issues presented?*

The lower court by its decision answered the question "No".

The Amici Curiae contend the question should be answered "Yes".

STATEMENT OF FACTS

The Statement of Facts set forth in the Brief of Plaintiffs and Appellants is hereby adopted.

ARGUMENT

Preliminary Statement

(All italics ours unless otherwise noted.)

By permission of this Honorable Court dated November 12, 1958, the Rabbinical Council of America and the Union of Orthodox Jewish Congregations of America were granted leave to file a brief *amici curiae*. The Rabbinical Council of America has a membership of over 700 Orthodox Rabbis serving congregations throughout the United States and Canada and nearly all of its members have received their secular education

and religious training in the United States. The Union of Orthodox Jewish Congregations of America, organized in 1898, is the national body for the Orthodox Jewish Synagogues throughout the United States and Canada. It was founded by Congregation Shearith Israel of New York City, the oldest Congregation in America, which was established in 1654.

The interest of these two organizations in the disposition of this case is identical with that of the plaintiffs-appellants. At the trial of this suit the two principal witnesses in behalf of the plaintiffs were the immediate past president of the Rabbinical Council and the executive vice-president of the Union of Orthodox Jewish Congregations. The crucial questions involved herein are of vital concern not only to the immediate parties to the litigation but also to the large Orthodox Jewish community in the State of Michigan and to the millions of adherents of the Orthodox Jewish faith throughout the United States.

We have carefully read the excellent brief submitted by counsel for the plaintiffs-appellants and support the Statement of Questions Involved, the Statement of Facts and the arguments made therein. We shall endeavor to confine our discussion in the main to additional factors and supplementary material to be considered against the background presented by the plaintiffs-appellants.

The bill of complaint, filed August 26, 1955, alleges that the plaintiffs are members of Congregation Beth Tefilas Moses, an Orthodox Jewish Congregation located in Mt. Clemens, Michigan, and that the defendants are members of its Board of Trustees; that the defendants have physical control and direction of the activities and property of the Congregation including the Synagogue or house of worship, but do not have authority to change the form of worship; that the Synagogue was built and has been maintained from funds and contributions of Orthodox Jews.

It is further set forth that the Jewish religion is based upon the Halachah or authoritative rules of ecclesiastical law; that in accordance with the Halachah, "it is forbidden to pray in a synagogue where men and women sit together, as such synagogue under the Orthodox Jewish tradition has no *kedushah* or Congregational sanctity;" that the separation of the sexes in Synagogue practice has been strictly adhered to for over 3,000 years, and that Orthodox Jews "cannot conscientiously worship contrary to Orthodox custom and tradition in a synagogue where the sexes are not separated."

It is further alleged that on July 28, 1955, at a special membership meeting, certain members constituting a "reform movement" voted by a majority to introduce mixed seating; that defendants-trustees intend to effect such change which is "radically and fundamentally opposed to the doctrines, customs, usages and practices" of the Congregation and Orthodox Judaism; that if mixed seating is permitted, the plaintiffs and other members of similar Orthodox conviction will be deprived of the beneficial use of the Synagogue; and that the contemplated deviation to mixed seating "will deprive plaintiffs and the adhering members of the Congregation of their property rights in the synagogue and its appurtenances."

In their prayer for relief the plaintiffs sought a declaration that the action in voting mixed seating was contrary to the doctrine and practice of Orthodox Judaism and "constituted an illegal interference with the property rights of the plaintiffs;" "that the true Congregation of Congregation Beth Tefilas Moses are the plaintiffs" and other members of similar Orthodox conviction; and that in order to protect the plaintiffs' property rights, the defendants be enjoined from permitting mixed seating.

The amended answer of the defendants (20a-23a) denies that the Congregation is " 'orthodox' in the true sense and meaning of the word" and that it "was formed and dedicated

as a place of worship of an 'orthodox' Jewish Congregation." The defendants "admit that the 'Halachah,' the 'Talmud' and the 'Torah' represent the authoritative bodies of law within the Jewish religion, . . . and accordingly leave plaintiffs to their proofs thereof."

It is most significant that the defendants at the trial refused to cross-examine the witnesses appearing in behalf of the plaintiffs or to produce proofs in support of their answer. In such state of the record the plaintiffs' allegations must be deemed conclusively established. Accordingly, the defendants' sole permissible reliance is upon their motion to dismiss, renewed at the conclusion of the trial, which is based upon the erroneous grounds that the Court is without jurisdiction and that the introduction of mixed seating constitutes no radical and fundamental change in the doctrine and dogma of the Congregation Beth Tefilas Moses. The Court below based its decision solely upon the former ground.

In essence, this case presents the issue whether a Jewish Congregation, founded upon the Halachic principles of Orthodox Judaism, may, through the action of a transient majority, alter its dogma and deviate from such principles, through the introduction of a radical change, in this instance, mixed seating. We respectfully submit that the decisions of this Court, with which the overwhelming weight of authority in other jurisdictions is in accord, mandate a negative answer with a resultant reversal of the decree appealed from.

I. *Congregation Beth Tefilas Moses of Mt. Clemens was founded as an Orthodox Jewish congregation and its property dedicated to the doctrines of Orthodox Judaism.*

Both the defendants and the Court below advert to the fact that the word "Orthodox" does not expressly appear in the Articles of Association or the Constitutions of the Syna-

gogue. The defendants would make the presence of this precise word the sovereign talisman as regards the original tenets of the Congregation and the intent of its founders. Its absence, they urge, is fatal to a conclusion that Beth Tefilas Moses was founded as an Orthodox Jewish house of worship. The law happily rejects such narrow formalism and instead looks to any competent evidence proving the original tenets of the congregation and the intended use of its property, such as the constitution and by-laws, declarations of faith and practice, customs and usages in existence when the congregation was organized and the usages accepted by all prior to the controversy (see *Zollman, American Church Law,* §§247-8; *United Armenian Church v. Kazanjian,* 322 Mich. 651, 661; and authorities cited *infra* under subdivision B).

A.

Manifestly, members of the judiciary, like other intelligent laymen, are frequently unfamiliar with the doctrines and dogmas of religious faiths other than their own. Indeed, mere generality of ideas concerning other faiths sometimes involves misconceptions; as, for example, that the prohibition against eating pork is presently adhered to by all branches of Judaism. This is not so as to reform elements who have rejected all adherence to dietary laws. Nonetheless, in the settlement of the legion of intrachurch disputes over which the civil courts have accepted jurisdiction, the courts examine religious creed and dogma and resolve them in the same manner as other disputed questions of fact (see, *e.g., Bear v. Heasley,* 98 Mich. 279, involving a comparison of original and amended Confessions of Faith of the Church of the United Brethren; *cf. Schlichter v. Keiter,* 156 Pa. St. 119, 27 Atl. 45; *Kuns v. Robertson,* 154 Ill. 394, 40 N.E. 343, considering the same Confessions but reaching as questions of fact a contrary result).

The record makes clear that the term "Orthodox" as applied to a particular group within the Jewish faith is of comparatively recent origin. Originally, the word "Judaism" represented that which is now known as "Orthodox Judaism" based upon literal Divine Revelation. It was only when departures from normative Judaism arose in the last century, that is, "Reform" and later "Conservative" Judaism, that the term "Orthodox" was applied to that which had been originally called "Judaism." "Orthodox" by definition means holding right, true or correct opinion (Webster's New International Dictionary [2d ed.]; Murray, New English Dictionary), and is meant to imply that this is the original historic Judaism. Obviously, therefore, the use of the word "Orthodox" is neither definitive nor essential as it is meant to distinguish it from the deviational Reform and Conservative movements.

> "Well, I would say that whenever the term Judaism or Jewish Religion is used without a qualifying adjective of recent vintage, it must refer to Orthodox Judaism, as a matter of fact, we only use the term 'Orthodox' because we have been forced in order to make it authentic to use it, otherwise we would simply say Judaism or Jewish Religion."

We may note in passing that notwithstanding the defendants' discursive comments on "what is Jewish and who is a Jew," the fact remains that there are three major alignments in Judaism in the United States, namely, Orthodox, Conservative and Reform; that the difference between Orthodox on the one hand and the other two groups is *"a profound theological one, a qualitative one,"* while the difference between Conservative and Reform is only "quantitative," and that each group has a separate congregational association—for the Orthodox, the present *amicus curiae*, the Union of Orthodox Jewish Congregations of America; for the Conservative, the United Synagogue of

America, and for the Reform, the Union of American Hebrew Congregations.

B.

Where there might be some doubt as to what were the original tenets of the Congregation and the intent of the founders, the courts will receive any competent evidence shedding light thereon (*Zollman, American Church Law*, §§247-8). Thus, examination is made of the constitution and by-laws (*Fuchs v. Meisel*, 102 Mich. 357, 369; *Baker v. Ducker*, 79 Cal. 365, 373, 21 Pac. 764, 765); of declarations of faith and practice when the funds were obtained (*Park v. Chaplin*, 96 Iowa 55, 65, 64 N.W. 674, 677); of contemporaneous usage (*Bakos v. Takach*, 14 Ohio App. 370, 383, 32 O.C.A. 569, 578; *Presbyterian Congregation v. Johnston*, 1 Watts & S. 9, 37 [Pa.]; and the usages accepted by all prior to the controversy (*Baer v. Heasley, supra*, 98 Mich. 279, 316; *Greek Catholic Church v. Orthodox Greek Church*, 195 Pa. St. 425, 434, 46 Atl. 72, 75). As stated by Lord Eldon in the frequently quoted and approved case of *Attorney General v. Pearson*, 3 Merivale 353, 400, 36 Eng. Rep. 135, 150:

"[W]here an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question, than through the medium of an inquiry into what has been the usage of the congregation in respect to it; . . . I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation."

C.

In the light of the criteria set forth in the preceding authorities, there cannot exist even a scintilla of a doubt that

Congregation Beth Tefilas Moses was founded as an Orthodox Jewish Congregation and its property dedicated to the doctrines of Orthodox Judaism. The fact that the precise term "Orthodox" does not expressly appear in the Articles of Association or the Constitutions of the Synagogue is, under the compelling circumstances described immediately below, immaterial.

Examination of the 1918 Constitution demonstrates conclusively the Orthodox character of the Congregation. The entire document is instinct with Orthodoxy, as witness the following:

(a) The Constitution was written in Yiddish, "the vernacular of the immigrants who came from Poland, Russia, [and] Hungary." This language factor is significant because the founders "wanted to point out while in another new home and new country they cling to the traditions of their forefathers of which, of course, are Orthodox." A Yiddish constitution for a non-Orthodox congregation would be a curiosity, an anomaly.

(b) "Praying shall follow the form according to the *rite of the Ashkenaz Jews,* for this form was also adhered to by our fathers." This refers unmistakably and exclusively to Orthodox Judaism, since such nomenclature is foreign to the Conservative and Reform movements. In Orthodox Judaism, there are two forms of prayers or rites, namely, the Ashkenazic and the Sephardic,[1] neither of which of course permits mixed seating. The dichotomy between the Ashkenazic and the Sephardic rites may be loosely compared to that between the Western or Latin rites churches and the Byzantine or Eastern rites churches which differ in no essential dogma and acknowledge the supremacy of the Pope (see *Bakos v. Takach, supra,* 14 Ohio App. 370, 32 O.C.A. 569; *Greek Catholic Church v. Orthodox Greek Church, supra,* 195 Pa. St. 425, 46 Atl. 72).

1. Adherents of both rites are found in the membership of the *amici curiae.*

(c) The reference in the Constitution to such practices and functionaries as a *mikveh* (ritualarium for religious ablutions), a "burial society," and to the reservation of definite space in the cemetery for suicides, again bears the indelible imprint of Orthodox Judaism. These are matters foreign to the non-Orthodox movements in Judaism and would be considered by the followers thereof in the same light as the dogma of the Assumption of the Virgin Mary proclaimed by the late Pope Pius XII may be considered by non-Roman Catholics.

While the present Constitution, adopted in 1953 or 1954 without the vote of plaintiff Litvin, is written in English and expresses the purpose of "furthering the Jewish religion," "[i]t does not, by any stretch of the imagination, postulate another kind of Jewish Religion than the one originally adhered to." The new Constitution was designed to eliminate the numerous outdated *minutiae* in the old (*e.g.*, failure to attend services with an attendant 25 cent fine) and was written in English as the language of the present congregants. There is nothing in the present Constitution which indicates an intention to depart from the fundamental principles of Orthodox Judaism expressed and inherent in the original Constitution—assuming, contrary to the legal principles set forth under Point III, *infra*, that a new constitution could validly effect radical departures from the original tenets.

The record shows that since the founding of the Congregation almost fifty years ago, the men and women did not sit together at religious services; the men sat in the main portion of the Synagogue, the women in the balcony. The Congregation has always been served by Orthodox Rabbis.

Accordingly, the constitutions, the contemporaneous usage and the usage accepted by all prior to the controversy conclusively demonstrate the Orthodox character of the Congregation Beth Tefilas Moses.

II. *The doctrines of Orthodox Judaism proscribe mixed seating, and an adherent of such faith cannot in conscience worship in a Synagogue where such practice is permitted.*

To those unfamiliar with the dogmas and doctrines of faiths other than their own, the materiality and significance of particular rituals and practices of such other religions may not be readily apparent. Thus, the introduction of instrumental music during religious services or of a changed attire of the clergy or worshippers at such services may signify a radical departure from cardinal principles of a faith.[2] Pertinent is the observation of the Court in *Landis' Appeal,* 102 Pa. St. 467, 473, involving a schism among Mennonites:

"The second Master in his report has said that the primary cause of the differences between these people had its origin in the cut of the Rev. Mr. Overholtzer's coat. Undoubtedly such was the fact, for this new-fangled coat, when it first made its appearance in the conference, symbolized rebellion, a change of principles, and it is not the first time that the cut or turning of a coat has signified something of much more importance than was apparent either in its style or texture."

While the defendants would treat the separation of the sexes at Divine worship as without doctrinal significance and the introduction of mixed seating as "at most a matter of church practice," the proof is overwhelming (if not conclusive in view of the defendants' failure to defend) that the separation of the sexes during Divine worship has been a cardinal principle and fundamental tenet of Orthodox Judaism for over 3,000 years; that an adherent of this faith cannot in conscience worship in a Synagogue where mixed seating is permitted since such Temple

2. Among the radical departures from the basic tenets of Orthodox Judaism are: (1) playing of instrumental music during Sabbath and holy day services; (2) praying by males in the Synagogue with uncovered heads; (3) embalming a corpse and burial in metal coffins.

lacks the necessary *kedushah* or sanctity; that a follower of the Conservative or Reform movements may worship in an Orthodox Synagogue without violating his religious principles, and that the first visible distinguishing feature of the Orthodox ritual vis-a-vis that of the Reform and Conservative movements is separate seating for men and women. The bases of this age-old proscription against mixed seating are set forth in the record, and mention should be made that such prohibition does not in the slightest infer or suggest an inferiority of women in the Jewish religion—on the contrary, "[t]he fact is that it bespeaks to the properly trained religious mind the glory and respect of Jewish women, womanhood."

That the separation of the sexes during Divine worship is a cardinal principle and basic requirement of Orthodox Judaism was recognized by the Superior Court of Pennsylvania, the statewide intermediate appellate court, in the recent case of *Fisher v. Congregation B'nai Yitzhok,* 177 Pa. Super. 359, 110 A. 2d 881. *Fisher* and the incontrovertible proof herein demonstrate that the introduction of mixed seating constitutes a radical and fundamental change in the Congregation's theology, and not merely "shades of opinion on the same doctrine or dogma" (*Mertz v. Schaeffer,* 271 S.W. 2d 238, 242 [Mo. App.]; *Mt. Zion Baptist Church v. Whitmore,* 83 Iowa 138, 148, 49 N.W. 81, 84). Unlike the situation in *Mertz,* which involved a comparison of the "Common Confession" of the Missouri Synod of the Lutheran Church with corresponding portions of the Orthodox Lutheran Doctrine promulgated by the Orthodox Lutheran Conference, the plaintiffs herein, as the testimony discloses, cannot in conscience worship in the Synagogue if mixed seating is effected "without departure from the faith upon which the church was founded" (*Mertz,* at 242 of 271 S.W. 2d).

The defendants' plaint that "[c]ertainly none will claim that the same worship and the same ritual previously used by

a congregation become, by the mere fact of mixed seating, un-Jewish or that the worshippers are no longer Jewish or are guilty of a diversion of church property," assumes the premise that there are no differences of dogma and doctrine between Orthodox Judaism on the one hand and the Conservative and Reform movements on the other, and that the separation of the sexes at Divine worship is without fundamental doctrinal significance. Since the proof demonstrates that the defendants' assumption is unfounded, the inference drawn by them is clearly erroneous.

Accordingly, it has been established that mixed seating constitutes a radical departure from the tenets of Orthodox Judaism to which the Congregation was dedicated.

III. *The majority of a congregation cannot, as against a faithful minority, institute a practice radically and fundamentally opposed to the characteristic doctrines to which the congregational property is dedicated.*

Religious societies are generally divided into three categories as to their form of government, namely, monarchical or prelatical, with authority being centralized in the spiritual leader; associated, with authority vested in a governing body such as an assembly, and independent or congregational (*Protestant Reformed Church v. Blankespoor,* 350 Mich. 347, 350; *Thomas v. Lewis,* 224 Ky. 307, 312, 6 S.W. 2d 255, 257; 3 Stokes, Church and State in the United States 376). Jewish congregations, like the one involved herein, fall within the third category.

By the overwhelming weight of authority, the courts will exercise their powers to protect a minority in a congregationally governed church, however regular the action or procedure of the majority may be in other respects, against a diversion of the society's property to another denomination *or to a group*

supporting doctrines fundamentally opposed to the characteristic doctrines of the society or disavowing the tenets and practices hitherto followed, even though the property is subject to no express and specific trust (45 Am. Jur., Religious Societies, §55, p. 765; 76 C.J.S., Religious Societies, §71, p. 853; Annotations, 8 A.L.R. 105, 113; 70 A.L.R. 75, 83). This Court has consistently adhered to the principle that those who adhere to the original fundamental tenets and doctrines, though a minority, are the true congregation; and that the church property may never be diverted from its intended use—use by the congregation for the benefit of those who still adhere to the faith and the customs and usages that existed prior to the dissension (*Bear v. Heasley, supra,* 98 Mich. 279; *Fuchs v. Meisel,* 102 Mich. 357; *Borgman v. Bultema,* 213 Mich. 684; *Michigan Congregational Conference v. United Church of Stanton,* 330 Mich. 561). For representative recent cases elsewhere, (see *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114; *Whipple v. Fehsenfeld,* 173 Kan. 427, 249 P. 2d 638, *certiorari denied,* 346 U.S. 813, 918; *Parker v. Harper,* 295 Ky. 686, 175 S.W. 2d 361; *Blauert v. Schupmann,* 241 Minn. 428, 63 N.W. 2d 578). In the application of the governing principle, the protest of a *single* member is sufficient to prevent a diversion (*Rock Dell Norwegian E.L. Church v. Mommsen,* 174 Minn. 207, 212, 219 N.W. 88, 90; *Kemp v. Lentz,* 46 Ohio L. Abs. 28, 31, 68 N.E. 2d 339, 341).

As against this overwhelming array of authority, the defendants rely principally upon *Katz v. Goldman,* 33 Ohio App. 150, 168 N.E. 763, a 1929 decision by one of the nine district courts of appeal in Ohio. Because of the great reliance placed by the defendants upon *Katz,* careful analysis thereof is essential.

At the outset it should be observed that procedurally the issues therein were disposed of on the basis of a motion for judgment on the pleadings, namely, the amended petition and

the answer. *No proof was presented by either side; no evidence such as was adduced at the trial of this suit was availed of by the court.* Moreover, a coordinate branch of the same court had previously overruled a demurrer to the amended petition, thus indicating a difference of opinion (at 151 of 33 Ohio App., 168 N.E. at 764). Furthermore, *Katz* has never been cited in any reported Ohio decision.

In support of its position that absent an express trust, independent congregations are solely controlled by a numerical majority, the action of which is not subject to judicial scrutiny, the court cited *Kenesaw Free Baptist Church v. Latimer,* 103 Neb. 755, 174 N.W. 296; *Watson v. Jones,* 13 Wall. [80 U.S.] 679, and two lower Federal court decisions following *Watson. Kenesaw* is a leading exponent of the minority view that there is no limitation on the control of the numerical majority in a religious society with an independent form of government (see Notes, 22 U. of Cin. L.Rev. 273, 275; 23 Tulane L.Rev. 572, 573). The dictum in *Watson* expressing a "hands off" policy as regards the action of a majority of an independent church has been frequently criticized (Annotations, 8 A.L.R. 105, 112; 24 L.R.A. [n.s.] 692, 698-9, 703), and has not been followed in the great majority of later decisions by state courts. "This decision [*Watson v. Jones*], however, departed from the uniform current of prior American authority, as well as the British cases involving non-established Churches; and, while seldom expressly repudiated [*Bear v. Heasley supra,* 98 Mich. 279, is one of four cases cited to such effect in the footnote], it is rarely followed outside of the federal courts, and is usually distinguished" (Note, 46 Yale L.J. 519, 522).

Further light upon the aberrant character of *Katz v. Goldman* is shed by *Bakos v. Takach, supra,* 14 Ohio App. 370, 32 O.C.A. 569, decided by the same district court of appeal a few years earlier. In the opinion for reargument, the court

stated (at 385 of 14 Ohio App., 32 O.C.A. at 579-580):

"A rule, which is established by the weight of authority, *at least outside of Ohio,* is, that the majority faction of an independent or congregational society, whether incorporated or not, however regular its action or procedure may be, cannot, as against a faithful minority, divert the property of the society to another denomination, *or to the support of doctrines radically and fundamentally opposed to the characteristic doctrines of the society, even though the property is subject to no express or specific trust.* . . . In view of the early decisions in Ohio, in *Keyser v. Stansifer,* 6 Ohio, 363; *Heckman v. Mees,* 16 Ohio, 583, and *Bartholomew v. Lutheran Congregation,* 35 Ohio St. 567, it is not our purpose to hold that this rule is operative to the full extent as stated above . . ."

One naturally wonders how the same tribunal even forgot to mention this rule in the *Katz* opinion!

Furthermore, the rationale of *Katz* is opposed to the later case of *Kemp v. Lentz, supra,* 46 Ohio L. Abs. 28, 68 N.E. 2d 339, where the Court said (at 341 of 68 N.E. 2d, 46 Ohio L. Abs. at 31-2):

"We think the law has very definitely determined that a church organization, even though congregationally controlled, may not affiliate itself with another denomination and transfer its property so long as a single member of such a church objects to its transfer of property. *This principle is also given application where a local church, while not changing its name or identity, yet departs from the church doctrines so that it can no longer be said that it is following the creed of the organized church."*

The basic infirmity of *Katz v. Goldman* is highlighted by the statement that "certainly this court could not define Jewish orthodoxy and traditional Judaism *except from the testimony of experts,* and it is an inevitable fact that such an inquiry

would result in multiplying dissension, instead of eliminating it" (at 163 of 33 Ohio App., 168 N.E. at 767). The incontrovertible fact is that the use of expert testimony in this class of dispute is standard procedure. Such evidence has frequently been considered by this tribunal and the numerous other courts adhering to the principle that even in a congregational society, the majority cannot depart from the original tenets. (It appears that the Ohio court in *Kemp, supra,* did take evidence and on appeal additional exhibits were introduced for the first time.) As to the solicitude expressed in the latter part of the quoted sentence from *Katz, supra,* we may observe that an attitude of judicial non-intervention in this situation concretizes the might of the numerical majority as the legal right.

Katz may also be distinguished on its facts since such elements as consolidation of two congregations, acquiescence over a period of years in the innovations, etc., were present. But enough has been shown to demonstrate the inherent weakness of that decision as a matter of rationale and of precedent. So slender a reed has become the defendants' chief support—a support opposed to the great weight of authority in Michigan and other jurisdictions.

IV. *The civil courts have jurisdiction to determine the issues presented.*

The principle is firmly established that while courts are reluctant to take cognizance of the purely ecclesiastical affairs of religious societies, independent or otherwise, in suits between contending factions they will assume jurisdiction to determine such issues as which group is entitled to the use and control of the church property (*Holt v. Trone,* 341 Mich. 169, 174; *United Armenian Church v. Kazanjian, supra,* 320 Mich. 214, 217). As stated in 76 C.J.S., Religious Societies, pp. 873-4:

"While the civil courts have no jurisdiction over, and no

concern with, purely ecclesiastical questions and controversies, they do have jurisdiction as to civil, contract, and property rights even though such rights are involved in, or arise from, a church controversy."

The bill of complaint which was occasioned by the defendants' announced intention to introduce mixed seating beginning with the High Holy Day services in the fall of 1955, alleged that the contemplated action of the defendants would force the plaintiffs to leave the Synagogue and worship in one (necessarily outside of Mt. Clemens) which possessed the essential *kedushah* or congregational sanctity. The evidence fully supports such allegations. In other words, the action of the defendants would bar the plaintiffs from the use of the Synagogue just as effectively as a forced eviction or a changed lock would.

Under the circumstances, it is obvious that the real dispute in this case involves the ultimate issue, which group has the right to the use, enjoyment and control of the congregational property. The resolution of this issue necessarily involves civil and property rights as does the plaintiffs' request in their prayer for relief that "the true Congregation of Congregation Beth Tefilas Moses are the plaintiffs and those who adhere to the established tradition and practice of Orthodox Judaism as recognized by the Congregation prior to the vote aforesaid."

Moreover, as this Court observed in the leading case of *Fuchs v. Meisel, supra,* 102 Mich. 357, which was cited recently in *First Protestant Reformed Church v. DeWolf,* 344 Mich. 624, 633, the issue may be one of control and use rather than ownership. In *Fuchs* it was said (p. 371):

"In the present case the bill recognizes the defendant trustees as the lawful trustees, in charge and in possession of the church property. No attempt is made to deprive them of its control or possession when used in a legitimate manner. The only purpose is to compel them to permit the use of the church

and parsonage according to the discipline, rules, usages, and polity of the church. It is immaterial in whom the legal title stands. One party may hold the title, and another be entitled to the use and possession of the property; or, as in this case, both may be entitled to its joint use and possession. It may be admitted for the purposes of this hearing that the title is in the local society or its board of trustees. The question is not, as in many of the cases cited in the briefs of counsel, in whom is the title to the property? but, in whom is the right to its use for religious worship both as pastor and layman? . . . The question presented relates exclusively to property rights, over which the proper courts have almost universally exercised jurisdiction. If the defendants' position be the true one, it follows that they are in no manner bound to the faith and tenets of this church, and that they may withdraw, and take the property to any other denomination of Christians."

Apart from the considerations discussed above, another basis exists to satisfy any jurisdictional requirement, to wit, the plaintiffs' membership in Congregation Beth Tefilas Moses. Whether characterized as a traditional property right or a personal, civil right, the modern trend is to recognize such membership as a right which the courts will protect (*Randolph v. First Baptist Church*, 120 N.E. 2d 485 [Ohio]; Annotation, 20 A.L.R. 2d 421, 458).

CONCLUSIONS

The proof is incontrovertible that Congregation Beth Tefilas Moses was founded as an Orthodox Jewish Synagogue and its property dedicated to, and for almost fifty years used to further, the doctrines of Orthodox Judaism. The separation of the sexes at Divine worship is a fundamental doctrine of this faith maintained in this Congregation since its founding, and an adherent thereof cannot in conscience worship in a Synagogue where

mixed seating is permitted. Under established principles of law the rights of the plaintiffs to the continuance of the Synagogue as an Orthodox house of worship will be protected by the courts.

RELIEF SOUGHT

The Decree of Dismissal entered by the lower court should be reversed and a Decree granting the relief prayed for in the Bill of Complaint should be ordered.

Respectfully submitted,

SAMUEL LAWRENCE BRENNGLASS,
Attorney for Amici Curiae,
103 Park Avenue,
New York, New York.

Dated: December 19, 1958.

The Decision of the Michigan Supreme Court

DAVIS *v.* SCHER

1. RELIGIOUS SOCIETIES—COURTS—JURISDICTION—ECCLESIASTICAL QUESTIONS —PROPERTY RIGHTS.
   A civil court has no jurisdiction over ecclesiastical questions unless property rights are involved.
2. SAME—COURTS—PRACTICE OF RELIGION.
   Civil courts do not have the right to interfere with the practice of religion in any way whatsoever.
3. SAME—COURTS—FREEDOM OF RELIGION.
   It is the duty of courts to preserve freedom of religion and its practice and to protect the rights of minority groups.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 3] 45 Am Jur, Religious Societies §§ 40, 41.
[4, 5, 6, 8] 45 Am Jur, Religious Societies § 55.
[7] 45 Am Jur, Religious Societies § 59.
[9, 10] 45 Am Jur, Religious Societies § 48.

4. SAME—CHANGE IN PRACTICE OF RELIGION—PROTECTION OF MINORITY.
The membership of a congregation, which is one of several congregations belonging to a particular religious faith to which the local church property and practice is dedicated, does not have the right to effect, by vote of a momentary majority, a change in religious practice, not conformable with the origin and historic character of the faith of the church of which the local congregation is one member, as against those who faithfully adhere to the characteristic doctrine of the church, and thereby deprive the minority of the use of the church property.

5. SAME—DIVERSION OF PROPERTY BY MAJORITY.
The majority faction of a local congregation or religious society, being one part of a large church unit, however regular its action or procedure in other respects, may not, as against a faithful minority, divert the property of the society to another denomination or to the support of doctrines fundamentally opposed to the characteristic doctrines of the society, although the property is subject to no express or specific trust.

6. SAME—ORTHODOX JEWISH CONGREGATION—MIXED SEATING—USE OF PROPERTY.
An Orthodox Jewish congregation, which is prohibited from participation in services where there is mixed seating of the sexes, may not be deprived of the right to such use of their property by a majority group contrary to law.

7. SAME—COURTS—ECCLESIASTICAL MATTERS—PROPERTY RIGHTS.
Civil courts do not interfere in matters of church polity purely ecclesiastical, but when property rights are involved they are to be tested in the civil courts by the civil laws.

8. SAME—PROPERTY—DEDICATION—DIVERSION.
Property of a religious society that is dedicated to the use of a religious denomination cannot thereafter be diverted to the use of those who depart from that faith, but must remain for the use and benefit of those who still adhere to the faith.

9. SAME—PROPERTY—TRUSTS.
A conveyance of land to the original trustees of a religious society conveys the land in trust for the purposes for which the congregation was formed.

10. SAME—PROPERTY—TRUSTS.
A conveyance or bequest to a religious association or to trustees for such association, necessarily implies a trust.

11. SAME—ORTHODOX JEWISH CONGREGATION—PROPERTY—SEPARATE SEATING OF SEXES.
Undisputed testimony that Orthodox Judaism requires that sexes be separately seated in the synagogue during religious services provided for a use of the property dedicated to the use of an Orthodox Jewish

congregation which was subject to protection by the civil courts, notwithstanding a majority of the congregation had voted to have mixed seating.

Appeal from Macomb; Kane, (Edward T.), J., presiding. Submitted January 7, 1959. (Docket No. 20, Calendar No. 47,666.) Decided June 5, 1959.

Bill by Meyer Davis, Sam Schwartz and Baruch Litvin against J. N. Scher, Morris Feldman and other members of the Board of Trustees of Congregation Beth Tefilas Moses, an Orthodox Jewish congregation, to enjoin use of synagogue property in certain manners not in accord with Orthodox practice. Bill dismissed. Plaintiffs appeal. Reversed and remanded.

Walsh, O'Sullivan, Stommel & Sharp, for plaintiffs.

Charles Rubiner and *Arthur James Rubiner,* for defendants.

Amici Curiae:

Rabbinical Council of America and Union of Orthodox Jewish Congregations of America, by *Samuel Lawrence Brennglass.*

BEFORE THE ENTIRE BENCH,
KAVANAGH, J.

Plaintiffs-appellants are members of Congregation Beth Tefilas Moses, a Jewish synagogue located in the city of Mt. Clemens in Macomb county, Michigan. The defendants-appellees constitute the board of trustees of the congregation.

The congregation was founded in the year 1911 and was incorporated under PA 1897, No. 209, as an ecclesiastical corporation. The charter of the corporation lapsed for failure to file reports in 1934 and the congregation has continued as an unincorporated association down to the present time. The original constitution was adopted in 1918 and was printed in Yiddish. The present constitution was adopted in 1953 or 1954. The land on which the synagogue was built in 1921 was acquired

by the congregation between 1912 and 1919. When the synagogue was built, it was constructed with a women's balcony which has remained and been used as such down to the present controversy.

Plaintiff Litvin is a businessman and has been a member of the congregation for about 20 years. He served at one time as financial secretary of the synagogue and later as its president. In or about the year 1954 agitation for mixed seating arose in the congregation. On a vote the issue was voted down. A year later a committee was appointed for the purpose of considering the practice of mixed seating. Plaintiff Litvin and other members of the congregation opposed the move, pointing out that the Orthodox practice forbade mixed seating. However, the majority of the congregation voted for mixed seating and the defendants-appellees thereafter proposed to carry it out.

Following the vote to permit mixed seating, plaintiffs-appellants filed their bill in chancery, and a temporary injunction restraining mixed seating was entered. During the pendency of the temporary injunction some instances of mixed seating were attempted and the plaintiffs, consistent with their contention as to the requirement of Orthodox Jewish practice, left the synagogue and worshipped in an Orthodox synagogue in Detroit.

Defendants filed a motion to dismiss alleging, among other things, that the court was without jurisdiction to adjudicate the dispute between the parties hereto, for the reason that such dispute is with respect to doctrinal and ecclesiastical matters only and not in relation to property rights; and it would be inconsistent with complete religious liberty for the court to assume such jurisdiction.

Defendants subsequently filed an answer to the bill.

The chancellor denied the motion to dismiss without prejudice to the rights of defendants to renew the same at the

close of plaintiffs' proofs, and restrained any different seating arrangement for the holidays in September and October of 1955 than had prevailed for the corresponding holidays in 1954.

On the trial of the issue, before plaintiffs introduced their proofs, the court was informed by counsel for the defendants that they did not wish to cross-examine witnesses or present any proofs in the case and they would rely upon their motion to dismiss at the end of plaintiffs' proofs.

Plaintiff Litvin testified that he had been a member of the congregation for approximately 20 to 21 years. He further testified he had been an officer for a portion of this time and was familiar with the original constitution written in Yiddish. Mr. Litvin stated in response to a question as to whether the congregation had ever been served by other than Orthodox rabbis:

"*A*. Not to my recollection, ever since 1929 that I have been around Mt. Clemens they have been all Orthodox rabbis and those rabbis prior, which I know, they were also Orthodox rabbis."

A plan of the synagogue was identified and introduced in evidence which indicated that the plan called for a balcony for the seating of women. Plaintiff Litvin testified that segregated seating had been the rule, with the exception of rare instances where women were permitted because they were sick or invalids to use the benches in the extreme southwest part of the synagogue. He testified that this was the Orthodox practice that men and women do not sit together during prayer and that this congregation was served by Orthodox rabbis. Mr. Litvin further testified that after the institution of this suit he and others left the synagogue when mixed seating was attempted.

Rabbi David B. Hollander was then sworn and testified that he was at that time the honorary president of the Rabbinical Council of America and, also, Rabbi of the Mount Eden Jewish

Center in the borough of Bronx. He testified that the Rabbinical Council is an organization of Orthodox rabbis. He further testified that the law prohibiting mixed seating of the sexes is a fundamental law of the Jewish religion. He stated that in the past few years in America there have grown two new movements in the Jewish religion, one referred to as the Conservative, the other the Reform movement, and that both practiced mixed seating. Rabbi Hollander stated in response to a question:

"*Q.* Now, if you walked into a synagogue, Rabbi Hollander, would there be any immediate observable difference, any differentiation, let's say, between an Orthodox, Conservative or a Reform synagogue?"

"*A.* That's correct, the immediate observable thing would be that the men and women in the Orthodox synagogue would be required to be separated and the Conservative and Reform they would not."

Rabbi Hollander further stated that the mixed seating arrangement with reference to the Mt. Clemens synagogue had been called to the attention of his council and they had condemned it. In reply to a question by the chancellor, Rabbi Hollander testified that an Orthodox Jew could not worship in a synagogue where there is mixed seating.

Similar testimony was offered by Rabbi Dr. Samson R. Weiss. Rabbi Weiss also testified that the original constitution adopted in 1918 was a constitution of a synagogue which wishes to be an Orthodox traditional synagogue.

At the close of plaintiffs' proofs defendants were asked if they cared to present any proofs. They again informed the court that they did not wish to do so but would rely on their motion to dismiss. The court granted the motion on the theory this controversy was strictly a religious question and the matter of a property right was not involved.

Plaintiffs appeal to this Court.

It is admitted that a civil court has no jurisdiction over ecclesiastical questions unless property rights are involved. It is not the responsibility or duty of our civil courts, nor have they the right, to interfere with the practice of religion in any way whatsoever. Hundreds of thousands of people came to the shores of the United States of America seeking the right to practice their religion in accordance with the dictates of their own conscience, driven in most instances by either majority in numbers or by power of enforcement to refrain from practicing their own particular religion and join in a State religion. The drafters of our Constitution had this in mind and have provided that the State cannot in any way interfere with the practice of religion. Under the Constitution and Bill of Rights, however, it is made equally clear that it is the courts' duty to preserve freedom of religion and its practice and to preserve the rights of minority groups. It is upon this theory of religious liberty that this country has enjoyed more religious freedom than any country in history.

The Michigan Supreme Court has held on numerous occasions that the membership of a congregation, which is one of several congregations belonging to a particular religious faith to which the local church property and practice is dedicated, does not have the right to effect, by vote of a momentary majority, a change in religious practice, not conformable with the origin and historic character of the faith of the church of which the local congregation is one member, as against those who faithfully adhere to the characteristic doctrine of the church, and thereby deprive the minority of the use of the church property.

The weight of authority in Michigan is to the effect that the majority faction of a local congregation or society, being one part of a large church unit, however regular its action or

procedure in other respects, may not, as against a faithful minority, divert the property of the society to another denomination or to the support of doctrines fundamentally opposed to the characteristic doctrines of the society, although the property is subject to no expressed trust.

The defendants herein had an opportunity to present testimony to dispute plaintiffs' testimony. This they refused to do. Therefore, we are faced under the proofs with these unchallenged facts: (1) that this congregation was an Orthodox Jewish congregation; (2) that under the Orthodox Jewish law Orthodox Jews cannot participate in services where there is mixed seating; (3) that if mixed seating was enjoyed in this congregation Orthodox Jews would be prohibited from participating in services there. Clearly plaintiffs would be deprived of their right to the use of their synagogue—in other words deprived of the right of the use of their property and the use of the property by the majority group contrary to law. In the very early case of *Fuchs* v. *Meisel,* 102 Mich 357, 373, 374 (32 LRA 92), Justice GRANT, writing for the Court, said:

"In the freedom of conscience and the right to worship allowed in this country, the defendants and the members of this church undoubtedly possessed the right to withdraw from it, with or without reason. But they could not take with them, for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of this religious association; nor could they prevent its use by those who chose to remain in the church, and who represent the regular church organization."

The same rule of law was followed in *Holwerda* v. *Hoeksema,* 232 Mich 648. It was also followed in *Borgman* v. *Bultema,* 213 Mich 684, in an appeal from Muskegon County.

Justice STEERE, writing in the case of *Hanna* v. *Malick,* 223 Mich 100 (syllabus), held:

"Where the articles of incorporation and the by-laws of a local Orthodox Greek church, as drafted and adopted by the original incorporators, who were natives of Syria, clearly express the intention to bring the church under the supreme authority and jurisdiction of the Patriarch of Antioch, those who adhere to that declaration of faith and recognized jurisdiction are entitled to the possession, control, and use of its property for its declared purpose as against those seceding from the original organization and seeking to divert its use and control to the jurisdiction of a Holy Russian Synod or patriarch."

Justice BUSHNELL in *Calvary Baptist Church of Port Huron* v. *Shay*, 292 Mich 517, 520, 521, quoted from *Komarynski* v. *Popovich*, 232 Mich 88, 89, as follows:

" 'In matters of church polity purely ecclesiastical, civil courts do not interfere, but when property rights are involved they are to be tested in the civil courts by the civil laws.' "

Justice SHARPE, writing in *Holt* v. *Trone*, 341 Mich 169, 174, said as follows:

"In the case at bar property rights are involved, namely, which group has the exclusive use and control of the church property. We have no concern with ecclesiastical disputes, and whether the 'New Testament' authorizes and empowers a life tenure for elders with divine right to rule is not a proper subject for our determination."

Justice BOYLES, in the case of *First Protestant Reformed Church* v. *DeWolf*, 344 Mich 624, 633, said:

"While courts do not interfere in matters of church doctrine, church discipline, or the regularity of the proceedings of church tribunals, and refuse to interfere with the right of religious groups to worship freely as they choose, the question of the property rights of the members is a matter within the jurisdiction of the courts and may be determined by the court."

Justice DETHMERS, writing in the case of *Michigan Congre-*

gational Conference v. *United Church of Stanton,* 330 Mich 561, 575, 576, said:

"It is the well-established law of this State, declared in *Fuchs* v. *Meisel,* 102 Mich 357 (32 LRA 92); *Borgman* v. *Bultema,* 213 Mich 684; *Hanna* v. *Malick,* 223 Mich 100; and *United Armenian Brethren Evangelical Church* v. *Kazanjian,* 322 Mich 651, that while members of a church undoubtedly possess the legal right to withdraw from it, with or without reason, they may not, in so doing, take with them, for their own purposes, or transfer to any other religious body, property previously conveyed to, or dedicated to the use of, the religious denomination from which they are withdrawing or one of its member churches, but such property must remain for the use and benefit of adherents to that denomination or those who represent it. Not inconsistent is the earlier case of *Wilson* v. *Livingstone,* 99 Mich 594, when viewed as having been predicated on the theory that the property involved in that case had not been dedicated to the use of any religious denomination.

"The property involved in the instant case belonged, originally, to the First Congregational Church of Stanton and was, as such, dedicated to the use of the religious denomination commonly called Congregational, of which the Stanton church was a part. When, in the year 1937, members of the First Congregational Church of Stanton dissolved its corporate existence and undertook to take its property with them into the newly-incorporated United Church of Stanton (defendant), the legality of that attempt depended upon whether the new organization was a part of the religious denomination commonly called Congregational. If it was not, they could not, in leaving the Congregational denomination, take the property with them into the new church organization and convey it to the latter."

Justice BOYLES in *United Armenian* . . . 322 Mich 651, 660, quotes from *Borgman* v. *Bultema,* 213 Mich 684, 689:

" 'No one disputes, where property is dedicated to the use of a religious denomination it cannot thereafter be diverted to the use of those who depart from their faith, but must remain for the use and benefit of those who still adhere to the faith.' "

The conveyance of the land to the original trustees and to the congregation conveyed the land in trust for the purposes for which the congregation was formed.

"A conveyance or bequest to a religious association, or to trustees for such association, necessarily implies a trust." *Fuchs* v. *Meisel, supra.* (Syllabus.)

As to an express trust, the rule is well established and set forth in 45 Am Jur, Religious Societies, §61, pp 771, 772, as follows:

"Where property has been dedicated by way of trust for the purpose of supporting or propagating definite religious doctrines or principles, it is the duty of the courts to see that the property so dedicated is not diverted from the trust which has been thus attached to its use. So long as there are persons who are qualified within the meaning of the original dedication and are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is anyone so interested in the execution of the trust as to have a standing in court, a diversion of the property or fund to other and different uses can be prevented. *** It is not within the power of the congregation, by reason of a change of views on religious subjects, to carry such property to the support of a new and conflicting doctrine; in such case, the secular courts will, as a general rule, interfere to protect the members of an ecclesiastical organization who adhere to the tenets and doctrines which it was organized to promulgate in their right to use the property, as against those members who are attempting to divert it to purposes utterly foreign to the organization, and will enjoin its diversion from the trust."

In the case of *Fisher* v. *Congregation B'nai Yitzhok,* 177 Pa Super 359 (110 A2d 881) the superior court of Pennsylvania dealing with a similar proposition of law dealt with it in accordance with the Michigan rule. Plaintiff was an ordained rabbi of the Orthodox Hebrew faith. He was a professional rabbi-cantor. Defendant was an incorporated Hebrew congregation with a synagogue in Philadelphia. Plaintiff, in response to defendant's advertisement in a Yiddish newspaper, appeared in Philadelphia for an audition before a committee representing the congregation. As a result, a written contract was entered into on June 26, 1950, under the terms of which plaintiff agreed to officiate as cantor at the synagogue of the defendant congregation "for the High Holiday Season of 1950," at 6 specified services during the month of September, 1950. Compensation for the above services was to be $1,200. The congregation up to that time had been conducted without mixed seating of the sexes. At a general meeting of the congregation on July 12, 1950, on the eve of moving into a new synagogue, the practice of separate seating by the defendant formerly observed was modified. When plaintiff was informed of the action of the defendant congregation, he, through his attorney notified the defendant that he . . . would be unable to officiate as cantor. When defendant failed to rescind its action, plaintiff refused to officiate. He was able to obtain employment as cantor for one service which paid him $100. He sued for the balance of the contract price.

Testimony of 3 rabbis learned in Hebrew law appeared for the plaintiff and testified to the effect "that Orthodox Judaism required a definite and physical separation of the sexes in the synagogue." Testimony was also established that an Orthodox rabbi-cantor could not conscientiously officiate in a synagogue that violates such Jewish law. Judgment for the plaintiff in the sum of $1,100 was entered plus interest. The court on appeal said:

"In determining the right of recovery in this case the question is to be determined under the rules of our civil law, and the ancient provision of the Hebrew law relating to separate seating is read into the contract only because implicit in the writing as to the basis—according to the evidence—upon which the parties dealt."

The court affirmed the judgment of the lower court.

The rule above set forth for Michigan has been followed in other States.

In their contention that ecclesiastical matters above are involved, defendants rely heavily upon *Katz* v. *Goldman,* 33 Ohio App 150 (168 NE 763). Here the court adopted (p 163) a theory that if they were to try to define just Orthodox and Traditional Judaism there would be such a divergence of opinions that it would result in multiplying dissension instead of eliminating it.

Here, because of defendants' calculated risk of not offering proofs, no dispute exists as to the teaching of Orthodox Judaism as to mixed seating.

The case is reversed and remanded for entry of a decree in accordance with this opinion. Costs in favor of plaintiffs-appellants.

Dethmers, C.J., and Carr, Kelly, Smith, Black, Edwards, and Voelker, J.J., concurred.

The Final Decree

State of Michigan
in the Circuit Court for the County of Macomb
in chancery (No. 252-33)

DECREE

AT A SESSION of said Court held continued in the Court House in the City of Mount Clemens, said County and State, on the 21st day of September, 1959.

Present: Honorable Edward T. Kane, Circuit Judge.

An Opinion in this matter having been rendered by the Michigan Supreme Court on June 5, 1959, and the matter having been remanded to this Court for entry of a Decree in accordance with said Opinion;

NOW THEREFORE, THIS COURT DOES FIND, ORDER AND ADJUDGE AS FOLLOWS:

1. That the Plaintiffs are members of Congregation Beth Tefilas Moses, an Orthodox Jewish Congregation located in the City of Mount Clemens, in Macomb County, Michigan.

2. That the Defendants are the duly elected and constituted members of the Board of Trustees of said Congregation.

3. That the doctrines of Orthodox Judaism proscribe mixed seating, that is the seating of men and women together in the Synagogue without a definite and physical separation of the sexes.

4. That an adherent of Orthodox Judaism cannot in conscience worship in a Synagogue where mixed seating is permitted.

5. That the acts attempted by the Trustees as representatives of the Congregation, to-wit: the institution of mixed seating in the Synagogue of Beth Tefilas Moses were clearly violative of the established Orthodox Jewish law and practice.

6. That the acts of the Defendants in instituting mixed seating in the Synagogue of Beth Tefilas Moses deprived the plaintiffs and all who adhered to the established Orthodox Jewish practice of the right of use of their property contrary to law.

7. That the Defendants and their successors in office be and they are hereby enjoined and restrained from instituting or permitting mixed seating in the Synagogue of Congregation Beth Tefilas Moses.

8. It appearing that, before the controversy involved herein, it was the practice in the Synagogue of Congregation Beth Tefilas Moses to assign one bench in the Southwesterly corner of the main floor to elderly women who were crippled or otherwise by reason of disease unable to ascend the stairs to the balcony, nothing in this Decree contained shall be construed to prevent the continuance of that practice. It is further ordered that the Defendants and their successors in that capacity provide such usher facilities and/or signs as shall be reasonably calculated to carry out this paragraph of the Decree.

9. It further appearing that the actions of the Defendants in this matter as Trustees of the Congregation were carried out in their representative capacities, Plaintiffs may tax their costs and have execution therefore against the membership of the Congregation as an unincorporated association in the manner and form by law provided.

s/ EDWARD T. KANE
Circuit Judge

December 19, 1958