

The Establishment, Preservation and Legality of Mennonite Semi-Communalism in Manitoba

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Mennonites,¹ Amish² and Hutterites³ are three distinct subgroups within the larger Anabaptist branch of Christianity. For a considerable period of

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¹ For a basic overview of the Mennonite experience in Canada see the three volume series: Frank H. Epp, *Mennonites in Canada 1786–1920: The History of a Separate People* (Toronto: Macmillan, 1974); Frank H. Epp, *Mennonites in Canada 1920–1940: A People's Struggle for Survival* (Toronto: Macmillan, 1982); Ted D. Regehr, *Mennonites in Canada 1939–1970: A People Transformed* (Toronto: University of Toronto Press, 1996). For an overview of the Mennonite experience in the United States, see Richard K. MacMaster, *Land, Piety, Peoplehood: The Establishment of Mennonite Communities in America, 1683–1790*, vol.1 (Scottsdale: Herald Press, 1985); Theron Schlabach, *Peace, Faith, Nation: Mennonites and Amish in Nineteenth-Century America*, vol.2 (Scottsdale: Herald Press, 1988); James C. Juhnke, *Vision, Doctrine, War: Mennonite Identity and Organization in America, 1890–1930*, vol.3 (Scottsdale: Herald Press, 1989); Paul Toews, *Mennonites in American Society 1930–1970*, vol.4 (Scottsdale: Herald Press, 1996).

² For background reading on Amish groups, see John A. Hostetler, *Amish Society* 3rd ed. (Baltimore: Johns Hopkins University Press, 1993); Donald B. Kraybill, *The Riddle of Amish Culture* (Baltimore: Johns Hopkins University Press, 1989). The disagreement that eventually led to the establishment of the Amish as a distinct branch involved a schism in the Mennonite community in the Alsace region of Europe in the late 17th century over the strictness of church punishment in the use of shunning, with the Amish adopting full discontinuation of all relationships, while the Mennonites at that time and place practiced a loose shunning that consisted only of a discontinuation of church membership and communion in church. Subsequently many more conservative Mennonite groups have practised shunning that is every bit as strict as the Amish as a form of social control. The Hutterites also have various levels of shunning, including excommunication from the church and expulsion from the colony.

³ I have found the following five sources, listed by date of publication, to be particularly helpful: Victor Peters, *All Things Common: The Hutterian Way of Life* (New York: Harper and Row, 1971); John A. Hostetler, *Hutterite Society* (Baltimore: Johns Hopkins University Press, 1974); Karl A. Peter, *The Dynamics of Hutterite Society: An Analytical Approach* (Edmonton: University of Alberta Press, 1987); John Hofer, *The History of the Hutterites*, rev. ed. (Altona: Friesen and Sons, 1988 Revised Edition); Samuel Hofer, *The Hutterites: Lives and Images of a Communal People* (Saskatoon: Hofer Publishers, 1998).

time I have been working on a project dealing with how the law of the state (the outside law) has dealt with various disputes involving the norms of the Hutterite communities (the inside law), such as disputes over excommunications and communal property claims.⁴ The next stage of my research project on the interaction between the outside law of the state and the inside law of Anabaptist groups involves the Mennonites.⁵

In this paper, I want to deal briefly with an issue involving Mennonites that is probably of relatively minor historical interest, but may nevertheless eventually form an important part of a more comprehensive view of the interaction between law and Mennonite life. The little slice of history reviewed in this paper involves the legal status of the original Mennonite land settlement patterns and communal village agreements in Manitoba. In essence, my thesis is that the Mennonite village semi-communal pattern of land use, adopted according to the inside law of the Mennonite community at the time, was actually *supported* by the outside law of equitable trusts, and that the courts of the state would likely have upheld the village agreements if they had been tested by litigation. My thesis appears to be completely contrary to the frequently asserted proposition by historians that there was no legal support for the Mennonite village pattern of land use.⁶

After some further introductory remarks, my paper is divided into two parts. First, I will deal briefly with the legal framework for *establishing* the Mennonite semi-communal property regime in Manitoba. This part of the story involves nothing new on my part and it has been covered with greater depth by others.⁷ I

⁴ Alvin J. Esau, "Communal Property and Freedom of Religion" in John McLaren & Harold Coward, eds., *Religious Conscience, the State and the Law* (Albany: State University of New York, 1999) at 97–116; Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: University of British Columbia Press, 2004); Alvin J. Esau, "Law and Property: The Establishment and Preservation of Hutterite Communalism in North America: 1870–1925", in John McLaren, Nancy Wright & A.R. Buck, eds., *Disputic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2004) at 207–221. Also see Alvin J. Esau, "The Resolution of Church Property Disputes: Canadian and American Models" (2003) 40 Alta. L. Rev. 767.

⁵ For some Mennonite-related work on this project, see Alvin J. Esau, "Mennonites and Litigation," (2000), available at <www.umanitoba.ca/faculties/law/Courses/esau/litigation/mennolitigation.htm>. Also see Alvin J. Esau, "Islands of Exclusivity: Religious Organizations and Employment Discrimination" (2000) 33 U.B.C. L. Rev. 719–826. This article focuses on the case of a Mennonite Bible College in Steinbach faced with a charge of discrimination for dismissing an employee who was not a Mennonite and then looks more broadly at the uncertain boundary of freedom of religion to hire co-religionists and/or demand lifestyle conformity of members and employees of religious groups.

⁶ *Infra* note 55.

⁷ For more comprehensive treatments of various issues, see William Janzen, *Limits On Lib-*

simply touch upon it as a necessary background. It is in the second part of the paper, where I deal with the role of law in the *preservation* of the Mennonite property regime, where I wish to introduce and defend a thesis that, as far as I know, has not been argued before.

While sharing various beliefs as to adult baptism, the separation of church and state, and the conviction that disciples of Jesus should refuse to use violence,⁸ Mennonite and Amish groups have generally disagreed with the Hutterite group as to whether community of property is normatively required as a condition of living in Christian community. Mennonite and Amish groups have generally accepted private ownership, while Hutterites have rejected it.⁹ However, while the Hutterites surrender individual ownership rights to property, the acceptance of private ownership by Mennonite and Amish groups is still conditioned by various norms such as stewardship and sharing. Stewardship includes the notion that all property belongs to God and is not really owned by us; it is entrusted to us to be cared for and disposed of within a framework of obligations to God and to our neighbour. The concept of sharing adds the notion that we have an obligation to exercise charity to persons in need outside the community, and we have reciprocal obligations of mutual aid between members of the church to provide resources and labour to each other when any member of the church body is in material need.¹⁰

When we take stewardship and sharing into account, the distinction between the Mennonite and Amish acceptance of private ownership on the one hand, and the Hutterite insistence on community of goods on the other, becomes somewhat less dramatic, at least as applied to some of the more traditionalist Mennonite communities. While not conforming to the Hutterite model of community of goods, Mennonite communities have sometimes created

erty: *The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990); and Adolf Ens, *Subjects or Citizens? The Mennonite Experience in Canada, 1870–1925* (Ottawa: University of Ottawa Press, 1994).

- ⁸ For a paradigm of dominant Anabaptist thought, see Guy F. Hershberger, ed., *The Recovery of the Anabaptist Vision* (Scottsdale: Mennonite Publishing House, 1957). Of course the original Anabaptist movement included various competing visions.
- ⁹ For a brief overview under the titles of “Property” and “Community of Goods” see Canadian Mennonite Encyclopedia Online <www.mhsc.ca/encyclopedia>. It should be noted that there were periods of time when the Hutterites reverted to private ownership—once in the aftermath of prolonged and severe persecution from external sources, and the second period in Russia in the aftermath of internal struggles and apathy. In each case community of property was eventually restored. See The Hutterian Brethren, eds., *The Chronicle of the Hutterian Brethren Vol. 1* (Rifton, New York: Plough Publishing, 1987); The Hutterian Brethren of Crystal Spring Colony, eds., *The Chronicle of the Hutterian Brethren Vol. II* (Altona: Friesen Printers, 1998).
- ¹⁰ See Willard M. Swartley & Donald Kraybill, eds., *Building Communities of Compassion: Mennonite Mutual Aid in Theory and Practice* (Scottsdale: Herald Press, 1998).

a mixture of private ownership and common ownership or have required that some private resources are to be used collectively.¹¹ We might label these various intermediate or hybrid models as constituting examples of semi-communal property regimes. This is to say that the religious community has a view of property that is fundamentally *communitarian* as opposed to the outside law view of property as a *commodity*.

In this paper, I examine the Mennonite semi-communal agricultural village system of land use that the Russian Mennonites transplanted for a time on the North American prairies.¹² I will not deal with the many fascinating parallels and differences between the experience of the Mennonites in terms of the legality of their land use patterns, and that of the Doukhobors, many of whom were also Christian communalists, but not traditionally classified as part of the Anabaptist family.¹³

The purpose of this paper is to raise some issues as to how the "outside law"

¹¹ For example, in some Mennonite colonies all land has been held by the church or church corporation and then parceled out for individual use or for collective use, and various co-operatives may also be operated by the community for the production and marketing of goods. As to Mexican Mennonite colonies, see Harry Sawatzky, *They Sought a Country: Mennonite Colonization in Mexico* (Berkeley: University of California Press, 1971); Calvin Redekop, *The Old Colony Mennonites: Dilemmas of Ethnic Minority Life* (Baltimore: John Hopkins University Press, 1969). As to Mennonite colonies in Paraguay, see Joseph Winfield Fretz, *Pilgrims in Paraguay* (Scottsdale: Herald Press, 1953). Note that in Russia a land crisis developed in the Mennonite colonies due to population growth and a rule against subdividing holdings into smaller portions, thus leading to the establishing of several new Mennonite colonies. See for example, William Schroeder, *The Bergthal Colony*, rev. ed., (Winnipeg: C.M.B.C. Publications, 1986). There were also Mennonites who lived outside the colony structure, some of whom became wealthy estate owners. That Mennonite colonies in Russia had, and in Paraguay and Mexico still have, so much autonomy as to become a "state within a state" raises the question of whether the Anabaptist separation of church and state is thereby violated because the community at some level may be required to "use the sword, and not just the spirit" to enforce norms and adjudicate disputes in areas of criminal or civil jurisdiction usually allocated to the state. That the community itself may internally divide authority between "governmental" officials and "church" officials hardly solves the problem if the community as a whole is supposed to be non-resistant. See James Urry, *None But Saints: The Transformation of Mennonite Life in Russia, 1789-1889* (Winnipeg: Hyperion Press, 1989).

¹² One of the best descriptions is given by John Warkentin, "Mennonite Agricultural Settlements of Southern Manitoba" (1959) 49 *Geographical Review* 342. Also see the recent republication of Warkentin's 1960 Ph.D thesis, *Mennonite Settlements of Southern Manitoba* (Steinbach: Hanover Steinbach Historical Society, 2000).

¹³ See John McLaren, "The Failed Experiments: The Demise of Doukhobor Systems of Communal Property: Land Holding in Saskatchewan and British Columbia, 1899-1999" in John McLaren, Nancy Wright & A.R. Buck, eds., *supra* note 4 at 223-247. Also see Carl J. Tracie, *Toil and Peaceful Life: Doukhobor Village Settlement in Saskatchewan, 1899-1918* (Regina: Canadian Plains Research Centre, 1996).

of the host society in Canada, particularly some aspects of the law of property, interacted with the "inside law" of the Mennonite semi-communalists. What was the relationship between the outside law (the official law of the state) and the inside law (the norms of the community)? Our discussion is limited to a particular time period and to a limited area of interchange between the formal law of the host society and the customary law of the immigrant community. Any conclusions made are not intended to be generalized into an overall assessment of the balance between legal accommodations and legal oppressions experienced by this religious community. For example, we may distinguish those developments where laws were specifically directed against Mennonites as a result of hostilities aroused against them in the host society,¹⁴ as compared to those circumstances where the general law of the host society, not meant to be discriminatory, nevertheless negatively impacted the group due to their particular religious norms. In cases of direct discrimination against religious groups, law appears to function as an instrument through which powerful interests can translate their hostility and prejudice against less powerful groups through the "legitimized" use of state coercion and violence.¹⁵ But in regard to the outside law of property as it related to the inside law of semi-communalism, we are dealing more properly with the potential of indirect discrimination. Assuming that the laws of the host society (the outside law) dealing with property acquisition and use were premised on individual ownership, what adverse impact, if any, did those laws have on semi-communal groups? If there was adverse impact, was the law changed so as to accommodate the needs of the communal group?

¹⁴ For example, in 1919 the Federal Government prohibited further immigration of Mennonites, Hutterites and Doukhobors into Canada. See, Orders-in-council of 1 May 1919 and 9 June 1919. These restrictions were lifted for Hutterites and Mennonites in 1922. The governments of Manitoba and Saskatchewan also systematically forced public schools on the Mennonites, imposed an English-only curriculum, and used all the power of the compulsory attendance legislation to force Mennonite parents to send their children to public schools. While the more conservative Mennonites did not challenge the many fines and imprisonments of Mennonite parents in the wake of refusal to send their children to the public schools, eventually one slightly more liberal group in Manitoba took a test case to court. The leading unsuccessful case was *R. v. Hildebrand and Doerksen* [1919] 3 W.W.R. 286 (Man. C.A.). Leave to appeal to the Privy Council in London was refused. The fact that many of the more conservative Mennonites departed from Manitoba and Saskatchewan in the wake of the school controversy serves as an example of how the law related to education did not accommodate the needs of the religious group.

¹⁵ While law is not legitimated by state coercion, at bottom the law is still backed by the violence of the state. See Robert Cover, "Violence and the Word" (1986) 95 Yale L. J. 1601.

I. ESTABLISHING MENNONITE SEMI-COMMUNALISM

A. Reservations of Land for Mennonites

Mennonites in North America may be roughly divided into two different streams: the Swiss-South German group who migrated West and arrived in North America as early as 1683, and the Dutch-North German group who migrated East to Prussia and then eventually further East again, establishing major semi-autonomous colonies in Russia. Mennonites from the Swiss stream arrived in Canada from Pennsylvania as early as 1786, while the Russian Mennonites arrived about a century later, in various waves beginning in the 1870's.¹⁶ This paper only deals with property issues involving the first wave of the Russian group.¹⁷

Besides promising the Mennonites exemption from military service and the ability to run their own schools free from governmental interference, the Dominion Government by an order-in-council approved on 26 April 1872, promised the Mennonites that various blocks of crown land available for homesteading would be reserved *exclusively* for Mennonite settlement if they immigrated to Canada.¹⁸ The order stated, "The settlers may obtain contiguous lots of land, so as to enable them to form their own communities."¹⁹ Subsequently two blocks of Federal crown land in Manitoba were reserved by order-in-council for the exclusive homesteading of Mennonite immigrants; 8 townships in one area (the East Reserve) and later 17 townships in another (the West Reserve).²⁰ [See ap-

¹⁶ In the 1870s, the Mennonites were divided as to the need to leave. Approximately 18 000 of the 50 000 or so Mennonites in Russia emigrated, while the rest remained after the Russian government made concessions for alternative service rather than insisting on military conscription. While the Mennonite community in Russia flourished for many decades thereafter, the communities were then devastated during the aftermath of the Russian revolution and a wave of further immigration took place in the 1920s. See Frank H. Epp, *Mennonite Exodus: The Rescue and Resettlement of the Russian Mennoites Since the Communist Revolution* (Altona: Friesen & Sons, 1962).

¹⁷ For various earlier difficulties in obtaining crown grants and block settlements in Ontario, see for example, Lorraine Roth, *The Amish and Their Neighbors: The German Block, Wilnot Township, 1822-1860* (Waterloo: Mennonite Historical Society of Ont., 1998); T. D. Regehr, *Peace, Order and Good Government* (Winnipeg: C.M.B.C. Publications, 2000) at 27-33.

¹⁸ The whole set of promises made by the Canadian authorities is often referred to as "the Mennonite Privilegium". These are reproduced in appendix B and C of Schroeder, *supra* note 11 at 125-128.

¹⁹ Order-in-Council of 26 April 1872, as reproduced in Appendix I of Ens, *supra* note 7 at 237.

²⁰ Further Mennonite reserves were later created in Saskatchewan. Janzen, *supra* note 7 pro-

pendix figure one and two.) Between 1874 and 1880, approximately 8000 of the most conservative of the Russian Mennonites immigrated to Canada, mostly to these reserves in Manitoba.

The idea of having exclusive block settlements moves us beyond the narrower issue of how individuals or even collectivities might acquire legal *title* in particular plots of land and live close to others who are of the same language, culture or religion, to the broader issue of acquiring a *territory*, a bounded space in which the religious community as a group might be given autonomy to set up its own institutions, including allocation of land use, within the larger protective framework of the host society. Block settlement privileges could be viewed within a conception of federalism that moves beyond the typical division of powers between the central government and the provinces, to a conception of federalism that encompasses the division of powers between governmental authority, the authority of certain groups, and associations that are capable of generating a full bodied normative world of their own.²¹

However, it is unlikely that the Canadian willingness to allow for block settlements by a reservation system had anything to do with a communitarian theory of liberalism, but was simply motivated by a desire to induce people to settle the west with the assumption that they would eventually "assimilate".²² At one point when various amendments to the *Dominion Lands Act*²³ were being debated in the House of Commons, Sir John A Macdonald stated:

[U]nless they are allowed to settle together in that way they will not come at all. Perhaps, in the case of German or Irish or any other immigration, it would be better to have the different races scattered throughout the territory, so that by degrees they might amalgamate, and become, in the end, Canadians; but the first thing to do is to get them to come, and if they will not come readily and scatter over the country, then we must bring them out in communities.²⁴

vides details at 27–35. It should be remembered that one complication in the reserve system was that in every township, four sections were reserved for sale by the Hudson's Bay Company and 2 sections were reserved for sale by the Province for the support of schools. To retain exclusiveness, the Mennonites would argue that only they should be allowed to purchase these lands.

²¹ Carol Weisbrod, "Emblems of Federalism" (1992) 25 U. of Mich. J. L. Ref. 795.

²² See C.A. Dawson, *Group Settlement: Ethnic Communities in Western Canada* (Toronto: Macmillan, 1936).

²³ S. C. (1872) c. 23 as amended from time to time.

²⁴ *House of Commons Debates*, (14 March 1881) at 1361. The issue of the creation of Mennonite reserves does not appear to have been debated in the House of Commons; instead there was an extended debate over a loan by the government to the Mennonites and secured by credit pledges from Ontario Mennonites. The debates are reproduced in Ernst Correll, "The Mennonite Loan in The Canadian Parliament, 1875" (1946) 20 *Mennonite Q. Rev.* 255–275.

The Canadian willingness to create exclusivist reserves may be contrasted with the American unwillingness to do so. What became known as the "Mennonite Bill" was debated in the United States Senate in 1874. Mennonite representatives had already made a tentative deal whereby they could purchase all the odd-numbered sections of a tract of land in the Dakota Territory from a Railway company.²⁵ The Mennonites then petitioned, Congress requesting that the even-numbered sections available for homesteading, which were coterminous to the railway lands, be reserved for exclusive homesteading by the Mennonites for a period of time. Thus a bill was drafted that originally encompassed the setting aside of 500 000 acres of land in what is now North Dakota for exclusive homesteading or purchasing by Mennonites and Hutterites from Russia for a five-year period.²⁶ While the Bill had the support of President Grant and other officials, it was ultimately defeated and the proposed Dakota block settlement collapsed. Various Senators made speeches about the undesirability of dividing the country into separate ethnic or religious enclaves instead of building a united country of citizens.²⁷ While many Senators spoke in glowing terms of the moral integrity and industry of the Mennonites and the need to accommodate the Russian Mennonites so that they would come to the United States instead of going to Canada, the argument was forcefully made that it was offensive to have exclusivist and separationist group settlements. In opposing the bill, Senator Edmunds from Vermont stated:

To me it is a question entirely independent of what these people may think, or what any other community of people may think, upon any religious or political or social topic. ... Why sir, what kind of a country should we be if distinctions prevailed such as this bill proposes to set up, of locating men of special religious or special political or social ideas exclusively in one place, and another exclusively in another, and so on? ... It is fundamentally wrong that there should be allowed by law the right of any sect or body of people to separate themselves from the rest of the community and to have the exclusive privilege to build up within the State ... a state of society which excludes in effect and excludes by law ... every other citizen of the Republic from intermingling in their society. ... Let us have no exclusions; let us know no boundaries; let us be a na-

²⁵ The tentative contract between the Northern Pacific Railroad and the Mennonite Representatives is reproduced in Clarence Hiebert, ed., *Brothers In Deed to Brothers in Need: A Scrapbook About Mennonite Immigration From Russia, 1870-1885*. (Newton, Kan.: Faith and Life Press, 1974) at 69-70.

²⁶ As noted by Rod A. Janzen, *The Prairie People: Forgotten Anabaptists* (Hanover: University Press of New England, 1999) at 26-28; Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon Books, 1980) at 42-43; Mark D. Rosen, "The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory" (1998) 84 Virginia L. Rev. 1053.

²⁷ The bill and debates from the Congressional Record are reproduced in Ernst Correll, "The Congressional Debates on the Mennonite Immigration From Russia, 1873-1874" (1946) 20 Mennonite Q. Rev. 178.

tion and a people where every man everywhere stands on an equality with his fellow-man, where there are no boundaries like Chinese walls to separate one sect or one opinion of politics or one calling from another; but an equal citizenship and an equal freedom.²⁸

Despite the obvious advantages of having explicit Canadian governmental promises and legal accommodations, of the 18 000 Mennonites that left Russia in the 1870s, about 10 000 went to America, while only 8 000 went to Canada.²⁹ While the Mennonites were unable to achieve any block reserves of homestead land from the American government, the aggressive competition between railway companies to settle railway owned land and the availability of contiguous plots of homestead land with that railway land created various ethnic enclaves without government accommodation, in any event.³⁰ Many Russian Mennonites settled in Kansas and Nebraska, where various townships eventually evolved into what might be called exclusivist Mennonite settlements.³¹

B. Hamlet Privilege for Mennonites

But the idea of reserves does not capture the key point of Mennonite semi-communalism. Mennonites did not originally disperse to their own individual homesteads on the reserves, but rather they replicated from Russia a semi-communal pattern of land use that involved two main features, namely street-villages and an open-field system of farming.³² [See appendix figure 3.] At one

²⁸ *Ibid* at 185–187. It would be interesting to explore the degree to which the American experience with the early Mormons had something to do with attitudes to separatist religious groups. During some periods of the 19th century, the Mormons had their own versions of being “a state within a state” by acquiring considerable autonomy within a particular geographical territory. See Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-Day Saints, 1830–1900* (Urbana: University of Illinois Press, 1988).

²⁹ Georg Leibbrandt, “The Emigration of the German Mennonites from Russia to the United States and Canada in 1873–1880” (1932) 6 M. Q. Rev. 205 and (1933) 7 M. Q. Rev. 5 at 33.

³⁰ An overview of American settlement is found in Schlabach, *supra* note 1 at 231–294.

³¹ See D. Aidan McQuillan, *Prevailing Over Time: Ethnic Adjustment on the Kansas Prairies, 1875–1925* (Lincoln: University of Nebraska Press, 1990). See also Royden K. Loewen, *Family, Church and Market: A Mennonite Community in the Old and New Worlds, 1850–1930* (Toronto: University of Toronto Press, 1993) at 70–77 regarding the group of Kleine Gemeinde Mennonites who bought 15 000 acres of land in Jefferson County, Nebraska, from a Railway Company and set up ‘villages’.

³² For a good overview, see C. J. Tracie, “Ethnicity and the Prairie Environment: Patterns of Old Colony Mennonite and Doukhobor Settlement” in Richard Allen, ed., *Man and Nature on the Prairies* (Regina: Canadian Plains Research Center, 1976) at 46. See also *supra* note 12.

stage there were up to 120 of these Mennonite villages in Manitoba. Recently, in a study dealing with the village of Neuberghthal, Frieda Esau Klippenstein conveniently summarizes for us some of the features of the Mennonite cultural landscape.³³ A few of the points on her list include:

- The pooling of homesteads by a group of settlers and the superimposing of a particular village plan onto those lands allowing a combination of private and communal spaces and resources. A typical village had approximately 20 to 24 families on four to six sections of land.
- A single village street. This feature is referred to in the name “Strassendorf”, literally meaning “street village”. Sometimes the village street followed the north-south or east-west lines of the homestead grid; other times they were aligned on a diagonal, following the water source (a stream or river), providing maximum shelter from prairie winds, or taking advantage of drainage patterns.
- Long, narrow lot farmsteads perpendicular to the village street.
- Homes which consisted of house and barn connected together (“Wohnstallhaus”)...
- The village farm lands divided into arable lands (“Gewann”) for ploughing and planting, and pastures/haylands (“Fluren”) for grazing animals and cutting hay for winter use. These fields and pastures were “open” rather than enclosed by fences. The cultivatable land was divided into narrow strips of approximately 10–15 acres (“Kagel”), which were distributed equally among the villagers so that the best and worst land fell equally. Usually each section of this farmland held as many strips as there were villagers. These strips were visible on the land because narrow strips of uncultivated land (“Rhein”) were left between to mark their edges. Eventually, because of a natural buildup of dust, straw and soil these strips became even more defined as raised edges.
- A communal system of working the land and caring for livestock. In this system there was a combination of private and shared responsibilities. Though strips of arable land were assigned to individual farmers, such work as haying and threshing was done by groups working together. Similarly, though livestock was individually owned, a village herdsman would herd and watch over them in a communal pasture, making individually fenced pastures unnecessary.
- Village government composed of a “Shultze” (mayor) and committee of “Wirte” (landowners) who met regularly and made decisions on the running of the village.³⁴

³³ Frieda Esau Klippenstein, *Neuberghthal National Historic Site: A Cultural Landscape History* (Winnipeg: Parks Canada, 1997) at 13–14.

³⁴ *Ibid.*

We might add, as well, that beyond the authority of the local village there were institutions of the larger church and community that tied people together. There was a head mayor ("Oberschulze" or "Obervorsteher") and elected colony council ("Gebietsamt"). The larger community had its own internal fire regulations and insurance scheme ("Brandordnung"), its own regulations for the transfer and division of property after death, and institutions for looking after estates of orphans and engaging in other financial transactions for members of the community (the "Waisenamt").³⁵

In attracting and retaining Mennonite immigrants, the government made a second legal accommodation, along with the reserve system to allow for the establishment of this semi-communal Mennonite village pattern of land use. The homestead provisions under the *Dominion Lands Act*³⁶ were based on surveying and imposing on the land the now-familiar grid pattern of individually owned quarter-sections within the larger pattern of 36-section townships.³⁷ This pattern of land ownership obviously did not fit the street village and open-field semi-communal land use customs of the Mennonites. Janzen summarizes the conventional homestead provisions as follows:

A settler could obtain a quarter-section with 160 acres, by registering a claim and paying the nominal fee of \$10. This was known as a homestead "entry." The settler then had to meet both a residence and a cultivation requirement, meaning that he had to reside on his homestead and cultivate at least a portion of it. After three years he could obtain the legal title, officially known as the 'patent'.³⁸

While the Mennonites wanted contiguous land for purposes of living together, when it came to how that land would be granted by the government to individual settlers within this reserve the contiguous quarter-section of a homestead with individual residence and cultivation requirements was inappropriate for Mennonite semi-communalism. Obviously, under the Mennonite pattern a particular homestead might well be carved up for a communal pasture, woodland, locating a school or church, or cut up into private fields and residential lots for

³⁵ See Gerhard John Ens, *Volost and Municipality: The Rural Municipality of Rhineland* (Altona: R.M. of Rhineland, 1984) for an overview of various Mennonite organizations and a history of the West Reserve; *supra* note 22 at 107–171 also focuses on the West Reserve. As to the Kleine Gemeinde in the East Reserve, see Loewen, *supra* note 31; Delbert Plett, *Pioneers and Pilgrims* (Steinbach: Crossway Publications, 1990); Abe Warkentin, ed., *Reflections On Our Heritage: A History of Steinbach and the Rural Municipality of Hanover from 1874* (Steinbach: Derkson Printers, 1971).

³⁶ *Supra* note 23.

³⁷ See Kirk Lambrecht, *The Administration of Dominion Lands, 1870–1930* (Regina: Canadian Plains Research Centre, 1991).

³⁸ Janzen, *supra* note 7 at 20. For a leading historical account see Chester Martin, *Dominion Lands Policy* (Toronto: McLelland and Stewart, 1973).

individuals other than, or in addition to, the individual homesteader ultimately trying to get title to that land from the government.

To accommodate the Mennonite reality, the government amended the homestead provisions in 1876 to provide for what became known as the 'hamlet privilege'. The provision stated, "In the case of settlements being formed of immigrants in communities (such as those of the Mennonites and Icelanders) the Minister of the Interior may vary and waive, in his discretion, the foregoing requirements as to residence and cultivation on each separate quarter-section entered as a homestead."³⁹ Thus a homesteader who resided in the village might still be given title to their quarter-section of land even though not residing on it.

The hamlet privilege seems to have been frequently terminated, modified, revived, and terminated again in a confusing sequence of legislative amendments and orders-in-council from 1876 to 1907.⁴⁰ One of the most important of the legislative changes took place in 1883, when the residence requirement could still be waived but the cultivation requirement could not.⁴¹ What is important for our limited purposes, however, is that despite the occasional difficulties with the hamlet provisions, it appears that Mennonites in all the reserved areas were able to take title to land, even though they did not necessarily reside on it or cultivate it as normally required by the homestead provisions. This was an important accommodation made to the normal requirements of the law related to grants of public land, so as to allow the establishment of Mennonite semi-communal land use.

It may be that doubt as to the legality of the Mennonite scheme arose due to the various amendments or even terminations of the hamlet provision, but the ultimate validity of the village scheme has nothing to do with the hamlet privilege. Adolf Ens suggests that the Mennonites "assumed that the setting aside of reserves for them implied the right to regulate landholding patterns internally."⁴² However, the hamlet clause simply allowed individuals to get title to particular plots of public land. *Once title was taken, the existence, termination, or amendment of the hamlet clause was irrelevant.* It was not the federal law of

³⁹ *An Act to Amend the Dominion Lands Act*, S. C. 1876, c. 19, s. 9. There is some speculation as to whether the Minister of the Interior ever did officially in writing permit the Mennonites to use the hamlet clause, but certainly both governmental authorities and Mennonites relied on the so called hamlet clause as if that permission had been given. See Peter D. Zacharias, *Reinland: An Experience in Community* (Altona: Reinland Centennial Committee, 1976) at 71-74.

⁴⁰ These matters are covered to some extent in Janzen, *supra* note 7 at 19-59, and Ens *supra* note 7 at 35-38, 94-96. However further research is needed to establish the whole legislative history of the hamlet clause and what motivated amendments and terminations of it.

⁴¹ *An Act to Amend the Dominion Lands Act*, S.C. 1883, c. 17, s. 32.

⁴² Ens, *supra* note 7 at 35.

amendment of the hamlet clause was irrelevant. It was not the federal law of public land grants that mattered anymore, but rather the general private property law of the province of Manitoba. Once the title was acquired, what legal status did the village pattern of land use have, given that your house-barn was usually on someone else's land, and you were working strips of land on someone else's quarter? That the subsequent status of the hamlet clause is irrelevant may be illustrated by changing the scenario to Mennonites purchasing private land to begin with. Suppose that 20 Mennonite families were able to buy five or six sections of contiguous land and they each bought a quarter and created a Mennonite village.⁴³ The legal status of the village arrangement would be the same whether the title to the lands were originally acquired by homesteading public land or purchasing private land. This is to say that the hamlet privilege was essential for the establishment of the semi-communal system within a public land grants reserve ordinarily based on individual ownership, but it did nothing for the preservation of the system thereafter.

II. PRESERVING MENNONITE SEMI-COMMUNALISM

A. Temporality of Territory: Opening up the Reserves

Adolph Ens suggests that the reserve system was never meant to be a permanent arrangement. While there was no limitation period included in the orders that created the Manitoba reserves, the government did not promise that only Mennonites would be forever allowed to buy land or take up any remaining homesteads within the area of the reserves.⁴⁴ Rather, the reserves were a temporary measure to induce Mennonites to immigrate and allow them to settle as a group and establish homogeneous communities. The government was not breaking a promise to the Mennonites when the restrictions on settlement by non-Mennonites were lifted by 1898, after many years of pressure from various parties who wanted to purchase or homestead in the reserved areas, and after a few independent Mennonites were in some cases selling their land to non-Mennonites.⁴⁵ By the time the reserve system ended in Manitoba, the vast majority of the land in the two reserves had been taken by Mennonites, in any event. When further Mennonite reserves were established in Saskatchewan (near Hague-Rosthern in 1895 and Swift Current in 1904), exclusive settlement was explicitly limited in time, indeed in the second reserve for only a one-year

⁴³ Indeed various villages, albeit briefly, were established in Kansas and Nebraska. See Schlach, *supra* note 1 at 265 and Loewen, *supra* note 31.

⁴⁴ Adolf Ens, *supra* note 7 at 41.

⁴⁵ As to the ending of the Manitoba reserves in 1898 see Adolf Ens, *supra* note 7 at 42–44.

period.⁴⁶

The reserve system, though limited in time, was of fundamental importance in accommodating the religious ideology of the Mennonites to live as a separated people. But note that this was a limited accommodation. Even though to a significant degree there are still areas of these former reserves today that are populated overwhelmingly by people from an ethnic Mennonite background, (in Manitoba we still talk about entering "Mennoland"), the limitation of time on exclusive settlement meant that if there was homestead land not yet taken, a non-Mennonite might apply. Furthermore, subject to our discussion of the legal status of the village system, a Mennonite having obtained title to land under the homestead provisions might thereafter sell that land to a non-Mennonite.

While there were a host of practical difficulties implementing the reserve system in terms of ensuring Mennonite exclusivity of land grants in the face of non-Mennonite squatters, for example, the taking out of homestead rights by non-Mennonites prior to the creation of the reserves and sometimes subsequently, the negotiation of purchase rights exclusively for Mennonites to odd-numbered lots granted to railway companies in some reserves, and so forth,⁴⁷ these difficulties should not obscure a more fundamental reality. Even if the initial granting of crown land within a block was reserved exclusively to Mennonite homesteaders, the ability of Mennonites to preserve the continued exclusivity of the community thereafter was dependent on the internal cohesion of that community. Furthermore, more liberal Mennonite groups did not desire territorial exclusivity, but rather desired to maintain strong communal identity and social boundaries without necessarily being isolated from the host society.

B. Uncertainty of Legality of Village Agreements?

By 1925, the semi-communal village pattern had largely disappeared in favour of individual farmers residing on and cultivating their own land. Some street villages were preserved as a matter of residence arrangements, but the sharing of land as a matter of cultivation ended.⁴⁸ Multiple reasons can easily be identified for why Mennonite semi-communalism in this form did not survive over the long term. The need to find land for the next generation, often available only outside existing village boundaries, and the strong inter-generational kinship bonds of helping sons and daughters establish themselves no doubt played a part

⁴⁶ *Ibid.* at 96.

⁴⁷ See Janzen, *supra* note 7 at 19–35.

⁴⁸ There are actually 18 street villages that exist in some form today (in terms of residential lots), many with house-barns and the like. See Esau Klippenstein, *supra* note 33 regarding the Neuberghal site. Here the villagers agreed to dissolve their village cultivation pattern but retain the residence format by subdividing the land on which the residential lots had been formed and buy those lots from the legal owners of the land.

in pulling some farmers out of the village pattern.⁴⁹ As new farming technologies arose, larger holdings rather than small discontinuous strips of land became the norm.⁵⁰ As the railways entered the reserves, various trading centres arose and eventually became towns, providing a ready market for goods and services that displaced the former dependence of the villagers on each other.⁵¹ In Russia, the village pattern was not just an expression of community, but also provided a measure of security in the face of periodic raiding and violence.⁵² This justification for village living fell away as the settlers experienced decades of safety on the Canadian prairies. The authority of the church as the source of homogeneity of values was weakened by a series of inter-church conflicts and schisms, and by the imposition of municipal local government, rather than church local government.⁵³ At bottom, Mennonite semi-communal land use came to an end in Manitoba because for most Mennonites, unlike the Hutterites and most of the Dukhobors, communal land use was not a faith issue.⁵⁴ The majority of the most conservative and communitarian Mennonites, who were more deeply loyal to the village pattern, moved to Mexico or Paraguay in the 1920s after numerous prosecutions and incarcerations for refusal to obey the provincial school laws.

But now we get to the core question of legality. In addition to these various reasons for the demise of Mennonite semi-communalism, many commentators have noted that the village system was “unsupported by the law.”⁵⁵ Indeed

⁴⁹ Loewen, *supra* note 31 at 144–145.

⁵⁰ Warkentin, *Geographical Review*, *supra* note 12 at 362: “..the peasant way of life simply was not suited to the Canadian commercial wheat growing, which demanded efficient and extensive farming.”

⁵¹ Dawson, *supra* note 22 suggests that the coming of the railway was crucial to the eventual breakup of the villages. For a fascinating history of one of the towns within the East Reserve, see Esther Epp-Tiessen, *Altona: The Story of a Prairie Town* (Altona: D.W. Friesen, 1982).

⁵² Schlabach, *supra* note 1 at 270.

⁵³ See Gerhard Ens, *supra* note 35 at 85.

⁵⁴ I am grateful to Carl Tracie for reminding me of this point.

⁵⁵ E. K. Francis in his seminal work, *In Search of Utopia: The Mennonites in Manitoba* (Altona: Friesen and Sons, 1955) states at 65 that, “the law of the country did not support the open-field system...” See also John Warkentin, *Geographical Review*, *supra* note 12 at 344: “..were willing to accept a land division that had no legal foundation.” Abe Warkentin, *supra* note 35 at 27: “This ...division was voluntary, and unlike that in Russia, unsupported by law.” Under the title “Land Distribution (Canada and Latin America)” the *Canadian Mennonite Encyclopedia Online*, *supra* note 9 states: “This redistribution of land generally had no basis in law, but was undergirded by the authority of the church.” To the same effect, Gerhard Enns *supra* note 35 at 24, “...despite the fact that it had no legal basis...” Adolf Ens, *supra* note 7 at 37: “Since holding each other to the agreement was an internal church matter rather than an external legal one..” Also Tracy, *supra* note 32 at 59: “Since the land was le-

Warkentin suggests that no law whatsoever prevented an owner from moving to his own quarter-section, or selling it to anybody else, or from mortgaging it and thereby placing others in the village in peril of losing their homes sited on it.⁵⁶ In regard to one village on the East Reserve, where the land was often unsatisfactory as compared to the West Reserve, Warkentin notes a violation of both the norms of sharing property and the norms of nonviolence:

In one village, for instance, one man owned the quarter section on which all the arable land was located, and since he wanted all the good land for himself, he actually employed physical means to drive the other farmers away from the *Kagel* that were situated on his quarter section. Naturally he won, and the village disbanded because he was fully within his legal rights.⁵⁷

No one seems to be arguing that the so-called lack of legal support *caused* the breakup of the village system, but the implication is that this lack of legal support was one of the multiple factors that contributed to, or at least hastened, the demise of the system. Indeed, Warkentin states that in regard to the Mennonite farm villages, "Their *greatest* weakness lay in the fact that the open field system had no legal basis."⁵⁸ It is my argument that this frequently stated view that the law did not support Mennonite semi-communalism is likely, false.

I would argue that the law of trusts might well have accommodated the Mennonite village pattern. Elementary to the law of trusts is the idea that someone may hold the legal title to property but someone else may have an equitable beneficial interest in that property because the property is held by the legal owner subject to a trust in favour of the party with the equitable interest. Such trusts can arise by way of agreement between the parties. I may own Blackacre but make an agreement with you that you will have access to use my pond, or that you may cross my land to get to yours, or that you will have the first opportunity to buy my land, or that you can live on a portion of it, and so forth. In some cases, a trust might be established where the legal owner has very little actual control over the property. For example, church property, before the

gally under individual title, those wishing to sacrifice group approval for individual gain were not hindered legally in claiming their own land." Irene Friesen Petkau and Peter A. Petkau, *Blumenfeld* (Winkler: Blumenfeld Historical Committee, 1981) at 132: "This 'nucleated' settlement pattern required the cooperation of all the villagers to accept a type of land division that had no legal foundation."

⁵⁶ John Warkentin, *Geographical Review*, *supra* note 12 at 362–363. Warkentin suggests that even the formal village agreements were unenforceable and cites a document, "A. Walsh to L. Russell, March 2, 1882" found in the Department of the Interior files in the Public Archives in Ottawa. Without being in a position to find out the contents of this document, I do not know if it constitutes an opinion of a lawyer as to the provincial land law of Manitoba at the time and what the basis of such an opinion would be.

⁵⁷ Warkentin, *Mennonite Settlements of Southern Manitoba*, *supra* note 12 at 143.

⁵⁸ *Ibid.*, preface at xvi [emphasis added].

incorporation of religious societies, was often held by trustees who had the legal title to the property, but of course the property was held for the benefit and use of the religious community. The legal owners could not do anything they wanted with the property, but rather the law would enforce the terms of the trust. In the same way, we might argue that the village agreements constituted trust deeds which subjected the legal owners to various equitable interests of other villagers that the law would have recognized and enforced.

To be sure, obvious difficulties were thought to exist by having a hybrid system of private use and common use separated from private ownership. For example, suppose that Friesen (a Mennonite) held legal title to a quarter-section of the land encompassing the village. He decided that it would be nice to get away from the constant scrutiny of the village elders and believed that as legal owner he could simply pull up his house-barn, move it to his own quarter-section and remove his land from the village pattern of cultivation. Such a move, by just one villager, might interfere with the viability of the whole village, depending on the location and use of the Friesen land that is being withdrawn from the system. If the Friesen land actually contains the residential sites of nine or ten other families, what happens when Friesen orders them to leave so that he can commence using "his" land exclusively for himself? On the other hand, suppose that Friesen had a horrible year, said, "I'm moving to Alberta" and sold his land to McLaren, an Anglican from Morden who sought to start his own farm. Or suppose that half the village residential lots are situated on the Friesen land and then Friesen got a loan from McLaren who registers a mortgage against the Friesen property for security for the loan, and then Friesen had another bad year and McLaren took foreclosure proceedings. Furthermore, if we assume that the particular homestead entries were originally just randomly allocated to settlers, because the actual plots for cultivation would be allocated equitably within the community, unfairness would arise if the Friesen land happened to be the best land and he was now claiming it for himself.⁵⁹ If we focus on legal title alone, it would appear that the freedom of the individual owner is indeed matched by a parallel insecurity of the whole communal land use structure.

However, it should be remembered that in regard to the outside law of the host society, the Mennonite semi-communal village system was based on agreements, on contracts that the villagers made with each other to form these villages and pool their lands in this way. Gerhard Ens notes:

In the case of Reinland 12 farmers, many of them relatives, banded together in 1875 to form a village. These farmers made an agreement that they would continue the village

⁵⁹ This disparity of quality of homestead land might well be a problem when any village arrangement came to an end by mutual consent. One person might be the owner of a swampy quarter not suitable for cultivation. Equitable dissolution of semi-communalism might well require compensation as between villagers.

organization they had practiced in Russia utilizing the individually deeded land for the common good, that they would share responsibilities as to taxes for roads and schools and agreed not to sell their land to anyone of whom the village did not approve. This last stipulation was important since in Manitoba, unlike Russia, the village or church did not own the land outright, rather it was owned by individual farmers and if one member decided to withdraw from the village plan it would disrupt the entire system.⁶⁰

John Dyck notes that in regard to the village of Bergfeld in the East Reserve, the villagers held a meeting in 1880 and agreed that:

Firstly, we want to jointly locate and settle in one village, .. Thirdly, however should it happen that someone, out of feelings over an offence or of his own inclination, should want to have his own land, he does not have the right to action which might damage the village or even destroy the community life, but shall be free to sell his property or dispose of it to a member of the community who is concerned to seek the well-being of the village as much as lies in his power and not destroy it.⁶¹

Some of the early village agreements were written in short and simple style.⁶² For example, the Neuenburg agreement of 1882 stated:

1. We the undersigning Mennonites of the Colony Neuenburg, twenty owners comprising the village commune, hereby bind ourselves to place into common use the land, which we have received from the government as our property, in the manner to which we were accustomed in Russia.

2. Because the land laws here require that each must hold title to his homestead individually, we agree to retain it in communal use and to accept the portions assigned to us by lot.

3. We agree that any one may sell his homestead (*i.e.* the twentieth portion of the five sections that which belong to the village) providing that a majority of the villagers agree, that is, two-thirds of the village owners.

4. To bind ourselves to these terms we personally sign our names on the reverse hereof. On the strength of this agreement we desire that the government confirm it and make it binding upon our descendants.⁶³

It is my contention that such an agreement, assuming we have sufficient clarity of terms based on customary norms and common understandings, might well have been given legal effect, at least in some circumstances, if it had ever been

⁶⁰ Gerhard Ens, *supra* note 35 at 24.

⁶¹ John Dyck, "Alt-Bergfeld" in John Dyck, ed., *Historical Sketches of the East Reserve 1874–1910* (Steinbach: Hanover Historical Society, 1994) at 12.

⁶² For example, the Bergthal agreement and Osterwick agreement reproduced in John Dyck, ed., *Working Papers of the East Reserve Village Histories 1874–1910* (Steinbach: Hanover Steinbach Historical Society, 1990) at 27 and 75.

⁶³ John Rempel and William Harms, *Atlas of Original Mennonite Villages, Homesteaders and Some Burial Plots of the Mennonite West Reserve* (Altona: by the authors, 1990) at 90.

tested in the courts. I am unable to find any reported cases of litigation dealing with Mennonite village agreements.⁶⁴ Traditionally, particularly among the most conservative Mennonites, a commitment to nonresistance would preclude bringing a law suit against someone, particularly a fellow villager, even when the law may have clearly favoured your position. It is unlikely that any villagers would have sued Friesen if he had withdrawn his land from village use.⁶⁵ But suppose they had done so. Friesen may be the legal owner, but by agreeing with others that his land will be used by them in a certain way, has not Friesen by contract granted various interests to the others that a court might uphold, at least as against Friesen? True, the others do not have legal ownership of the portion of the Friesen land that they reside on or work, but they may well have an enforceable equitable right to use and occupy the Friesen land. In a sense, whether by way of contract or by way of use, Friesen now holds portions of his land in trust for the use of others. If Friesen sold to McLaren and McLaren had no notice that the Friesen land was part of a communal land use regime, perhaps McLaren would win a suit brought by the villagers, but if McLaren had notice of the Mennonite village agreement at the land titles office, a court might well have determined that the legal title was subject to the equitable interests of the villagers.

In the case of *Inwards v. Baker*,⁶⁶ the court applied the doctrine of proprietary estoppel to prevent a father, who was the legal owner of the land, from removing a house on the land occupied by his son, who previously had built the

⁶⁴ Based on leafing through the *Western Law Reporter* from the late 19th century followed by the *Western Weekly Reports* from 1912 to 1925. This, of course, does not mean that litigation did not take place. Many cases are settled before trial and some cases that are heard in the courts are not necessarily reported. It would require further research in court registry records and files to establish a more definitive view on this issue.

⁶⁵ See Esau, "Mennonite and Litigation", *supra* note 5. There were some exceptions where even conservative Mennonites did go to the law contrary to the anti-litigation norms of their own community. For example, there was protracted litigation that resulted when a conservative group of Mennonites in Saskatchewan, moving away from Canada, pooled all their land and various belongings and tried to sell it all collectively through church leaders as trustees. It would appear that the Mennonites were taken for a ride at a great cost by unscrupulous actions of real-estate speculators and trust company officials. One round of litigation, involving a law suit brought by the Mennonite trustees to retain title to their land as well as a lawsuit brought by the speculators, was fought all the way to the Judicial Committee of the Privy Council. See *Friesen et al. (Trustees for the Mennonites) v. Saskatchewan Mortgage and Trust Co. and Mennonite Land Sales Co. and Great West Permanent Loan Co.* [1924] 3 W.W.R. 883 (P.C.), lower court citations omitted. In a second round of litigation on the matter, some settlement was finally reached just as another appeal to the Privy Council was commencing. See *Friesen v. Saskatchewan Mortgage etc.* [1926] 3 W.W.R. 125 (Sask. C.A.). There are also a host of individual subsidiary cases of litigation related to the wider controversy.

⁶⁶ [1965] 1 All E.R. 446 (C.A.).

house on the father's land with the invitation and consent of the father. The Court refused to grant the plaintiff an order for possession of the bungalow his son had built and held that the son was entitled to stay there as long as he wanted. The Court stated that when a person has expended money on the land of another with the expectation, induced or encouraged by the owner of the land, that he would be allowed to remain in occupation, an equity is created such that the court would protect his occupation of the land; and that the court has power to determine in what way the equity so arising would be satisfied. This equitable doctrine has its roots in the House of Lords case of *Ramsden v. Dyson*.⁶⁷

The Manitoba Court of Appeal case of *Smith v. Curry*⁶⁸ is just one example of how equitable doctrines can limit the freedom of the legal owner. In 1905 adjoining owners of lots in the town of Souris agreed to construct adjoining buildings that maximized space by having a common wall with doors and passageways. By consent, steps were constructed that gave access to the second floors of the two buildings, but in each case by mutual consent and convenience the steps were on the other person's property. So the back steps on owner A's building actually allowed entry to the second floor of owner B's building, while the front steps on owner B's building allowed entry to the second floor of owner A's building. When one of the parties threatened to close the doors to the common wall and unilaterally end the arrangement, the Court said that the agreement, having been relied on by the other party, could not be set aside so long as the buildings existed. Even though the agreement was not put into writing, or registered against the lands, the one party who now wanted to break the agreement was estopped as a matter of equity from denying access rights over his property to the adjoining party.

Gerhard Lohrenz, another Mennonite historian noting the breakup of the villages, states:

This happened not because village life was not satisfying, but rather because the law of this land supports the individual. Group living demands that the individual subordinate his own interest to the interest of the group. To achieve this there must be some force to keep the non-cooperating individual, of which every society has a few, in line. This force was not existing here in Canada and this was the main reason why the villages in many instances were given up in favour of individual living and the dispersed homestead.⁶⁹

We might respond that unlike criminal law or various public regulatory law, which may be directly enforced through governmental initiative, much of "private" law is only enforceable ultimately by the willingness of an injured party to take their claim to court against a party that refuses either to acknowledge vol-

⁶⁷ (1866) L.R. 1 H.L. 129.

⁶⁸ (1918) 29 Man. R. 97 (C.A.).

⁶⁹ Gerhard Lohrenz, *The Mennonites of Western Canada* (Winnipeg: by author, 1974) at 24.

untarily their violation of a legal right or at least to agree to an alternative form of dispute resolution process. A government official or the police will not help you if you complain to them that someone has breached a contract with you, that someone has injured you in an act not amounting to a crime, or that someone is violating a property right that you claim to have. The force of the state will only come to your aid after you have litigated the matter and received a court order in your favor. Traditional Mennonites viewed litigation as incompatible with their religious doctrine of nonresistance given that litigation is ultimately an invocation of the violence of the state to enforce a court order. Thus, what I am suggesting is that the difficulty was not that the outside law did not support the inside law of Mennonite land use, but rather that the outside law could not be enforced because the inside law of the community prohibited going to outside law to do so.

Disputes over village agreements were not taken to court. For example, in regard to the village of Neuanlage, we know that in 1885 a number of the villagers wrote a petition, addressed to the Government of Canada, expressing their concern that one member of the community had given notice to the others that he wanted to take individual possession of his land despite his original agreement to the village pattern. This individual happened to have the homestead entry for the very land on which the village was sited, which was also land of better quality, compared to the other homestead entries. In their petition some of the other villagers stated:

The Elders (Preachers) of our Church have already tried, to stay such injustice, but in vain—the transgressors call upon the Law for aid, well knowing that the country's Laws will permit such actions, ... but we hope not without indemnifying the injured Brethren. We have applied to a Justice of the Peace, and he advises us to seek council of an Advocate, but our religious conviction forbids us to treat with such men, and moreover our hard earned belongings would soon part from us for ever...⁷⁰

A reply to this petition was given by an official of the Federal Department of the Interior stating that the individual who was ordering the others off his land had received the patent for that land in the normal way, and thus the Department could not do anything about the complaint. The official went on to state:

The question appears to be a private one between yourselves, and the advice of the Justice of the Peace, which you mention, viz., to submit the legality of the Agreement you say was made between Mr. Klassen and the other settlers in the Village, to a good lawyer, is the best that can be given.⁷¹

Eventually, many village agreements were formalized and registered at the Land Titles Office, including a new one for Neuanlage, the villagers having moved their buildings to a different location due to Klassen's move to be independent

⁷⁰ Rempel and Harms, *supra* note 63 at 20–21.

⁷¹ *Ibid.*

of them. The Neuanlage situation demonstrates precisely the point I wish to make here—that the preservation of the system had nothing to do with acquiring original title from the federal government, but rather was a matter of the general private law of trusts that apparently the Mennonite settlers were unaware of, or unwilling, due to their religious beliefs, to enforce in court. The traditional Anabaptist prohibition on aggressive litigation may be entirely appropriate as I have argued elsewhere,⁷² but I do not think that the characterization of the outside law as hostile to Mennonite inside property norms is appropriate.

In any event, formalization of village agreements might have strengthened the legality if a case was ever taken for enforcement purposes. At some stage there was a movement to formalize agreements that had been informally made years ago. For example, in 1892 a more formal Bergfeld agreement was drawn up and registered at the Land Titles Office. In this agreement, the various parties declared themselves to be in partnership in regard to their lands, that they would use the lands as agreed, and that no party would sell, or mortgage, or lease their property other than to, “a member or members of the said Mennonite Sect or Community and then only on receiving the consent in writing to such sale or disposition of the members of the Sect or Community.”⁷³

The Neuberghal agreement was not put into writing until 1891, some 15 years after the village had been operating.⁷⁴ The formal agreement was signed and sealed by 24 people who held legal title to lands in the village. The agreement identified all the parcels of land and who had legal title to each one; these persons then agreed to “work their lands in common”. The agreement also singled out the four owners on whose lands the various buildings and yards happened to be situated and these four owners (parties of the first part), for the nominal consideration of a dollar, granted a 99-year right to all the other landowners named in the agreement (parties of the second part), and their heirs and executors to, “live and abide” on the land of these four ... and have the “privilege to use the lands as gardens, and also have the privilege of building, establishing, and making the buildings aforesaid without any hindrance or impediment ... and to cultivate that piece of land adjacent to their houses”. It is specifically mentioned that the four owners will not mortgage or transfer or encumber the said land without the consent of two thirds of the persons now forming the said village community. Interestingly, the agreement itself contemplated that by a two-thirds vote the village might be dissolved. There was also a provision that “no complaint for expulsion, nor complaints of any kind, shall be

⁷² *Supra* note 5.

⁷³ Dyck, *supra* note 61 at 14.

⁷⁴ Esau- Klippenstein, *supra* note 33 at 27. The agreement is reproduced in Appendix 4 at 81. The dissolution agreement of 1909 is reproduced in Appendix 5.

made which could deprive the said parties of the second part of the possession of the said land." I interpret this to mean that someone might be expelled from the church and be under the ban, but still retain a right under the agreement to remain and live in the village. The formal 1892 village agreement for Sommerfeld was identical, but there were only two landowners on whose land the village had been built, and then 18 other land owners participating in the village structure.⁷⁵

There is indeed some straining here as to the legal formalities that would give security to the arrangements. Do we have simply a contract for which damages might be payable, but not the creation of a property interest? Do we have a partnership for land use purposes, a long-term lease, or a trust deed creating property rights? For our purposes, what is important is that the law, conceiving property as a metaphysical bundle of rights, like a sack of sticks associated with a thing, rather than the physical thing itself, has long recognized that one person may hold the stick of legal title, but another person may have been granted a stick of possession, and another person may have been granted a stick of passage through the thing, and so forth. In what way then did the general law of the land not uphold the validity of these agreements to pool individually owned lands and arrange for the various collective uses for those lands? Indeed, perhaps the strongest evidence that the law actually supported village agreements is found in legislation directly on point.

After more than 25 years of having Mennonite villages in Manitoba, provincial legislation was passed which, I would argue, had a double effect. On one hand, the legislation may have clarified and facilitated the breakup of the villages, but on the other hand, it could be viewed in effect as ratifying the argument that these agreements did give rise to enforceable legal interests. The legislation, passed in 1902, was called *An Act Respecting Mennonite Village Agreements*.⁷⁶ (See Figure Four.) The first section stated:

1. Any Mennonite village agreement, or any agreement or instrument by which Mennonites or members of the Mennonite sect, or parties described as such in the instrument, agree or have agreed to allow lands of the parties thereto or of any of said parties to be held or used for their general benefit or for any common purpose, may be canceled at any time by a two-thirds majority of the parties thereto entering into a written agreement to cancel the same.

The second section basically streamlined notice provisions in cases where the village agreements had been registered against land, so that a creditor in a foreclosure action or other proceeding would not have to give notice to every vil-

⁷⁵ The Sommerfeld agreement is reproduced in Gerhard Ens, *supra* note 35 at 255–262.

⁷⁶ R.S.M. 1902, c. 25. This legislation remained in force till at least 1970. See R.S.M. 1902, c.112; R.S.M. 1913, c. 127; R.S.M. 1940, c. 131; R.S.M. 1954, c.159. The legislation no longer appears in R.S.M. 1970, but still was in the statute books through the late 1960's. Perhaps it is actually still valid legislation today, never having been repealed.

lage member, but rather service on three of the members would be deemed to be service on all the members. Finally, the legislation stated:

3. This Act shall apply to all such agreements whether entered into before or after the passing of this Act.

By retroactively adding a dissolution clause requiring a two-thirds majority, the legislation was implicitly ratifying the formation of such agreements in the first place. Despite considerable effort, I can find no historical records for why this legislation was passed.⁷⁷

Thus, rather than concluding that the village pattern was unsupported by law, I would argue that the villagers did not go to law to force someone to remain against their will. The issue of village dissolutions was handled internally through church authority or through local government authorities, but not in the courts. For example, in the village in Schoenfeld, when one of the villagers wanted to work their own homestead in 1885 the matter was taken to the Council of the Rural Municipality of Hanover, (at that time a body of Mennonites elected by the heads of Mennonite villages),⁷⁸ where it was decided that the farmer could not work his own land for a period of one year from the date of the meeting, but that he could do so thereafter. However, there were a couple of villagers who lived on his land, so the council ordered that:

The buildings belonging to the Heinrich Dycks were to remain on Siemens' quarter section and as long as either spouse was alive they were to have full use of the buildings and the accompanying farmyard. The buildings belonging to Derk Reimer could stay on the Siemens' land for a two-year period... At the end of the two year period Siemens was given authority to require Reimer to remove the buildings.⁷⁹

The willingness to agree to dissolution, with some attention to the interests of

⁷⁷ According to (1902) *Journal of the Legislative Assembly*, the Mennonite Bill was introduced by the Attorney General, Colin Campbell, of the Conservative Roblin government, on 15 January 1902. It was given a second reading on 27 January 1902 and referred to the Select Standing Committee on Law Amendments. That committee agreed with the same without any amendment and the Bill was passed on 20 February 1902 along with a host of other legislation. There is nothing to indicate any debate as to the merits or purposes of the legislation. The *Manitoba Legislative Assembly Sessional Papers* contain nothing additional to this bare-bones chronology. Newspaper reports in the *Winnipeg Telegram* and *Winnipeg Tribune* and *Winnipeg Free Press* simply note that this legislation was passed with a host of other legislation, without providing any background. There is nothing in the Colin Campbell papers in the Manitoba Provincial Archives shedding any light on this matter. Was the legislation initiated by requests from Mennonites, or was it initiated by institutional lenders? Colin Campbell was a corporate lawyer in Winnipeg, though elected in Morris, a constituency near or encompassing many Mennonites. Thus far, I can find no mention of this legislation in any history of the Mennonites in Manitoba.

⁷⁸ Lydia Penner, *Hanover: One Hundred Years* (Steinbach: Derksen Printers, 1982).

⁷⁹ Dyck, *supra* note 61 at 200.

others, was sensible, but if villagers had opposed dissolution and had, contrary to their religious norms, tested the matter in court, I fail to see why the courts would not have upheld Mennonite village agreements.

III. CONCLUSION

What seems to count historically is not what the law actually provided for, but rather what people *thought* the law provided for. Even contemporary accounts continue to state:

This redistribution of land generally had no basis in law, but was undergirded by the authority of the church. In those areas where church authority broke down or where churches split, the villages frequently disbanded. In Manitoba a tension was thus established between the wishes and the legal rights of the individual on one hand, and the good of the community on the other.⁸⁰

While my argument has been somewhat speculative and is open to further research, I hope I have at minimum cast considerable doubt on these assertions. In this small slice of the interaction between the outside law of the state and the inside law of the community, the outside law might well have been much more accommodating than was, and still is, thought to be the case.

Despite the contemporary law of property and trusts, today's legal climate is different. The idea of having restrictive covenants, where property in some area could only be sold to members of certain religious or ethnic groups, would likely be struck down as violating public policy and provincial human rights legislation. However, as illustrated by contemporary Hutterite land holding, the most promising legal vehicle for both communal and semi-communal land use is now some form of associational incorporation.⁸¹ While we may conceive of the law as flowing out of concerns to protect individuals rather than groups, it should be pointed out that our law actually displays "a deep reverence for the group, as long as it assumes corporate or quasi-corporate form."⁸²

⁸⁰ "Land Distribution (Canada and Latin America)" in *Canadian Mennonite Encyclopedia Online*, *supra* note 9.

⁸¹ Some form of cooperative or corporate vehicle may have been used in Saskatchewan where various Mennonite villages survived for much longer than in Manitoba, partly because the church or community bought land in the name of the church rather than individually. See Richard J. Friesen, "Villages in Saskatchewan" in Lawrence Klippenstein and Julius G. Toews, *Mennonite Memories: Settling in Western Canada* (Winnipeg: Centennial Publications, 1977) at 187.

⁸² Liam Seamus O'Melinn, "The Sanctity of Association: The Corporation and Individualism in American Law" (2000) 37 *San Diego L. Rev.* 101 at 105. For the history of quasi-corporate legislation which allows religious groups to hold property through trustees who, with their successors, are able to hold land in perpetual succession and sue and be sued on behalf of the group, see A. H. Oosterhoff, "Religious Institutions and the Law in Ontario:

Finally there, is an important debate going on in political-legal theory as to how state law based on a liberal theory of individual autonomy and equality should deal with "traditional" ethnic or religious groups who live by norms that might be considered culturally illiberal.⁸³ Will we accommodate these groups and give them considerable collective autonomy to live by their own norms, or will we impose liberal individualist notions of law and human rights on these groups? Whether the law supported Mennonite village agreements or not is a moot point for us today, but we may still draw lessons from history, not just when the outside law conflicted with the inside law, but also when it accommodated it.

An Historical Study of the Law Enabling Religious Organizations to Hold Land" (1981) 13 Ottawa L. Rev. 441.

⁸³ One prominent Canadian theorist is Will Kymlicka with numerous publications, one of which is *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995). Another is Charles Taylor, with numerous publications, one of which is *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992).

FIGURE ONE: MENNONITE EAST RESERVE. (Map from William Schroeder and Helmut T. Huebert, *Mennonite Historical Atlas* (Winnipeg: Springfield Publishers, 1996) at 73.)

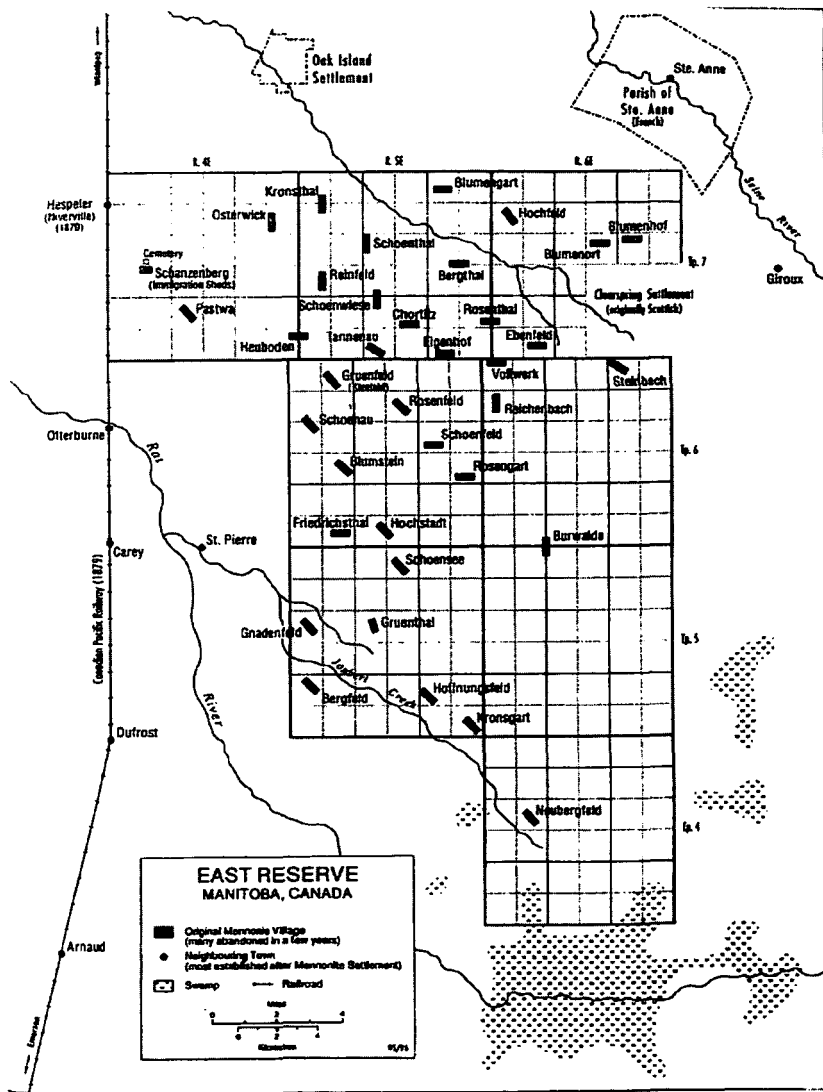


FIGURE TWO: MENNONITE WEST RESERVE. (Map from William Schroeder and Helmut T. Huebert, *Mennonite Historical Atlas* (Winnipeg: Springfield Publishers, 1996) at 74.)

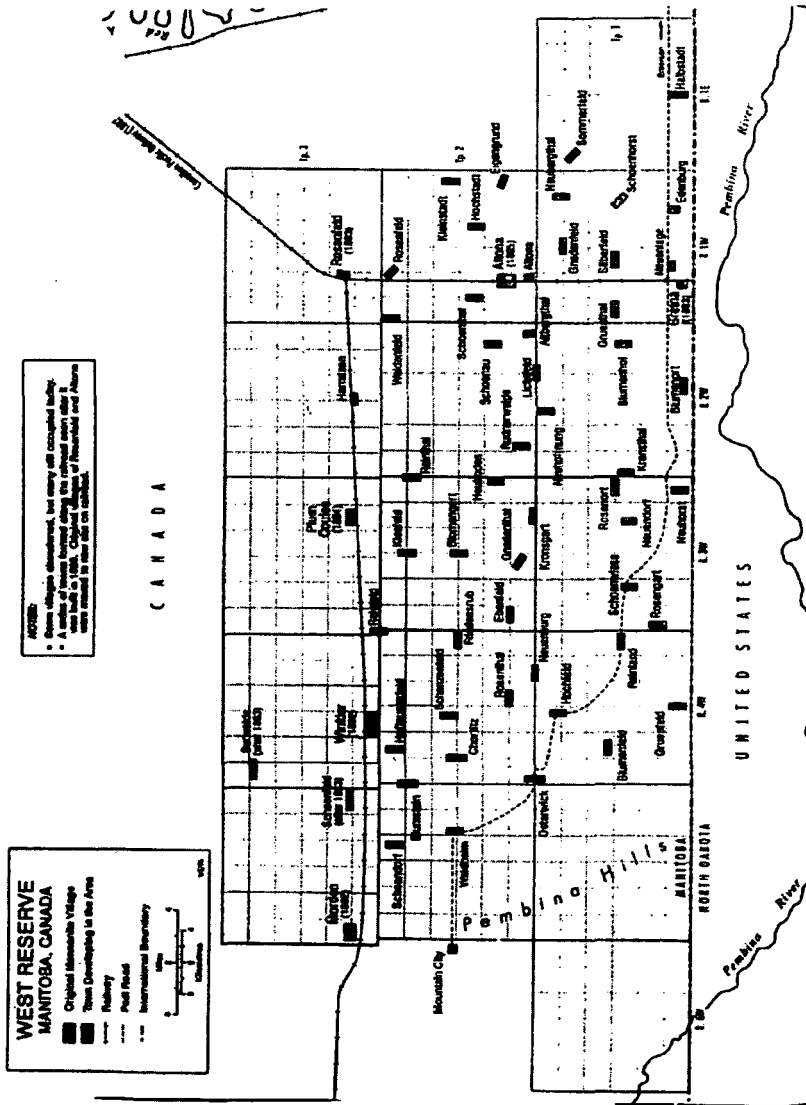


FIGURE THREE: MENNONITE VILLAGE AND FIELD PATTERNS. (Maps of Blumenfeld and Neuhorst, West Reserve from J. Waskentin, "Agricultural Settlements of Southern Manitoba" in (1959) 49 Geographical Review Map of Steinbach, East Reserve, courtesy of John C. Reimer.)

