JAMES JOHNSTON .....APPELLANT;

AND

THE MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Rights of a pew-holder in St. Andrew's Church, Montreal—Refusal to continue lease to a pew-holder by Trustees—Damages.

J., an elder and member of the Congregation of St. Andrew's Church, Montreal, had been a pew-holder in St. Andrew's Church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68, and received for the rental of 1872 a receipt in the following words:

"66.50. MONTREAL, January 9th, 1872.

"Received from James Johnston the sum of sixty-six $\frac{50}{100}$ dollars, being rent of first-class pew No. 68, in St. Andrew's Church, Beaver Hall, for the year 1872.

"For the Trustees,

"J. Clements."

On the 7th December, 1872, the Trustees notified J. that they would not let him a pew for the following year. J. thereupon tendered them the rental for the next year, in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the possession of pew No. 68, by the Respondents, the pew having been placarded "For Strangers," strangers seated in it, his books and cushions removed, &c. For these torts he brought an action against Respondents, claiming $10,000 damages.

Held: that J., being an elder and member of the Congregation of St. Andrew's Church, Montreal, as such lessee, having tendered the rent in advance, was, under the by-laws, custom and usage, and constitution of St. Andrew's Church, entitled to a continuance of his lease of the pew for the year 1873, and that reasonable, but not vindictive, damages should be allowed, viz., $300.
(The Chief Justice and Strong, J., dissenting).

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J.J.

James Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal.

Appeal from the Court of Queen's Bench for Lower Canada (Appeal side) confirming (1) the judgment of the Superior Court for Lower Canada, sitting in the District of Montreal, dismissing an action for damages brought by Appellant against the Respondents for refusing to allow him to continue in the occupation of pew No. 68 in St. Andrew's Church in the City of Montreal.

In his declaration the Plaintiff alleged:

1st. That from 1867 to 1873, inclusive and continuously, he was lessee of pews from the Defendants in St. Andrew's Church, Montreal.

2nd. That he was the legal lessee, *holder* and occupant of pew No. 68 for the year 1872.

3rd. That by his previous leasing and pewholding he became and was a *pewholder* in St. Andrew's Church, under the 10th by-law in the Act of Incorporation of Defendants and amendments.

4th. That his holding of pew No. 68 for the year 1872, was by *verbal* lease.

5th. That he was an elder and member of session of he church.

6th. That he was the legal lessee of said pew 68, for the year commencing 1st January, 1873, and ending 31st December, 1873, by tacit renewal.

7th. That Defendants declined to let Plaintiff a pew for the year commencing 1st January, 1873.

8th. That Plaintiff, on the 20th December, 1872, and on the first juridical day of 1873, tendered the amount of rental to the Defendants notarially for a pew for the year 1873, and that Defendants refused to let "said pew 68, or any other pew in the said church, to Plaintiff."

9th. That Plaintiff being the legal lessee and holder of

(1) Dorion, C. J., and Ramsay, J., dissenting.

pew 68 for the year 1873, the Defendants annoyed and disturbed him in his use and occupation of it, by pasting upon it printed placards containing the words "for strangers," by removing his books and placing other books in it, by discommoding him by placing strangers in it without his consent, by removing his cushions and hassocks from it to his warehouse.

10th. That the Defendants acted "*as aforesaid*, maliciously and knowingly, and with intent to bring "Plaintiff into contempt, ridicule, disgrace, &c." and that "by reason of the said illegal, unjust, scandalous, malicious and defamatory conduct of Defendants, Plaintiff hath been and is greatly injured in his "good name, fame and reputation, &c.; and hath, "by reason of ALL THE SAID PREMISES, suffered loss "and damage, the whole to the damage of the said "Plaintiff at Montreal aforesaid, of ten thousand "dollars currency of Canada;" and concluded as follows: "wherefore Plaintiff making option of a trial "by jury, and praying *acte* of said option further prays "*acte* of the sufficiency of his said tenders for rental "for said pew, made to Defendants previous to the "institution of this action for the said year, commencing the first day of January, 1873, and ending the "31st day of December, 1873, as also of the tender and "deposit herewith made and renewed, and further "prays that the Defendants may be adjudged and condemned to pay and satisfy to Plaintiff the sum of ten "thousand dollars, currency of Canada, with interest "and costs of suit, and of exhibits, out of the amount "herewith deposited, in so far as it may be sufficient "distracts in favor of the undersigned Attorney."

To this declaration the Defendants pleaded:

First, the general issue; and secondly, a special plea averring:

1st. That Plaintiff was not a pewholder or lessee of a pew in St. Andrew's Church after the 31st December, 1872.

2nd. That they had a right to refuse pew 68 for the year 1873.

3rd. That by the by-laws, customs and practice in the church, the pews are let each year and from year to year, and the lease expires at the end of each year; that there is no continuation without a consent, and no notice required to discontinue.

4th. That it was undesirable and inexpedient to let pew 68 to Plaintiff for the year commencing the 1st day of January, 1873, or for any other time, and in the exercise of their discretion, and in good faith, without malice, or any other than conscientious motives, and with a desire to fulfil their duties, and for the preservation of peace and harmony in the congregation, the Defendants did, to wit, on the 7th day of December, 1872, decide and determine not to let a pew to Plaintiff.

5th. That on the 25th December, 1872, the congregation, in a general meeting, at which Plaintiff was present, and in the proceedings whereof he participated, confirmed this action of the trustees.

6th. That the Plaintiff then and thereafter acquiesced in said decision of the Defendants, and admitted that he was not the lessee of pew No. 68, and the Defendants thereafter desired to accommodate strangers in said pew, there being no other pew in the church available for the purpose, but the Plaintiff wrongfully disturbed and interrupted the use of the said pew by strangers and injured and caused damage in the premises of the

Defendants; but himself has suffered no damage whatever in the premises; and that the Defendants, in the whole matter, acted in good faith and in accordance with the practice, by-laws, rules and regulations of the said Church.

The Plaintiff's answer and replication were general. Upon these issues the parties went to proof, and judgment was given in favour of Respondents.

16th, 17th and 18th Jan., 1877.

D. Macmaster, Esq., Counsel for Appellant :—

The Appellant complains of a tort, and asks for damages on three grounds.

1st. Because of the refusal of the Respondents to lease or assign him "a pew" in St Andrew's Church.

2nd. Because of their refusal to lease or assign him pew 68 for the year 1873.

3rd. Because having complied with all the formalities necessary to insure the continuance of his pew holding and the lease of pew 68, and being, according to his contention, the legal lessee and pewholder of that pew for the year 1873, he was molested and disturbed in his use and occupation of it by the Respondents who, placarding it "for strangers," placed strangers in it without his consent and against his will to an extent to deprive himself and his family of the use and occupation of it; removed his cushions and books from it and sent them to the warehouse of his firm with a carter, and otherwise questioned his title and brought him into ridicule.

He alleges that he has "by reason of all the said premises suffered loss and damages to the extent of $10,000."

The issue raised by the Plaintiff is much broader than that to which the Defendants have attempted to restrict him, and to that to which the Honorable Judges, adher-

ing to the judgment of the Courts below, have restricted him.

The Respondents by their resolution "declined to let a pew to Mr. James Johnston for the next year" (1873).

Appellant relies upon:—

1st. His right as a pewholder in St. Andrew's Church from 1867 to 1872 inclusive, under the tenth by-law of the church, as interpreted by the usage and customs prevailing in St. Andrew's Church.

2nd. His rights as a lessee of pew 68 for the year 1872, by a *verbal lease* under the law of the Province (1.)

3rd. His rights as a commoner and corporator derived from his being a member of the congregation owning the church property administered by the Respondents, and

4th. His rights and privileges as an elder and member of St. Andrew's Church, under the constitution of the Church of Scotland.

His allegations called for an adjudication upon all these points, and upon all and each of them he relied for the maintenance of his claim for damages.

The Plaintiff's allegations also raise the issue that he was entitled to a continuance of his lease for the year 1873 by *tacite reconduction*, under Article 1609 of the Civil Code of Lower Canada; this contention he now waives, relying on the four propositions stated.

The germ of the issue is, whether the Appellant was entitled to hold and occupy a pew in St. Andrew's Church for the year 1873, or had the trustees the right to refuse him a pew for that year.

1. The Plaintiff was entitled to a pew for the year 1873, under the tenth by-law of the church, and the

(1) Civil Code of Lower Canada, Article 1657.

customs and usages prevailing in it. "Any person who shall lease a pew from the trustees for one year and pay the rent in advance shall be considered a pewholder. The lease of a pew and sittings are to be paid annually in advance from the 1st January, and are considered to be then due, &c," (By-law 10.)

[CHIEF JUSTICE RICHARDS :—"Did they refuse him a pew or pew 68 ?"]

MR. MACMASTER :—"Both, my Lord; he alleges that they refused to lease him that pew or any other pew, and the Respondents contend and plead that they did 'decide and determine not to let a pew to the Plaintiff.'"

The quality of pewholder was acquired by the payment of one year's rent in advance. The by-law plainly has reference to a permanent occupation, and it is proved that it was so construed by the congregation.

The evidence clearly established that when a person had once paid his rent in advance, he retained his pew from year to year as a matter of right, without reference to the trustees and that, as a matter of practice, the pews did not revert to the trustees at the end of each year. No express leasing of pews to Plaintiff is proved. The parties are presumed to have contracted with reference to the prevailing custom. 2 Parsons on contracts (1).

In doubtful cases usage may be referred to in the construction of a Statute as affording a contemporaneous exposition. *Dunbar* v. *Countess of Roxborough* (2). *Noble* v. *Durell*, (3) usages become consensual laws. Brown's Law of Usage and Customs (1875) (4). In this case the well-established custom of continuous pew occupation emanated into contract.

(1) Sec. 543-4; (2) 3 Cl. & Fin. 335; (3) Durnford & E. R., p. 271; (4) p. 28.

2. The Plaintiff was entitled, under the law of the Province, to the lease of pew 68 for the year 1873.

His lease was verbal. No written lease is proved by the Respondents.

He paid his rental on the 9th of January, 1872, for pew 68, and received a receipt signed by the church officer. The Court of Original Jurisdiction held this receipt to be a written lease, and that the tenure expired at the end of the year 1872.

"The lease, if written, terminates, of course, and without notice, at the expiration of the term agreed upon," (1)

A simple receipt acknowledging the payment of a sum of money for a specific thing for a specific time, signed by only one of the parties, is not a contract, much less a written contract, though it may be evidence of a contract written or verbal. The receipt of the money for the time specified is not inconsistent with the existence of either a written or a verbal lease for a much longer period. In this case the lease was undoubtedly *verbal*, but the term agreed upon not being proved, is presumptively one reconcilable with the provisions of Article 10 of the by-laws, which seems to contemplate continuous pew tenancy, so long as the pew holder pays his rent in advance. Interpreted by usage, the term is *uncertain* as to its duration, dependent on the payment of pew rent annually in advance; but "when the term of a lease is *uncertain*, or the lease is *verbal*, or presumed, as provided in Article 1608 (three separate conditions) neither of the parties can terminate it without giving notice of it to the other, with a delay of three months, if the rent be

(1) C. C. L. C. 1658.

payable at the terms of three or more months, &c." (1). The Plaintiff, under the law of the Province, was then by reason of the term of his lease, being *uncertain*, and by reason further of the lease itself being *verbal*, entitled to a notice of three months to terminate. This notice he did not receive, and the lease remained undetermined, and continued during the year 1873.

There are no provisions in our law which exempt pews or church seats from the ordinary rules of lease relating to houses and other immovable property. "The rules contained in this chapter relating to houses extend also to warehouses, shops and manufactories, and to all immovable property other than farms and rural estates, in-so-far as they can be made to apply."(2) Pew 68 is proved to be fastened to the floor with nails for a permanency. It is immovable by destination (3).

3. The Appellant was entitled to a pew, and could not be deprived of a seat in the church, under the Act of Incorporation (4) and the by-laws made thereunder.

He was a member of the congregation, and had rights as a commoner and corporator in the church property administered by the Respondents. The church property was held and administered by the Respondents, and by their predecessors "for the use and behoof of the congregation." The congregation purchased and owned the church lot and building.

A pew-holder was a member of the congregation (by-law 12) and a joint owner of the church property. He was a constituent of the Respondents, who, for the sake of convenience, were entrusted with the supervision and general management of the temporal affairs of the church.

(1) C. C. L. C. 1657 ; (2) C. C. L. C. 1645; (3) C. C. L. C. 379 and 380 ; (4) 12 Vic., Cap. 154.

They had no absolute or arbitrary rights They were the mere servants of the congregation in temporal matters. They prefunctorily leased the pews as they became vacant from any cause, and collected the rent also. They had no extraordinary or exceptional powers. Their authority is expressly restricted by the Statute incorporating them.

They "may make, establish and put into execution, alter or repeal such by-laws, rules, ordinances and regulations as shall not be contrary to the constitution and laws of this Province, or to the provisions of this Act, or to the constitution of the Church of Scotland, as in that part of the United Kingdom of Great Britain and Ireland, called Scotland now (1849) by laws established, and as may appear to the said Corporation necessary or expedient for the interests thereof." They had no authority to exclude the Plaintiff from the church in which he had a legal interest and right of property. By analogy of reasoning, as explained by the learned Chief Justice in the Court of Queen's Bench, they might have excluded the whole congregation and have closed the church.

4. The Appellant was entitled to a pew by reason of his rights and privileges as an elder and member of the church, under its act of incorporation. The congregation of St. Andrew's Church expressly subjected themselves to and prohibited themselves departing from the constitution of the Church of Scotland, as in that part of the United Kingdom of Great Britain and Ireland called Scotland now (1849) by law established." They, furthermore, by their first by-law, enact: "This church and congregation now in connection with the established Church of Scotland, and adhering to the standards

thereof, declare that they shall continue to adhere to the said standards and maintain the form of worship and government of said Church," In virtue of these enactments and of By-law 18,it is plain that the members of the congregation intended to subject themselves to the constitution, standards and forms of Church government of the Church of Scotland, as then established in Scotland. They are presumed to have obtained legislation intelligently and with reference to the existing Statutes in Britain. The Church of Scotland is one of the established Churches of the United Kingdom. (1) The Church is recognized by the Statutes of Canada (2) as well as the act of Incorporation of St. Andrew's Church. At the time of the passing of the latter Statute (1849)there existed,and there still exists in Great Britain, a Statute 7 and 8 Vic., Chap. 44, Sec. 8 and 9, which provided for the establishment of "*quoad sacra*" churches in Scotland, in which the Elders are entitled to a pew in the church. The Plaintiff alleges his quality of Elder and the Rev. Gavin Lang, for the Defendants, declares that *quoad sacra* churches are governed in very much the same way as Churches here. The Imperial Statute last cited is entitled to recognition here. The Civil Code of Lower Canada, (3) provides for reference to the Statutes of the United Kingdom. The Plaintiff, as an Elder and spiritual officer of St. Andrew's Church, was a member of the Kirk Session, a body entirely independent of the Respondents, having cognizance of the spiritual affairs of the Church. If he were guilty of any offence against the spiritual laws he might be tried by the Kirk Session and not by the Respondents. The

(1) (Imperial Statutes, 5 Anne (1706) Chap. 8, Art. 25); (2) 18 Vic., Chap. 2, and by 7 George IV., Chap. 2, Sec. 1; (3) Art. 1207.

Kirk Session alone has power to exercise discipline for ecclesiastical offences.

Heale's practice (1); Cook's styles of procedure in the Church Courts (2); Duncan's Ecclesiastical laws of Scotland (3.)

The offence complained of against Defendant was that "he did not work harmoniously with the minister and his brother elders"—not a very serious accusation under the Republican system recognized by the Presbyterian Church. This resolution was passed on the 4th of November, 1872. The Trustees made the resolution the motive of their determination to refuse the Plaintiff a pew.

It is clear that the Plaintiff's failure to work harmoniously with his minister and his brother elders, was no ground for depriving him of his civil rights, and that the trustees acted *ultra vires*. It is also plain that he had been guilty of no offence entailing forfeiture of privileges for which he was amenable to spiritual censure—otherwise he would have been subjected to the discipline of the Kirk Session.

The previous attempts at disposing or suspending the Appellant had terminated disadvantageously to the Session, in the Synod—the highest Court of the Church, where the Appellant maintained his position and obtained a reversal of the judgment of suspension pronounced against him. The authorities seemed, however, determined to exclude him arbitrarily from the church, and the failure of the Kirk Session to secure this end in their previous venture, seems to have acted as a stimulant to the Respondents without any sufficient ground whatever to deprive him of his civil rights. It is to be

(1) pp. 9 and 10; (2) p. 1; (3) p. 211.

regretted that this attempt was accompanied with a series of petty, though distressing annoyances, extremely irritating to a sensitive man, evincing on the part of Respondents a dearth of charity dishonoring to the Christian profession. These facts are referred to as bearing upon the question of damages.

Under the constitution of the Church of Scotland, the Plaintiff, in virtue of his Eldership, was entitled to the privilege of a pew (1); such was the rule in this country also. Depriving an Elder of a pew was never heard of, either in this country or in Scotland, according to the testimony of the reverend gentlemen examined on both sides. Rev. Robert Campbell says it is contrary to the spirit of the Church of Scotland. The action of the Trustees is without ecclesiastical precedent. In England, every member of a Church is entitled to a pew (2).

The law of France is similar (3).

In Lower Canada the *concessionaire* (allottee) is entitled to a continuance of his lease so long as he pays his rent; and his wife, after his death, is entitled to continue the pew on the same terms: See Langevin, Manuel des Paroisses (4); Beaudry, Code des Curés (5.)

Toute personne majeure Catholique Romaine domiciliée dans la paroisse *a droit d'avoir un banc dans l'église:* Langevin, Manuel des Paroisses (6).

Plaintiff submits that for each of the four con-

(1) Duncan's Ecclesiastical Laws of Scotland, pp. 202, 204, 206, 207; (2) Burns' Ecclesiastical Law, vol. 1, p. 358, s. 3; Haggard's Consist. R., p. 317; Heale's Law of Church Seats, London, 1872, Book Second, pp. 31, 32, 48 and 49; (3) Denizart v. "Banc dans les Eglises," p. 174, sec. 7, p. 175, sec. 8; (4) p. 27; (5) pp. 236 and 242; (6) p. 28.

siderations mentioned he was entitled to a judgment in his favor, and in view of the aggravating character of the torts of Respondents, and their wanton invasion of his rights, to exemplary damages.

[The Appellant submitted the following authorities in support of his claim for damages against the Respondents:

Mayne on Damages (1); 10th Jur., N. S, part 2nd (2); *Yarborough* v. *Bank of England* (3); *Stevens* v. *Midland* (4); *Lawson* v. *Bank of London* (5); *Green* v. *London General Omnibus Company* (6); Civil Code of Lower Canada (7); *Brown* v. *City of Montreal* (8); *Long* v. *Bishop of Capetown* (9); *Brown* v. *Le Curé et les Marguilliers de la Paroisse de Montréal* (10); *Forbes* v. *Eden* (11).]

Mr. *W. H Kerr*, Q.C., Counsel for Appellant, followed:

If one of the objects of the congregation, in getting their Act of Incorporation, was to give to the trustees power to administer for their benefit the temporal affairs of the church, it cannot be denied that at the same time they declared that they would continue to adhere to the standards of the Church of Scotland, and maintain the form of worship and government of said Church.

It therefore becomes necessary to look into what was the form of worship and usages of said Church. Now assimilating St. Andrew's Church with a parish church, and its constituent congregation of pewholders as par-

(1) Pages 1 to 10; (2) Page 499; (3) 16, East, 6; (4) 18 Jur., N. S., 932; (5) 2 Jur., N. S., 716; (6) 6 Jur., N. S., 228; (7) Art. 356; (8) 17 L.C. Jur., 46; (9) 1 Moore's P.C.C., N.S., 411; (10) L.R. 6 P.C. Ap. 159; (11) L.R. 1 Sc. Ap. 568 et seq.

ishioners, etc., under the parochial system, authorities from the common law and from the civil law of the province are not wanting to sustain the rightful claim of the Appellant to continued pew occupation during his congregational connection and membership of the Church as a pewholder, and it was held in *Forbes* v *Eden* (1) per Lord Colonsay that a "Court of Law will interfere with the rules of even a voluntary association to protect the civil rights or interests of individuals which may be infringed." Citing from parallel parish laws: "Every man who settles as a householder (here, who joins the constituted Church and Congregation) has a right to call upon the parish for a convenient seat." *Groves & Wright* v. *Rector of Hornsey* (2.)

In Quebec the same rule is followed. The parallelism between the parish rights and the congregational member rights of St. Andrew's Church are near and plain. The intention of the members of the congregation, it is evident, was to import into St. Andrew's Church all the rules of the Scotch Church which could be imported.

Now in Scotland one of the greatest rights of a parishioner is the right of attending public worship and the right to a seat in the church.

Here by using the word *congregation* instead of the word *parish*, it may be argued that St. Andrew's Church is the parish church for its own congregation.

Moreover, in this case Appellant's right to holding a pew as a member of the congregation was recognized, and, according to the usage and custom of the church, he could not be deprived of this right except by the sentence of a Spiritual Court.

(1) L. R., 1 Sc., Ap., pp. 568, 569. (2) 4 Haggard's Consist. R. 194.

It will be contended that the receipt for the rent limited the term of the lease to one year. The receipt in an act done subsequently to the agreement between Respondents and Appellant, and all that can be said of it is that it is indicative of a verbal lease. In which case under Civil Code, Article 1657, Appellant was entitled to a notice of three months.

The Respondents have no arbitrary power to refuse a lease of a pew to a member of the congregation. If there is any doubt as to the character of the lease, we are entitled to refer to usage and custom. But where a Statute is express as to some points and silent as to others usage may well supply the defects, if not inconsistent with the express directions of the Statute : See *Noble* v. *Durell* (1), *United States* v. *Macdaniel* (2), and other authorities collected in Parsons on Contracts, Vol. 2. And hence these proved usages become consensual laws in the way to become chapters of law in the unwritten rules of the country, binding upon the parties to them. "These "usages are proved by evidence like a fact, and when "proved it is held in law it has an obligatory character "in relation to certain executed transactions. Its exist- "ence will raise the presumption that the parties to a "contract acted in conformity with its terms." (3)

The proved custom and usage are manifestly undeniable and form not only part of the original contract between the parties, but may be read with the 10th By-law as supplementary, not contradicting it, and may be given as follows: "Any person who shall lease a pew from the "Trustees for one year, and pay the rent in advance, shall

(1) 3 Durn & E. p. 271; (2) 7 Peters R. p. 15; (3) See Per Nelson, J. in *Allan* v *Merchants Bank*, 15 Wend. and Note to 3 Lansing R. 94, 95, cited by Browne, Law of Usages and Customs 1875, p. 28.

"be considered a pewholder: The rents of pews and "sittings are to be paid annually in advance, from the "first day of January, and are considered to be then due; "the current year is included when in these by-laws it "is stated as a qualification that the individuals must "have paid rent for three years and are members of three "years standing," "*and the pewholder shall be entitled "to continue in the occupation of his pew from year to year, "by paying his yearly rent in advance as heretofore "directed*" The supplemented by-law is not only the rule of the contract between the parties, but the constituent of the pewholder's title to the possession of his pew, which cannot be diverted from him by the arbitrary or discretionary exercise of trust power, and which is defeasible by the act alone of the pewholder, by his voluntary surrender or by his criminal misconduct subjecting him to deprivation of his pew tenancy by the proceedings at law: Because his possession is in the nature of a life tenancy so long as he continues his connection with the church, in the same way as the right of the parishioner to his pew concession continues during his connection with his parish. "Of course when the right to a pew has been created by a lease for a defined period, it will terminate at the expiration of that period, but when the pew has been sold to a purchaser, his right, unless surrendered, will continue as long as the church stands and is used for church purposes. On the death of the owner, it devolves upon either his heirs, or legatees, or devisees, or upon his personal representatives." Relations of Civil Law to Church Polity----Strong, 1874-75, page 130.

[The learned Counsel then referred to the following articles of the Civil Code, which he thought applicable

to the present case, viz.: Art. 1657, 1608 and 1642, and concluded by submitting that Appellant was not only entitled to a sitting but to a pew, and that he could not be deprived of it except by excommunication or by a new division being deemed necessary.]

Mr. C. P. Davidson, Q. C., and Mr. Cross, Q. C, Counsels for Respondents :—

The only two contracts relied on by Plaintiff, as stated in his declaration, are: 1st. A legal verbal lease. 2nd. A continuance of that lease by *tacite reconduction* or by verbal lease for want of notice. His conclusions are for damages for having been molested in his occupation and enjoyment of pew No. 68. The controversy is therefore solely as to his rights to occupy that particular pew. If Appellant wishes now to widen the issue and say he was entitled to a pew generally, failure on his part to prove his contracts ought not to turn against us if it should be shewn that usage and custom were not in favor of Respondents.

The first point, therefore, Respondents contend is that the declaration must contain all the causes of action, and no adjudication can be beyond its conclusions, and on this point will refer to Art. 17, 18, 20 and 50, of the Civil Code of Procedure.

Now as to the nature of this holding of Mr. Johnston. Was it a lease? If so, was it a written lease?

A verbal lease, if the holding of pews in a church fall within the provisions of the Civil Code, relating to the lease of houses or real estate, would have entitled Appellant to three months' previous notice of its termination, while a tacit renewal would have taken place by his remaining in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the Respondents.

The written receipt is "for the year 1872," and it obviated the necessity of giving the three months' notice. Evidence of verbal lease does not exist, and by By-law No. 10 no member or adherent could become a pewholder in St. Andrew's Church without prepayment of rent; so we find Appellant on the 9th January, 1872, renewing the lease of pew No. 68, paying its rental, and receiving a written contract for its enjoyment during the next ensuing year. Now under Civil Code, Art: 1658, leases if written, terminate of course and without notice. But it is impossible to apply to the lease of a pew the law applicable to ordinary leases.

The Court below has unanimously held that it was such a contract as could not be brought within the articles of the Code.

In the case of *Richard* v. the *Curé et Marguilliers de l'Œuvre et Fabrique de Québec*, (1) C. J. Sir L. H. Lafontaine, in his judgment at p. 16, remarks :—"The concessions of pews are made for a fixed term. It is in the interest of the Fabrique and of the parties concerned, including the Appellant, that it should be so, because this tends to assure equally for a fixed term the receipt of the revenue derived therefrom. The Fabrique is, by these means, put in a condition to fulfil the engagements of their administration. The Fabrique would be deprived of this advantage, if the clause in question was other than *comminatoire*, and if it was necessary in each case, to give notice, so as to put the lessee of each pew in default."

In this case the occupant had failed to pay his rent in advance, and the Church Beadle ejected him from his pew.

(1) 5 L. C. Reports, p. 16.

5 American Rep., (Albany); Kincaid's Appeal (1). The rights of pew owners in church discussed *arguendo;* 2 Pardovan (Hill's Institute) (2); *Auger* v. *Gingras.* Stuart's Rep., "A quasi possession *qui ne consiste* "*que dans des droits;*"(3) 1 Bell's Dictionary (4); Strong —Relations of Civil Laws to Church Polity (5.)

As to securing any new rights by holding possession for eight days after the 1st January, 1873. It is difficult how such a claim can be urged in the face of the facts of record and of Appellant's case, as stated by himself. He had notice of the resolution passed by the trustees on the 1st of December. He was present and voted at a meeting of the congregation held on the 25th of the same month, when a motion was carried endorsing the action of the trustees. He himself complains that Respondents refused the tenders of rent made with his protests of the 20th and 27th December, 1872, and 2nd January, 1873.

The evidence of more than one witness gives a positive denial to the pretension of acquiescence. Moreover, obedience to the articles of the Code previously referred to, ceases to be a necessity if the lease of pews cannot be assimilated to that of houses or other real estate, and an action for disturbance in the enjoyment of a pew cannot be maintained without title.

Auger v. *Gingras*, Stuart's Rep. (6); 1 Ferrière, Dic. des Termes de Prat., &c., (7); Jousse, Traité du Gouvernement Spirituel et Temporel des Paroisses (8); Beaudry, Code de Curés (9); 1 Marechal (10); *Stocks* v. *Booth*, (11) Possession for above sixty years of a pew in a church is

(1) P. 382. (2) P. 508; (3) P. 135; (4) P. 203; (5) P. 126; (6) P. 135; (7) Vo. Banc l'Eglise, (8) P. 55; (9) P. 37; (10) P. 73; (11) 1 Dunford and East, P. 428.

not a sufficient title to maintain an action upon the case for disturbance in the enjoyment of it. Woodfall, Landlord and Tenant (1); Prideaux on Churchwardens (2); Smith, The Parish (3); *Pettiman* v. *Bridger* (4); 2 Phill. Ecc. Law (5); Rogers (6).

It cannot be said that the act of Respondents was *ultra vires.* The control of pews is a temporal matter. It is proved that the practice was that all pews come once a year within the control of the Respondents, so that objectionable persons might be refused renewals of their holdings. The choice of pewholders so belongs to the temporalities of the church, that it cannot be interfered with by the Session. The by-laws give power to the trustees to let pews, and by the 9th Article it is provided that all buyers of forfeited pews must be approved of by the trustees. By the 3rd Article, all monies are to be received and paid "by order of the trustees only." The minister, and members of the church of very long standing, declare that the Respondents did not act *ultra vires.* On this point of the case were cited 2 Pardovan, (Hills Institutes) (7); Durand de Maillane *vo.* "*banc*" (8); *Burton* v. *Heuson, et al.*, (9); *Cooper* v. *First Presbyterian Church of Sandy Hill.* (10). This case, like all others found in the American Reports, is founded on title. Hoffman's Ecc. Laws of the State of N.Y. (11).

But Appellant claims his right as a spiritual right. If so, he should have addressed himself to an Ecclesiastical Court. The decision of the Trustees in exercising

(1) Page 540; (2) Page 260; (3) Page 408; (4) 1 Phill. Ecc. Rep., 324; (5) Page 1811; (6) Page 170; (7) Pages 523, 528; (8) Page 272; (9) 10 M. & W. 104; (10) 32 Barbour's N.Y. Rep., 222; (11) Pages 171, 247 and 251.

their power over a temporality of the church, must be considered as final. The Appellant, it is contended, had rights as a member of the congregation. This is doubtful, for he was not a corporator, so far as Trustees were concerned, as the election was by the vote of the proprietors. The Appellant has not been in continuous possession of a pew for three years, and he could not be on a committee to appoint a minister. Now, were not the Trustees justified in not renewing the lease, or, in other words, what is necessary to justify their act?

[On this point Counsel referred to Grant on Corporations (1); and Angell and Ames on Corporation (2); and also to the evidence of Dr. Campbell, one of the Trustees and connected with the Church for forty years, Rev. Gavin Lang, Dennistoun, Macdonald, Hunter, Mitchell, John Ogilvy and Morgan.]

Of the nineteen witnesses examined on behalf of Appellant, only one, the Rev Mr. Campbell, has ventured to assert even the qualified belief that it is not in accordance with the "spirit" of the Church of Scotland to refuse a member a pew. But his opinion is admittedly "founded on the parochial system," and he qualifies it by saying that "the Trustees would not be justified in refusing him a pew *so long* as he behaves himself civilly." But we urge also that Appellant acquiesced in jurisdiction of Respondents, although he has taken objection to the decision arrived at. The letter of the 10th December, 1872; the resolutions of the congregational meeting of 25th December, 1872, on which he voted; the letter of 29th May, 1873; pieces 4 and 5 of record being demands upon Respondents to exercise their powers in Appellant's favour, constitute

(1) Page 246; (2) Par. 411.

an acquiescence, such as bars Mr. Johnston from contending that session or trustees had no right to refuse him a pew. [See Brice, Ultra Vires (1); Hoffman's Ecc. Laws of the State of N. Y. (2); *Dumner* v. *Corporation of Chippenham*, (3)] Alldecisions opposed are based on the parochial system. The system followed in the Province of Quebec, where parishioners are compelled to pay tithes, cannot be assimilated to that of St. Andrew's Church, the contrast could hardly be more striking than between these Churches :

Respondents conclude by praying for confirmation of the judgment of the Courts below :—1st. Because the Appellant has alleged want of sufficient notice to quit, and tacit renewal, as the sole grounds in support of an alleged verbal lease ; whereas the Articles of the Code relating to lease do not apply to pews.

2nd. Because Appellant's holding of pew No. 68 terminated on the 1st December, 1872.

3rd. Because the Respondents, in the exercise of a rightful discretion, on the 7th of December, 1872, determined to refuse Appellant the occupation of pew No. 68 during 1873, and because that determination was ratified and confirmed by the congregation, on the 25th December following.

4th. Because Appellant has not set out any title to said pew ; has not questioned the power of the Trustees in the premises ; has not asserted any jurisdiction on the part of the Session ; has not alleged himself to be a member of the congregation, or that he has been deprived of or disturbed in any spiritual right, or that he was refused a pew generally.

(1) Pages 131, 275 ; (2) Page 279 ; (3) 14 Ves. Page 251.

5th. Because the renting of pews, collection of revenues and determination of holdings, are inseparable powers, and all of a purely temporal kind.

6th. Because there is no evidence of record legally connecting the Respondents with the four series of acts complained of, and because Appellant has not proven damages.

7th. Because the Superior Court first, and afterwards the Court of Queen's Bench, have found the facts and the law in this case to be in favour of Respondents.

8th. Because Appellant's action has been rightfully dismissed, with costs.

Mr. *Kerr*, Q.C., in reply, explained the difference between a servitude in the Province of Quebec, and an easement. The laws of lease and hire, as contained in the Code, were applicable to all kinds of tenure "all corporeal things might be leased or hired" (1); even incorporeal things might be leased or hired (2). The allegations of the Plaintiff's declaration were sufficiently wide to enable the Courts to adjudicate on all the points raised by him (3): upon the whole he contended that the Appellant was entitled to a judgment in his favour.

June 28, 1877.

THE CHIEF JUSTICE:—

The Statute under which the Defendants were created a Corporation, 12 Vic., Cap. 154, recites that the ground on which St. Andrew's Church was erected for the public worship and exercise of the religion of the Church of Scotland, in Montreal, was purchased by Alexander Rae and William Hunter, as Trustees, for the congregation worshipping in the said

(1) Civil Code, L. C., 1605; (2) Civil Code, L. C., 1606; (3) Code Civ. Proc., L. C., Part 20.

church, and held under a deed dated 3rd May, 1805, for the benefit and behoof of the said church, and the congregation thereof, and for no other purposes. The Statute further recited the purchase of certain lots forming part of the Beaver Hall property, in the City of Montreal, by certain trustees of the said church, for the use and behoof of the said congregation of the said church, and on which there was then being built a church suitable for the increased numbers of the said congregation. The inconvenience of the trustees not having a corporate capacity was also referred to, and the Legislature proceeded to constitute the then existing trustees (who are named) a body corporate and politic, by the name of "The Minister and Trustees of St. Andrew's Church, Montreal."

They were authorized to make, establish, and put in execution, alter or repeal such by-laws, rules, &c., as shall not be contrary to the Constitution and Laws of the Province, or to the provisions of the Act, or to the Constitution of the Church of Scotland, as established in Scotland, as may appear to the Corporation necessary or expedient for the interests thereof. Three of the members of the Corporation to form a quorum, for all matters to be done and disposed of by the Corporation. Section 2.—The Corporation were to hold, stand, and be possessed of the lots of ground, with the buildings thereon, forever, for the several limitations, trusts, provisions and uses declared and expressed in respect of the same by the deeds of sale referred to, and the declaration by Alexander Rae and William Hunter (made before notaries) and by the terms under which the trustees were elected. Section 3.—The Corporation were authorized to sell all, or any portion of, the proper-

ty held in trust by them, but only on a requisition signed by three-fourths of the proprietors of pews in the church, of at least one year's standing, and not in arrear of rent, and at the time residing in the parish of Montreal; and no sale or alienation shall be valid unless sanctioned by three-fourths of the proprietors, qualified as aforesaid. Section 5 provides for filling up vacancies in the Corporation. When the vacancy is occasioned by the death, removal, or change of residence of the minister, the succeeding minister shall fill the vacancy. When the vacancy is in the number of the lay members, the same shall be supplied by the votes of such persons as shall be elected to fill the same, by a majority of the votes of the proprietors of pews in the said church, of one year's standing, not in arrears of pew rent, at a meeting to be convened as thereafter provided. Section 6 — Whenever a vacancy occurs in the office of minister of the church, a meeting is to be called of the *proprietors, pewholders* and *members* of the church *not in arrear of rent*, for the purpose of taking the steps necessary for supplying the vacancy, by electing a committee of nine, of whom six shall be proprietors of at least one year's standing, and in full communion with the church, and the remaining three may be pewholders who have *paid rent for three years* preceding their election, and are in full communion with the church; who shall have full power to take such steps as to them may seem best adapted for speedily obtaining a minister to the said church. Under Section 7—to fill the vacancies as to the lay trustees—a meeting is to be called of the proprietors, not in arrear of rent, on a day to be named, for the purpose of supplying such vacancy or vacancies by a person or persons who are *proprietors in communion* with the

said church. Section 8 provides for the calling of public meetings of proprietors or *pewholders*, on a requisition signed by 20 *proprietors* or *pewholders*.

Under the amending Act, passed 27th May, 1857, Cap. 191, it was provided that the trustees, save the minister, should go out of office the 25th December then next; and by Section 2 an annual general meeting of the proprietors of pews is to be held on the 25th December in every year, and by Section 3, six trustees shall be elected at the first annual meeting after the passing of the Act. Section 4.—Two trustees to retire annually.

The by-laws of the church were put in evidence. They appear to have been passed on the 11th March, 1851. Under Article 2, the trustees were to call a general *meeting of the congregation*, to be held annually on the 25th December. Two auditors were to be appointed by those present, say of proprietors of at least one year's standing, and not in arrear of rent, and pewholders who have paid rent for the two years preceding, one of which auditors must be a proprietor, and the other may be a pewholder, *both* qualified as above. Article 3.—At the general meeting of the congregation the members present, qualified as above, shall elect a treasurer. Article 4.—In appointing a committee to select a minister, all proprietors *in right of property possessed* not less than one year, and not in arrear of pew rent, shall be entitled to vote, and also all members of not less than three years' standing, one at least of which shall have been a member in full communion, and not in arrear of pew rent, shall be entitled to vote. It was understood that there should be only one vote for each pew. *Where two or more persons so qualified* should occupy a pew, they should give but one vote, and in

case of disagreement as to who should vote, they should have no vote. No proprietor or pewholder was to have more than one vote. Section 6 of the Act is referred to. Article 9.—Every person having purchased a pew, and having paid for the same, and who shall produce a deed, duly executed by the trustees, is a proprietor, and entitled to all the privileges of a proprietor. Proprietors not in arrear for rent may transfer their pew, but no transfer is to be valid except on the express condition of the new proprietors being approved of by the trustees, and subscribing to the by-laws. Any proprietor who does not pay the annual rent fixed on his pew, agreeably to his deed, for the space of two years, shall be considered as having forfeited his pew in the church, and after notice, the trustees may sell the same to the highest bidder, and the proceeds of the same shall be applied to pay the rent due, and the surplus shall be paid to the last proprietor. Article 10.—Any person who shall lease a pew from the trustees for one year, and pay the rent in advance, shall be considered a pewholder. The rents of pews and sittings are to be paid annually in advance, from the 1st day of January, and are to be considered then due. The current year is included, where in the by-laws it is stated as a qualification, that the individuals must have paid rent for three years, and are members of three years' standing, &c. Article 11.—The trustees are empowered to sell all pews in possession of the church, at such times and upset prices as they may decide on, but not for a less sum than two years of the fixed annual rent amounts to, and subject to an annual rent over and beside the purchase money, and all deeds granted shall contain a clause that the annual rents may be augmented or in-

creased by the trustees, according as they may deem the wants of the congregation require; they having obtained the sanction of two-thirds of proprietors of pews of at least one full year in possession, not in arrear of rent, at the time residing within the Parish of Montreal. Article 12.—The congregation in these by-laws implies the proprietors of pews, pewholders, members in full communion with the church, and regular sitters whose names are entered in the church books, *collectively*. Article 13. The term church in these by-laws, referring to persons, comprehends those members of the congregation, collectively, who are in full communion. Article 15.—The trustees are to enter in a book, to be kept for that purpose, the names of the *proprietors* of pews, *pewholders* and sitters; when more than one individual rents a pew, they shall give their names to the trustees, that they may be entered on the roll of the congregation. Article 14.—The trustees, previous to the election of a trustee, or the election of committees for selecting a minister, shall make out lists or rolls of the *proprietors* and *members* qualified to be trustees, or to vote on the election of trustees or members of committees for the selection of a minister, or to vote in the election of such committees.

In the view I take of this case, it will not be necessary to consider, or express any opinion on, the unfortunate differences that have occurred between the Plaintiff and the congregation of St. Andrew's Church. The right of a parishioner to a seat in a parish church in England and Scotland being based on the fact that the nation assumes to provide for the spiritual instruction of the people, cannot be asserted in relation to the members of religious congregations in this country, which have

none of the rights of established churches, and must be regarded as voluntary associations.

The right to a pew in a church must be considered in the nature of an easement. The proprietor for the time being has a right to occupy it at meetings of the congregation for religious purposes, but he could not destroy it or erect beneath it a cellar or place of deposit for goods, or use it for like purposes. His rights being of a limited character, may be subject to modifications which would not attach to other interests coming out of lands. The fee simple in the property in this, as in most of the churches of this country, is vested in the trustees, whether under the name of trustees or minister and churchwardens, and they hold according to the various rights declared by the conveyances to them, or the acts of the Legislature incorporating them.

The Plaintiff, though, occupied a pew in the church for several years, and occupied one in 1869, described as "area pew No. 68 in St. Andrew's Church, Beaver Hall." The rent for the year was $75. He took the pew in dispute, and began to occupy it in January, 1872, and obtained a receipt for the rent dated the 9th January, 1872. Plaintiff produced and gave it in evidence, it reads: "Received from James Johnston the sum of "sixty-six $\frac{50}{100}$ dollars, being for rent of first-class pew No. "68, in St. Andrew's Church, Beaver Hall, for the year "1872. For the Trustees, J. Clements." Under the By-laws the rents are to be paid annually in advance, that taken in connection with the receipt shows that this letting was at all events for one year certain. Mr. Justice Sanborn, in his judgment, says: "If this is a lease it is "not one which falls within the application of Article "1657, C. C. It is not such a verbal lease as is contem-

"plated by that article. It is the uncertainty of the "term of the lease which necessitates the three months "notice to terminate it. This was fully discussed and "determined in the case of *Webster* v *Lamontagne*, "decided in this Court in 1874. In this case there was "no tacit renewal. The pew No. 68 had only been "leased in 1872, and the rent was paid in advance, and "a receipt taken specifying the rent for one year. This "was in conformity with the By-laws, and Appellant, "as a party interested, must have been presumed to "have known it without such receipt. Before the expir- "ation of the year Respondents notified Appellant that "they would not lease him a pew for the next year. "This was quite sufficient if it were treated as an ordin- "ary lease to prevent a contract of *tacite reconduction*." I don't understand that any of the learned judges before whom the case came, thought the Article 1657 of the code applied, nor do they think, as I understand their judgments, that there was a *tacite reconduction*.

The Plaintiff's right must then be based on the simple ground that he had a right to have a lease for the year 1873 of the pew No. 68, he being willing to pay the rent in advance for it. If we were to decide he was entitled to three months' notice to terminate the lease because it was a verbal one, I apprehend this would not be satisfactory to the Appellant, or to those who contend that the holders of pews have the right to a renewal of their leases from year to year on payment of the rent suggested. If this be the correct view, all the trustees would be required to do to terminate the lease, would be to give three months' notice, according to Article 1657, and there would be no difficulty and necessity of presumed or added conditions to the leases or licenses to occupy

It is not contended there is any express provision in the Statute or By-laws giving the right to pewholders not proprietors, to have a renewal of their *leases*, as they are called, and that right must be implied from the nature of the interest which the pewholders have as members of the church or from usage. As I have already intimated, I do not think there can be any analogy drawn from the right to occupy seats in the parish churches in Scotland, the right to a seat being based on a different principle there,—there are no pew *rents*, as such, and the minister being supported from other sources, whilst in St. Andrew's Church the rents of pews are appropriated to the payment of the minister's stipend.

The rights of proprietors seem to be defined by the Statute, and by By-laws adopted by the Corporation under the Statute. They alone can vote for trustees. In selecting a committee of nine for the purpose of choosing a minister, six of the number must be proprietors, every person having purchased a pew in the church, having paid for the same, and who shall produce a deed duly executed by the trustees is a proprietor, and entitled to the privileges of a proprietor as specified by the By-law. Proprietors not in arrear of rent may transfer their pews by sale, gift or will, but no transfer to be valid *except on the express condition of the new proprietors being approved by the trustees.*

A proprietor who refuses or neglects to pay the annual rent fixed on his pew agreeably to the deed for two years, shall forfeit his pew; and the trustees, having given two weeks notice of the forfeiture, may sell the pew to the highest bidder, provided the bidder *be approved* by the trustees. The proceeds of sale to be applied to the payment of the rent, and any surplus to be paid to the last proprietor.

I think we may fairly assume that it was not intended that pewholders should have greater privileges than proprietors. There is nothing in the by-laws or Act of Incorporation giving them the right to continue to hold a pew beyond the year for which it is leased, nothing said about their being entitled to a renewal of the lease of a pew, though reference is made to pewholders who have paid rent for three years. Suppose a pewholder neglects to pay his rent, can he continue to hold the pew? If not, how is he to be dispossessed of it? and when? Is he to have a reasonable time after the end of the year to pay the rent for the next year, which is payable in advance, and in the mean time is he a "pewholder"? And is the pew to be considered in his possession? Or is the pew in the possession of the trustees? When is it to be considered in the possession of the trustees, that they may sell it if they think proper? No provision is made as to these matters by the by-laws.

If the *pewholder* has the right of his own mere will to continue to occupy the pew for an indefinite period, the trustees would be very much embarrassed in carrying on the affairs of the Corporation. It might be for the interest of the Corporation to sell the pews that had been leased, and yet if the pewholder claimed to have his lease renewed from time to time, this would create difficulty. It might be necessary to raise the rents in order to pay the stipend of the minister, yet no provision is made for that purpose, as far as the pewholders are concerned; but when the pews are sold the deeds are to contain a clause that the annual rents may be augmented or decreased by the trustees, according as they may deem the wants of the congregation require, first obtaining the sanction of two-thirds of the proprietors

of pews, of at least a year in possession, and not in arrear of rent, residing within the parish of Montreal. There are other alterations as to the occupation of seats, that the change of time and circumstances might render it desirable to make, such as making the seats free, in relation to which this perpetual right of renewal (if I may use the term) of the pewholder would very much embarrass the management of the church. Suppose the pewholder paying the pew rent regularly, and not joining any other congregation, very seldom, if ever, attended church; must the trustees continue to let him have the pew, when there were other persons desirous of obtaining it, who would occupy it constantly?

If it be considered that the pews are let for a year, and the trustees re-let for each year, then none of these difficulties will arise. Whenever circumstances require a change in the mode of letting or occupying the pews, or the increase or diminution of the rent, such changes may be made at any time after the end of the year for which the leases are current. It is not to be presumed that this power will be exercised capriciously, or to the prejudice of the congregation worshipping in the church. The most favoured parties in the congregation are subject to the exercise of this discretion of the trustees, as to whom they may sell their pews. When selling pews they can exercise their discretion as to whom they will sell them, and I see no reason why they should not exercise that discretion as to whom they may lease pews. By giving to the pewholders the right which the leasing of the pew and paying of the rent for one year secures to them, you leave the trustees free to act as may be considered advantageous for the benefit of the congrega-

tion. Any reasonable or necessary changes may be made at the end of the year, when each pewholder has had what he has bargained and paid for—the use of the pew for the year. In this view no difficulty could arise; no discussions, whether what was about to be done was reasonable, or done at a reasonable time, in a reasonable manner; and no law-suits or unpleasant litigation, bringing the matters of the congregation before the Courts. These domestic affairs would be settled in their own forum, and in a more seemly manner than by legal proceedings, which produce discontent, anger and ill-feeling.

If the right to a lease for another year had been claimed by a pewholder the next year after the By-laws had been passed, and the trustees had refused to grant it, I am satisfied it would have been held, that there was no doubt that the pewholder, having leased the pew for one year, and paid his rent for that period, and having obtained the receipt, could not claim as a right to have the same pew granted to him for another year at the same rent, without the consent of the trustees. If that would have been the effect, then why should the Appellant, who must be held as to this particular pew, to have taken it for the year 1872 (he not holding it for 1871), be considered entitled to claim the lease of it as a right for 1873? I can see no satisfactory reason why it should be so held. It is argued, however, because pewholders for the last twenty-five years or more in St. Andrew's Church have had their leases renewed, therefore it must be conceded as a right.

No doubt usage is a strong point to take in these matters, but when the usage may be accounted for quite consistently with the claim of right set up, and

when it has not been exercised in a manner to show it has been claimed and admitted as of right, you may show facts and circumstances which would prove that the right claimed was not intended to be granted as claimed.

I have endeavored to show that the right claimed by the pewholders could not have been intended to be granted to them, by showing how carefully the rights of the trustees have been guarded in relation to "proprietors;' and if the rights now claimed bythe pewholders had been intended to be granted to them, more minute provisions would have been made as to enforcing the rights of the trustees against them, and matters would not have been left in such a chaotic state as it appears to me they would be in, if the views contended for by the Appellant are allowed to prevail. The fact that the congregation worshipping at St. Andrew's Church for more than 25 years past, have acted harmoniously, and been so united that the trustees have not had occasion to refuse to renew the lease of a pew to any pewholder who desired it, does not, to my mind, prove that it was because the pewholders had a right to claim this renewal as of right, but shews that the trustees, acting as reasonable men, did what they thought was right for the interest of the congregation and what was likely to ensure harmony. It is possible this may go on now for another quarter of a century or more without having any difficulty,

It is only when the exigency arises making it necessary to exercise the right to refuse to let a pewholder have for another year, a pew which he has occupied perhaps for several years, that the right of the trustees to refuse becomes known to the congregation in such a way as to attract attention. The giving of the right to occupy for another year, each year, through the receipt

given for the rent, is not all inconsistent with exercising the right to refuse to continue giving such right. It was necessary they should rent the pews to raise the revenue to pay the stipend of the minister; and the fact that the occupant of the pew wanted it for another year, and was willing to pay the rent, was a reason why they should let him have it. It was not necessary or desirable, merely to show their right to refuse to let for another year, that they should capriciously annoy pewholders by refusing to renew the letting to them. I do not think it is contended that the trustees could compel a pewholder to continue to hold the pew after the end of the year, though they might wish to do so, and though they may have refused to let it to another applicant, anticipating that the former holder would continue to occupy it. It seems to me that the doctrines contended for by the Appellant would give many important rights, options and privileges to the pewholder without corresponding obligations, and cast burdens and restraints on the trustees which they never undertook to submit to, and which it is not for the interests of the congregation they should bear. Giving to the pewholder the right to occupy the pew for the year for which he bargained and paid for, he has what in my judgment it was intended he should have, and you have the trustees free to manage the business of the congregation entrusted to their care, in the manner which may be best calculated to further the objects for which the Respondents were incorporated. This view would settle the rights of the parties on intelligible legal grounds.

In the evidence of one of the clergymen called for Appellant, it was stated that they had not legislated

on the subject of the rights of parties to pews, and therefore they must be governed by the principles of the Church of Scotland. The Church of Scotland lays down the rule that every man in the parish has rights in the parish church, and unless he makes himself offensive to the church his rights cannot be interfered with. It is founded on the parochial system. If a person were to apply for admittance into a Presbyterian church, and were notoriously objectionable, yet if he profess adherence to the principles of the Church of Scotland, the trustees would be bound to give him a pew if they had one at their disposal.

The Rev. Mr. Lang, the minister in charge, said:— "There is a time at the end of each year when all the pews in the church virtually revert to the trustees; that does not include the pews owned by proprietors." One of the trustees said:—"The trustees have always contended that the pews are rented from year to year; and that the lease of each pew ends with the year, and can only be renewed with the consent of the trustees either tacit or expressed." He has known cases in which parties have grumbled on being deprived of their pews in that way. The notice of the annual meeting intimates that the trustees or their representatives will be on hand to lease the pews of the church. It was customary to continue tenant in his pew as long as he pays rent regularly. The trustees consider they have a sort of discretion in regard to the letting of pews, "our right has never been questioned before, that I know of, to refuse a pewholder a pew."

Another minister, speaking of the church in which he is the minister, says:—"The managers (in his church) have duties very similar to the trustees in St.

Andrew's Church. The managers have the sole power over the pews, and can let them to whomsoever they please. As I understand it, the managers have the power to eject a member from his pew. I have no doubt of it." Many members of the congregation stated the custom to be, that you paid the rent and you were supposed to keep possession of your pew; the receipt given was for the rent for the year.

Some said they understood that any person paying his pew rent, got his pew on paying from year to year. The pews are continued by the payment of the rent in advance. There seems to be no doubt that the trustees have exercised the discretion so far as to refuse to continue single letting in pews, when a pew was wanted for a family. The pew occupied by Appellant in 1871 was owned by Mr. Mackenzie, who sold it, and Appellant wanted the trustees to refuse to approve of the sale; they, however, declined doing so, but compelled the young men who had sittings in No. 68 to leave that seat in order to give it to Appellant. I understand these young men had paid for the sittings just as the pewholders paid for their pews, but when the occasion, in their discretion, called for the exercise of the right to refuse to renew the letting of the seat, the trustees exercised it. When the necessity, as in this case, for the exercise of their right to refuse to renew the letting of a pew arose, they, in their discretion, exercised it, and refused to renew the letting of this pew to Appellant, and, as already intimated, I think they had the right to do so.

I have not been able to see all the cases and authorities cited on the argument to show that the right to refuse a member of a religious society a seat in a church

belonging to the body, is one which rests with the congregation alone, and that the exercise of their discretion will not be reviewed by legal tribunals. Many of the decided cases go to the full extent contended for. As I do not consider it necessary to go into that question in deciding this case, I express no decided opinion upon it. I consider that the Plaintiff here claims that he had a right to the pew in question; and, in the view I take of the law, he had not such right under the Act incorporating Defendants and their by-laws, and therefore his action fails and this appeal should be dismissed.

RITCHIE, J.:—

I have given this case a great deal of consideration; and have felt, throughout the argument and during my investigation, that it is surrounded with a great many difficulties, and my mind has doubted and fluctuated from time to time; but, after most careful consideration, I have arrived at the conclusion that the principle which Chief Justice Dorion, in the Court below, put forward, is the correct one.

The church which has given rise to this unhappy controversy, dates its origin as far back as 1805. The 12 Vict. cap. 154, incorporating the minister and trustees of St. Andrew's Church, Montreal, passed 30th May, 1849, recites that: "Whereas the ground in St. Peter's "Street, Montreal, upon which the church for the "public worship and exercise of the religion of the "Church of Scotland in the City of Montreal, commonly "called "St. Andrew's Church," is erected, was pur-"chased by the late Alexander Rae and William Hunter, "as trustees for the congregation worshipping in the "said church, under a deed executed in their favor on

" the third day of May, 1805, before Guy and Barron, " Notaries Public, and held by them (the said Alexander " Rae and William Hunter), according to their declara- " tion of date, 14th July, 1805, made before the said " Notaries *for the benefit and behoof of the said church and* " *the congregation and for no other purpose whatsoever*, " and is particularly described in the aforesaid deed of " sale and declaration."

It appears to have been found afterwards that the church was too small for the accommodation of the congregation, and that incorporation was desirable, and the Act, after reciting the election from time to time of trustees, and specifying the names of the then trustees, further recited that as such trustees by deed, passed before J. J. Gibb and colleague Notaries Public, bearing date at Montreal the 4th December, 1847, they acquired by purchase from Edwin Atwater, " those certain lots " of land * * * (particularly describing them) " * * * *for the use and behoof of the said con-* " *gregation of the said church, and on which there is* " *now being built a church suitable for the increased* " *numbers of the said congregation*," and after reciting that the trustees were not a body corporate, and that the trustees had represented the inconveniences resulting from the want of a corporate capacity, and that it had become necessary to sell the church in St. Peter's Street, and provide a larger building for the accommodation; the minister, trustees and their successors were constituted a body corporate with perpetual succession, with power to make such rules, ordinances and regulations as should not be contrary " to the constitution and laws of this Province, or to the provisions of this Act or *to the constitution* of the *Church of Scotland*, as in that

part of the United Kingdom of Great Britain and Ireland called Scotland, now by law established, and as might appear to the said corporation necessary or expedient for the interests thereof;" and it was also enacted "that the several lots of ground, together with the buildings thereon erected by the trustees aforesaid, shall be holden by the said Corporation to stand and be possessed thereof for ever, to and for the several *limitations, trusts, provisions and uses declared and expressed in respect of the same in and by the above referred to deeds of sale and declaration by the said Alexander Rae and William Hunter, as also by the terms under which the said trustees are elected.*"

Thus only the site of the church was changed, and after making provision for the corporation accepting and holding real estate to a certain amount, for alienating the buildings on St. Peters Street and other lands on certain conditions, for raising money by way of mortgage, for the filling of certain vacancies in the Corporation, the Act proceeds to provide for the filling of a vacancy in the office of minister of the church, and whenever a vacancy happens it is the duty of the Kirk Session to require "a meeting of the proprietors, pewholders and members of the said church, not in arrears of rent, for the purpose of taking the steps necessary for supplying such vacancy, by electing a Committee of nine by plurality of votes, of which six shall be proprietors of at least one year's standing, and the remaining three may be pewholders who have paid rent for three years preceding their election, and are in full communion with the said church," and shall have full power to take such steps as to them may seem best adapted for speedily obtaining a minister, &c., &c.

James Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal.

Under the Act of Incorporation certain by-laws were adopted. Article 1 provides that

"This church and congregation, now in connection with the Established Church of Scotland and adhering to the standards thereof declare that they shall continue to adhere to the said standards, and maintain the form of worship and government of said Church."

Article II.—"The trustees shall call a general meeting of the congregation, annually, to be held on the twenty-fifth day of December—or should that day fall on a Sabbath, then on the following day,—notice of which must be given from the precentor's desk on the two preceding Sabbaths; at which meeting the trustees shall lay before the congregation a statement of all accounts and financial matters connected with the church and congregation. Two auditors shall be appointed by those present,—say of proprietors of at least one year's standing and not in arrear of rent, and *pewholders who have paid rent for the two years preceding*,—one of which auditors must be a proprietor, and the other may be a pewholder, both *qualified as above*, to whom the accounts shall be submitted for examination. And provided, that upon the report of the auditors, or on other grounds, it may appear that the funds of the church, or any portion thereof, shall have been misapplied, the proprietors, or ten of them, may call a general meeting of the congregation to consider the same; and if any defalcation be found, they shall be empowered to take such steps as they may see proper to secure the interests of the congregation."

Article III.—"At the general meeting of the congregation, the members present, qualified as above, shall

elect a treasurer who shall receive and pay all moneys, by order of the trustees only; he shall prepare a statement of his intromissions, to be laid before the general annual meeting. He shall also furnish the trustees with a statement of the funds in his hands whenever they shall require it."

Article X.—"Any person who shall lease a pew from the trustees for one year, and pay the rent in advance, shall be considered a pewholder; the rents of pews and sittings are to be paid annually in advance from the first day of January, and are considered to be then due; the current year is included when in these by-laws it is stated as a qualification that the individuals must have paid rent for three years, and are members of three years' standing," &c.

Article XII.—"The term congregation in these by-laws implies the proprietors of pews, pewholders, members in full communion with the church, and regular sitters, whose names are entered in the church books collectively."

Article XV.—"The trustees shall enter in a book, kept for the purpose, the names of the proprietors of pews, pew holders and sitters; when more than one individual rents a pew, they shall all give their names to the trustees that they may be entered on the roll of the congregation."

Article XXI.—"Every person, whether proprietor, pewholder, sitter, or member of this church, shall, before they can be competent to elect or be elected to any office, or to have any share in the management of this church, subscribe the by-laws."

It is clear, from these provisions, that this church was for the benefit of the congregation according to

the form of worship and government of the Established Church of Scotland.

It is very much to be regretted, that either in this Act or in the by-laws, which were passed in 1851, provisions affecting questions which have arisen in this case had not been put on a footing more clearly enunciated.

It is evident that this church was not vested in these trustees for the purpose of letting or not letting, for the purpose of doing with reference to the congregation worshipping in it as might seem right in their own eyes, but they held the church for the use and behoof of the congregation at large, and they had no arbitrary discretion in the matter, nor right to treat the church as if it were their private property; either to gratify their own feelings or carry out their own individual views. To find out what rights the congregation had in this church, may we not fairly, must we not rather, look at what rights congregations have in the Church of Scotland, according to the form of worship and government of that Church.

As judicial notice cannot be taken of what the rules and regulations of that Church are, they must be proved. It is to be regretted that in this action this was not proved in a clearer manner, so that it could be easily understood, and we could be guided in the matter by something more distinct than appears in this case. The very words of the minister of this church, quoted by the learned Chief Justice, show how little reliance can be placed upon that clergyman's idea of what the duties of these trustees were when he says they had "a sort of discretion." What is the meaning of a "*sort* of discretion?" They must have a legal discretion or none at all.

The evidence of Rev. Mr. Campbell puts it on a more intelligible footing. He says, in effect, the rights in this church and the congregation are as near as may be, analogous to those of the Church of Scotland in Scotland, and the rights of a congregation there; and he says, that there the congregation are never deprived of their seats; that there such a thing as depriving an elder of the church of his seat was never heard of, so long as he was a member of the congregation; and taking the whole evidence together, I can arrive at no other conclusion than that for a period of seventy years, the constant and uniform usage and practice of this church has been that, so long as a party continued in good standing in the church and paid his rent in advance, he had the lease of his pew continued as a matter of course, and that the standing of a member of the church is a matter to be determined by the church courts and not by the trustees. Chief Justice Dorion, in his judgment (which I understand is, on this point, quite concurred in by my learned Brothers on this Bench from Quebec), shows that this is no unusual tenure in Quebec, for he says: "under the parochial organization which "prevails in Quebec, with reference to Roman Catholic "churches, the right of the lessee of a pew to retain it "as long as he resides in the parish on payment of the "annual rent originally agreed upon, unless there be a "written agreement to the contrary, is undoubted."

The contention, therefore, is not novel, that in this church the pews are let to the congregation, the rent being payable in advance; that when the rent is paid in advance the lessee continues to have the right of occupying the pew until some good cause can be shewn why he should be deprived of it, and thereby of the

benefit secured to the members of the congregation by the first deed and the Statute passed in 1849.

The members of the congregation are certainly entitled to the use of the church, and I can see nothing unreasonable in the mode of allotment and holding of seats in conformity with the usage proved in this case to have existed, and which Chief Justice Dorion, as we have seen, says was in accordance with the parochial organization of the largest church in the Province of Quebec. Nor does this system appear to have produced any inconvenience or to have in way interfered with the accommodation or orderly and convenient seating of all for whose benefit the church was organized and incorporated. On the contrary, the reasons are very obvious to my mind why the trustees should not have an arbitrary right to deprive members of the congregation of church privileges, by depriving them of pews, and so enabling them practically to hold the church not for *the use and behoof* of the congregation, but for those only whom they may,from time to time, choose to permit to enjoy its use,and which system appears to have worked without the occurrence of any one of all those numerous difficulties suggested by the learned Chief Justice as possible to arise.

I may mention also, I find in these by-laws the idea of continuity of occupancy of pewholders clearly recognized, and certain rights and privileges given, as for instance: Whoever paid rent for two preceding years is enabled to elect certain officers in the church. It is to be observed also, that instead of saying that the trustees shall make fresh agreements each year for renting the pews for each and every year, Article 10 declares that any persons who shall lease or rent pews

and sittings, are to pay for them annually in advance. That provision could not be necessary if they were to be leased every year, the clause would then be meaningless. If they were leased only for a year, and paid for in advance, there would be an end of the matter; but it says "the rents of pews and sittings are to be paid annually in advance." What does that mean? It means, I think, that having got the right of pre-emption or tenant right—if I may use the term—they go on exercising it, paying from year to year in advance, and if they do not pay in advance they forfeit the right to the occupancy of the pew. How could it be considered due, if it all rests on one indivisible agreement to be made each and every year? There would be nothing due, in that case, until the agreement was made—nothing due if the rent must be paid in advance.

The Act of incorporation and by-laws, fixing the qualifications of pewholders as electors as those holding pews for more than one year, in connection with the usage of the church, strengthen me in the conclusion at which I have arrived. It may be, all the difficulties suggested by the learned Chief Justice may arise, but they have not arisen in this church in seventy-three years, and it is clear the present difficulties did not arise from any of those causes put forward by the learned Chief Justice, but from the trustees (and possibly a majority of the congregation also) desiring to do indirectly what they could not do legally and directly.

It is absolutely necessary that I should make some reference to the unhappy differences which occurred. Otherwise I should not do so. One reason why I refer to them is to show there was no cause why the Plaintiff

should be deprived of his pew; and another is, it affects the damages to be awarded to this case. I trace the whole of these difficulties to the action of the minister of the church in changing the forms or modes of worship in the church, which was distasteful to the Appellant in this suit, and to others, a minority in the church. I know historically, I know individually, as a member of a church, and I know judicially, as having been called upon to decide questions growing out of difficulties arising from cases of that sort, that there is nothing more calculated to introduce an inharmonious spirit in a church, than departing from ancient usages of the church, and adopting forms and observances that the congregation are not accustomed to. If parties are in the minority under such circumstances; while I do not mean to say there may not be such changes as they might not be bound to submit to, I think their feelings—nay, even what may be regarded as prejudices—ought to be dealt with leniently. I appears, growing out of these changes, other difficulties arose. There is no doubt the Appellant in this case put forward a statement without sufficient foundation, though he says he had information which he supposed to be accurate at the time; and he certainly did contradict his minister with reference to a question of fact, in a manner and under circumstances that I do not think anybody would approve of, because, before he ventured to contradict another pointedly and unequivocally, he should have been well assured he had used all means to obtain information to justify him in putting forward a contradiction of that kind; but, though he was wrong in that contradiction, I think the gentleman who

aggravated him was far more wrong when he, openly at a public meeting of the church, said that that man had called his minister a liar. That is a term which I think no man is justified in putting into the mouth of another, unless that other has actually used the very expression itself, because, though it may be that a man may contradict another under the conviction that the statement made is erroneous or incorrect, still, to say the statement is erroneous or incorrect is far different from telling the person who is contradicted that he is "a liar." If the Plaintiff, really, honestly and sincerely believed the statement to be incorrect, and it was a matter material to the discussion in the church at that time, it seems to me he would be wanting in independence if he had not pointed out its incorrectness, but he should have taken good care that his information was accurate, and the manner in which he put forward the contradiction should have been carefully guarded. After that, there seems to have been other discussions, and then the trustees appear to have desired to get rid of the Plaintiff as an elder of the church. Now, so far as the evidence in this case goes, it appears that as to elders of the church the trustees have nothing to do, either with reference to their conduct or office or to their displacement from office; that they are subject alone to the jurisdiction of the Church Courts, and to be tried and removed by their decrees. And it seems also that for any misconduct of a member of the congregation, he may be brought before the proper courts, and have the matter duly investigated and duly tried, and, if tried, dealt with as those courts in their discretion may judge right and proper, but that the trustees, as such, have no power or

right to deal with the matter. It appears that Mr. Johnston was tried before a Church Court, and was at first condemned; but, upon appeal to a higher Church tribunal, he was entirely acquitted, and remained in his office of elder, not in any way subject to the control of the minister, or dismissal by the trustees.

But it appears they and a large majority of the congregation were desirous of getting rid of him as an elder. If they wished to get rid of him legally and properly, they had a perfect right to take such action as would properly accomplish that object, but I cannot assent to the proposition, that to accomplish what they could not do legally, they had a right to pursue another course and refuse to allow him to occupy his pew and to continue a pewholder, and thereby prevent him from continuing to be a member of the congregation. They could not do indirectly in that way what they failed to accomplish directly through the instrumentality of the Courts established in the church for adjudicating on such matters. When they adopted that course they were not, in my opinion, exercising a reasonable or a legal discretion—they were not withholding the pew from Mr. Johnston for any reasonable, legitimate or proper cause, they were simply endeavouring to gratify their own feeling with regard to his (in their opinion) obnoxious position in the church as an elder. They were endeavoring to use the power they had in the church as trustees, in a manner which, I think, the laws of the Church of Scotland, the original deed of the church. the charter of the church and the articles of the church never contemplated, and in a manner not justified by any precedent in the church, but directly contrary to the

uniform usage and practice of the church from its foundation. I cannot think it was ever contemplated that trustees should coerce or turn out an elder of that church by using a power over the pews in the way in which they did in this case. I make this observation here more particularly with reference to damages; for the very circumstance of their feeling, and avowing, they were accomplishing an object in that way, which they had tried before and could not accomplish by legal means, rendered their conduct all the more irregular, and in my opinion, improper. The way in which they carried out their purpose was equally objectionable. Considering the Plaintiff was an elder in the church; considering the number of years he was a member of the congregation, and his position in the church; sending, without any notice, by a common carter, all those articles used in his pew in the church, and putting them into his place of business, was not treatment such as he should have expected. He was an officer of the church (for an elder is a high officer), and this conduct was certainly not what he had a right to expect. This and the placarding of his pew afterwards was all done with one object—evidently to drive him from the eldership if not from the church. If he had done anything to entitle him to be driven from his eldership and from the church, that should have been established in the spiritual tribunals of the church, and not by the trustees in the way in which they have; so contrary to the spirit of the laws and government of the church.

In view of all these circumstances, I am constrained to the conclusion that the Plaintiff has been wronged in being practically turned out of this church when he

ought not to have been. I think this Court ought so to decide, and adjudge him such reasonable damages as, while not of a vindictive character, will serve to warn persons situated as these trustees, against such an improper exercise of the duties of their office. There is no more delicate position than that of an officer of a church who exercises such functions as these. Every man loves his church; every man feels that he will almost lose his life rather than his rights in his church, and if there is anything in this world calculated to arouse a man's feelings—and laudably so, for it is between him and his God—it seems to be an interference between him and his God, or the worship of his God, at all events. Therefore, I say it s that men's feelings are always keen on matters of this kind, and in persons in office in a church should not in disregard of their duty, deprive people wrongfully of their rights in the church. If they do, they must expect to be mulcted in such damages as will prevent a recurrence of the wrong doing. There is nothing more unseemly than a congregation at variance among themselves. It is at variance with the principles and doctrines inculcated in the church—with the life and doctrines of the blessed Saviour they go there to worship. We should do everything in our power, in adjudicating cases of this kind, to prevent these difficulties arising, and if the result of this judgment should be such, that these difficulties which have been so strongly pointed out by His Lordship, the Chief Justice (which, I humbly think, have not arisen in this case to justify the action of the trustees), should become apparent, all I can say is, if the regulations of this church and the laws of the Church of Scotland are not sufficiently

elastic to meet these cases, I am perfectly sure the right has never been refused to any church (in our province at all events) to make such rules and regulations for the management of their affairs as a body, as they may think right and proper, and may to the Legislature seem reasonable.

Regretting I am called upon to adjudicate upon this case; regretting the observations which, in the solemn discharge of my duty, I am called upon to make, I trust that all parties will re-consider this matter, and that it will lead to an amicable arrangement among them. I believe the Plaintiff had the right, when he had the pew for one year, to keep it so long as he continued paying pew rent in advance, unless, indeed, some good cause, which it is not necessary for me to specify, should be shown for depriving him of it. I will not say there may not be many matters referred to which might not be sufficient for suspending him. I do not say that might not be done, but it is sufficient for me to say nothing appears in this case that warrants the trust tees, in my opinion, in depriving him of the right to have that pew when he was willing to pay for it annually in advance. Under these circumstances, I think the judgment of the Court below should be reversed, and the Defendants in this case should be condemned to pay $300 damages, with full costs in all the Courts.

STRONG, J.:—

This action is, as I read the declaration, brought to recover damages for disturbing the Plaintiff in his enjoyment of pew No. 68, in St. Andrew's Church, in the city of Montreal. It is confined to the wrong

alleged to have been done to the Plaintiff in respect of this particular pew, and does not make the case that Plaintiff was illegally excluded from the church altogether; and, if it had made such a case, the evidence clearly would not have supported that pretension. It becomes material then to ascertain, in the first place, what was the Plaintiff's title to the pew 68 at the time of the disturbance of Plaintiff's possession, in the month of January, 1873.

The opinion I have formed, after consulting all the authorities cited in the factums and at the Bar, and several others, is that the contract entered into between the Plaintiff and the Defendants, the trustees, under which the Plaintiff occupied this pew No. 68, during the year 1872, was a verbal lease----a character which the Plaintiff himself attributes to it in his declaration. The Plaintiff then proves a title precisely as he alleges it in his declaration, as a lessee for the year ending on the 31st December, 1872, under a verbal contract with the Defendant, at a rental of $66.50. By the law of the Province of Quebec, a lease for a short term, less than nine years----entirely unlike such a contract in English law----gives no right of property to the lessee, but constitutes merely a personal contract between the parties. There is, therefore, much less difficulty than in the case of a similar contract governed by the laws of England, in holding that the right of use of a pew, which involves no interest in the property in the church, or in the pew itself, may be made the subject of a lease. The absolute sale of a right to use a pew has been held in England to confer no right of property in the soil, but merely a right in the nature of an easement or servitude, though, of

course, not an easement or servitude proper.----(*Hinde* v. *Charlton*) (1).

Article 1608 of the Civil Code of Lower Canada contains a provision not in terms expressed in the Code Napoleon, though it appears to be universally considered as the law of France also: "Incorporeal things "may be leased or hired except such as are inseparably "attached to the person. If attached to a corporeal "thing as a right of servitude they can only be leased "with such thing." There seems, then, no reason why a contract conferring a right to use a pew in the manner in which such property is generally used, namely, by occupancy during divine service, should not be as much a lease as the right to work a mine or quarry, or the right conferred by contract on a particular person, not amounting to a servitude in favor of another property, to use a right of way or passage.

In all these cases I find several of the commentators on the Code Napoleon, treating the contract as a lease. Marcadé, on Article 1713 of the Code Civil, at p. 431 (6th edition) says: "On ne loue pas une église, un "cimitière, une place publique, une grande route, un "fleuve, mais on loue très bien *des places dans une* "*église*, des emplacements d'étalages de marchands sur "la voie publique, le droit de recolter les fruits et "l'herbe d'un cimitière, le droit de pêche dans un "fleuve."

Other authorities are to be found to the same effect. I can see, therefore, no objection to attributing to the contract which the Plaintiff entered into, for the occupancy of the pew for the year 1872, the denomination and character of a lease as the Plaintiff himself has done

(1) L.R., 2 C.P., p. 104.

Then if it is a lease, one of the learned counsel for the Appellant, Mr. Kerr, whilst he concedes that the notice of 7th December made *tacite reconduction* impossible, invokes Article 1657 of the Civil Code (L. C.), which he says must apply to all verbal leases, whether made for fixed and certain term or not. According to the strict letter of Article 1657, three months' notice would be in all cases necessary to put an end to a verbal lease, even though it should be proved or admitted (as in the present case) to have been for a term certain.

The Article 1657 is almost identical with Article 1736 of the French Code, which only differs in requiring notice to be given, according to the custom of the place, instead of fixing an invariable delay of three months; and the Commissioners of the Code in their Report (4th Report, p. 29), say of the Article that "it is based partly "upon Article 1736, C. N., but goes beyond it in speci- "fying the delay of the notice required to be given." Then the commentators seem to be all of accord that the Article 1736 was inaccurately drawn, and that notice was only necessary in the case of a verbal lease for an uncertain term, and consequently where the duration of the lease is ascertained, though the contract may be verbal, the Article does not apply. Marcadé after discussing this Article, comes to the conclusion: "Il faut donc dire que le congé sera ou non sera neces- "saire, selon que la convention (écrite ou verbale, peu "importe) laisse, ou non, indefinie la durée du bail." (1) See also Duvergier (2); Duranton, (3); Troplong (4); Zachariæ (5); Demante, (6); and Laurent (7).

(1) Vol. 6, Page 481; (2) T. 18, No. 485; (3) T. 17, No. 116; (4) Du louage, No. 404; (5) Par Massé & Vergé T. 4, No. 383, Note 11; (6) T. 7, Pages 268, 269; (7) T. 25. Page 349.

This, I gather from the judgment of Mr. Justice Sanborn, was also discussed and decided in the case of *Webster* v. *Lamontagne* (1), though the report of that case in the Lower Canada Jurist does not show that very clearly. The lease was, of course, subject to the requirements, as to proof, of Article 1233, and as the rental was upwards of $50 it could not have been established by the testimony of witnesses; all difficulty on this head is, however, removed by the clear admission of the Plaintiff. The consequence is that the lease came to an end, without any notice, on the 31st December, 1872, at which date, in my opinion, the Plaintiff ceased to have any legal right to occupy the pew No. 68. The Plaintiff seems to have considered himself, that his right terminated at the end of the year, for, as Mr. Justice Monk points out, his tender of the rent for 1873 implied a recognition by him of the necessity for a new lease on which to found his title to the continued occupancy of the pew. Nothing is to be found in the Act of Incorporation, or in the by-laws made pursuant to it, giving colour to the contention that a contract for the lease of a pew for a year shall be construed not to mean what the parties agreed to, but shall be intended to be a lease for an indeterminate period, possibly for the life of the lessee.

Then, with reference to the usage applicable to the holders of pews in the Roman Catholic Churches in Lower Canada, upon which the judgment of the learned Chief Justice of the Court of Queen's Bench proceeds, I would venture, with great deference to an authority of so much weight, to suggest that in the cases to which

(1) 19 L. C. Jur. Page 10f

the Chief Justice refers, the lease of the pew being indeterminate as to duration, custom has provided for that, on which the parties have been silent, and has annexed to the contract the term that the lessee shall have the occupation of it as long as he resides in the parish, but I do not understand, from the statement of the law, which the Chief Justice gives in his judgment, that the usage would override the express contract of the parties, and that in a case like the present, where there was a lease of a pew for a year certain, this usage would entitle the lessee to insist on a right of occupancy as long as he remained a parishioner. Moreover, I should doubt, though on this point I hesitate to express an opinion, whether the rules applicable to the parish churches in Lower Canada would apply at all to the congregation of a voluntary religious body, regulated by an Act of the Legislature similar to that which forms the organic law of the Respondents' corporation.

As to the law applicable in Scotland to pews in churches belonging to the Established Church there, I find no reference to that law or usage either in the Act of Parliament or in the by-laws, and I am at a loss to understand any principle on which customs prevalent in Scotland can be imported into this contract of lease in such a manner as to override the express agreement of the parties. If it could be shown that these rules as to the occupation of pews in churches of the Scotch Establishment, had been expressly or by implication adopted by the Corporation of St. Andrew's Church they would, of course, have an important bearing, and the law of Scotland might be made applicable, but there is no evidence to show any such adoption, and, therefore, the rights of pewholders in this church are to be

assimilated rather to those of other voluntary religious associations than to those of pewholders in Scotland.

Then it has been argued that some usage or custom not to disturb a pewholding lessee in the occupation of his pew, has existed within St. Andrew's Church itself. Some testimony has been given by witnesses who rather state their own opinions on the subject than prove the fact of such a usage, which is, of course, not the proper way to prove a custom. Moreover, what these witnesses speak of, as to this usage of continuing leases is to be referred rather to courtesy and good feeling than to right, so that even if it were admissible to affect the rights of the parties in this way, the evidence would fall very far short of establishing any binding custom. But surely as matter of law it is out of the question to say that a lease having been made for a fixed term of one year, such a lease can be prolonged indefinitely by the proof of any usage or custom. Articles 1017 and 1024 of the Civil Code of Lower Canada, certainly do provide for a reference to usage in the interpretation of contracts. Article 1017 provides: "The customary clauses "must be supplied in contracts, although they be "not expressed." And Article 1024: "The obliga- "tion of contract extends not only to what is ex- "pressed in it, but also to all the consequences which, "by equity, usage or law, are incident to the contract "according to its nature." But these Articles only mean that all natural incidents and consequences flowing from the expressed agreement of the parties may be added to it by proof of usage. It is not meant that the express contracts of parties may be overruled or extended by usage. Larombiere, in his commentary on Article 1160 of the Code Napoleon (corresponding to Article

1017 of the Civil Code of Quebec) states this very decisively. He says: (Obligations, vol 1, p. 629): "Mais unique-"ment destiné à suppléer le silence du contrat, "l'usage ne peut prévaloir contre les dispositions "expresses des parties, ni contre les dispositions "formelles de la loi. Celles-ci commandent, celles-là "dérogent, et tous deux retirent à l'usage une puissance "qu'il ne peut et ne doit exercer qu'en l'absence d'un "texte explicite de la loi ou d'une clause dérogatoire "des contractants." I consider it just as much beyond the power of the Plaintiff to control or add anything inconsistent to the terms of the lease, as if, instead of it having been made verbally, it had been made in the most solemn and authentic manner known to the law, by a notarial instrument, in which the contract of the parties was recorded as a lease for one year, and *no longer*. Surely, in that case, violence could not be done to the agreement of the parties by any evidence of usage or custom, however clear and decisive

Referring to the authorities on English law, the rule as to annexing incidents to mercantile contracts or leases, by evidence of custom or usage, is governed in that jurisprudence by principles precisely similar to those I have mentioned (1).

If the Respondents had a right to take possession of the pew, their manner of exercising that right, provided they were guilty of no excess, cannot be called in question. This is in accordance with a well-known rule of the Roman law, which, I apprehend, finds a place in all systems of jurisprudence. (2)

There can, therefore, be no enquiry *quo animo* a party

(1) Leake on Contracts, pp. 111-115; *Webb* v. *Plummsr*, 2 B. & Ald. 746; *Clarke* v. *Roystone*, 13 M. & W., 752. (2) Dig. De Reg. Jur., L. 151.

exercises his undoubted right. At all events, this is the law of England (1), and I find the law laid down in precisely the same terms in a reported decision of the Court of Queen's Bench for Lower Canada (2). I think the appeal should be dismissed with costs.

TASCHEREAU, J. :----

The Appellant, as a member of the congregation of St. Andrew's Church, Montreal, brought against the Respondents, in the Superior Court in that city, an action upon the case, complaining of their refusal to allow him to continue, in 1873, in the peaceful occupation of a certain pew, known as No. 68, in the church above mentioned. He alleges, in his declaration, that from the year 1867 to 1873 he was lessee of that pew from the Respondents, at a yearly rent of $66.50, which sum he paid them regularly, and that he thus became and was a pewholder under the tenth by-law made under the Act of Incorporation of Defendants, and amendments thereto. That his holding of pew No. 68 for the year 1872 was *by verbal lease*. He further alleges that on the 7th December, 1872, he received from Respondents a notice that they declined to re-let him a pew for the year commencing the 1st day of January, 1873, which notice was in the following words, to wit :----

" MONTREAL, 7th December, 1872.

" Extract from the minutes of meeting of the trustees " of St. Andrew's Church, held in the vestry, on Satur- " day the 7th December, inst. It was resolved :

" That, in order to sustain the action of the congre- " gation, taken in regard to Mr. James Johnston, at its

(1) Williams' Notes to Saunders, pp. 18, 19; (2) *David* v. *Thomas*, 1 L. C. Jurist, p. 69.

" meeting on the evening of the 4th November last, " the trustees do now decline to let a pew to Mr. " James Johnston for the ensuing year.

" Carried,—Mr. A. Buntin dissenting.

" (Signed) JAMES WARDLOW,
" St. Andrew's Church,
" Secretary.

" To James Johnston, Esq., Montreal."

The Appellant alleges, also, that on receiving this notice he wrote a friendly letter to Respondents, saying that he was anxious to continue the lease of his pew for another year, and that, on being informed that they would not let him a pew, he caused a legal tender of $66.50 to be made to Respondents on or about 20th December, 1872, as rental for the year commencing about 1st January, 1872, which tender was refused by Respondents, who further refused to let him a pew for any sum. He alleges that this was followed by a notarial protest of the same date, and by another on the first juridical day of January, 1873, with a renewal of tender, which was refused by Respondents, with a declaration that they would not let the said pew, or any other pew, to the Appellant. He alleges, further, that notwithstanding said refusal, as an elder and a member of Session of the church, he was present at Divine Service on the first day of January, 1873, and occupied the pew in question, and continued to occupy it during the first ten days of January, without objection or interference by or on the part of the Respondents, and that he thus became the legal lessee of pew 68 for the year 1873, by tacit renewal (*tacite reconduction.*)

He then states that subsequently to the 10th January, 1873, he was molested by Respondents in the

occupation of his pew to such an extent, that Appellant's family was driven from attendance at Divine Service in said church, and that he had to put up with the presence of strangers in his pew, seated there by order of the Respondents. That Respondents had his cushions and books removed from the pew, and put and pasted in his pew placards with the words "For Strangers" printed thereon, and, in fact, by several other acts that they treated Appellant as having no right to the occupation of the pew, and did, in fact, act with intent to bring the Appellant into contempt and ridicule, and to force him to leave the church, to his damage of $10,000.

The Respondents pleaded that Appellant was no longer a pewholder after the 31st December, 1872, alleging their right to refuse to lease a pew to Appellant, and that according to the by-laws of the church they were under no obligation to continue the lease, and, moreover, that they were justified in so doing by a desire for the preservation of peace, and that they acted in good faith.

The facts proved in the case justify the averments of Appellant's Declaration, and, moreover, establish that the Respondents are a corporate body by virtue of Chap. 154, 12 Vict., which grants them the property, the administration of the temporalities of the church, for the use and advantage of the congregation. Now, it appears that in the year 1872, the Appellant gave offence to certain members of the congregation. He was then requested to retire from the eldership, and, having refused, the several resolutions above alluded to were passed, and, as the result of his grievances, the Appellant brought the present action. He has been unfortunate in the Superior Court, and on appeal to the Court

of Queen's Bench, the Court, by a majority of one out of five Judges, has confirmed the judgment which dismissed his action. I must here admit that the receipt for the rent constitutes a lease of that pew for the year commencing 1st January, 1872, and ending 31st December, 1872. Such a lease, under general terms, would terminate with the year, and a *tacite reconduction* could not for a moment be inferred, according to Article 1657 of Civil Code; but I am of opinion that the rule of law applicable, according to our Civil Code, to a lease of an immoveable property, is not applicable to a lease of a pew.

The Appellant contends that, according to the rules of the church, being a member of the congregation and an elder, he was entitled each year to the lease of a pew on payment of the yearly rent, and could not be deprived of that right without a fair trial by a competent tribunal, not composed of persons such as the trustees whose authority he energetically denies, but of the Kirk Session. I adopt in this cause this view of the Appellant. It is undeniable that according to the usuage of that church, a member once a lessee of a pew can continue to hold it by paying the usual rent and remaining a member of the church, unless he be guilty of immoral behaviour, and in that case the member can only be deprived of his pew by the Kirk Session. They alone were entitled to pass a vote of censure against the Appellant and settle the difficulty.

Moreover, the Respondents are mere trustees, to be compared to procurators and agents, with the very limited powers given to them by the constitution and by-laws of the church,—and nowhere can I find such extraordinary powers as those claimed by the Respon-

nents as trustees. The 10th Article of the by-laws, read in connection with the 9th Article, clearly shews that once lessee of a pew, a member of the congregation, by paying the annual rent and conforming to the rules of the congregation, is entitled to all the privileges belonging to the proprietors.

Now, as to the merits of the case relating to the justification set up by Respondents, I admit that the lan-language of the Appellant towards his minister was not the most polite, having flatly contradicted him on a question of facts; but some allowance must be made for the excitement of the moment; and if he was somewhat wrong in the beginning, his fault was certainly more than compensated and atoned for, by the petty annoyance he was subjected to on the part of the trustees, and specially by the unfair and illegal resolution to deprive him of the right to a pew. Having no authority, in the capacity in which they acted, to refuse to re-let pew No. 68, or any other pew, which was tantamount to an excommunication from his church, the conduct and language of the trustees towards a man of character and energy must have been very offensive, and of a nature to wound his feelings. I am therefore disposed to allow the appeal. I am of opinion that Appellant was entitled to his pew, and could not be deprived of it in this manner, so long as he paid the rent and remained a member of the corporation, unless he be expelled by the Kirk Session. I would allow him $300 damages for the ill-treatment and vexations he has been subjected to, by the conduct of the Respondents, with full costs in all the Courts.

FOURNIER, J :

L'Appelant a, depuis l'année 1867, jusqu'à l'année 1872 inclusivement, continuellement occupé un banc dans l'Eglise St. André de Montréal. En 1872, il occupait légalement le banc No. 68, comme membre de cette congrégation, en vertu d'un bail verbal qui lui avait été consenti par les Intimés à raison de $66.50 par année, payable d'avance suivant les réglements adoptés pour la régie des affaires de cette congregation et l'acte de 12 Vict. Ch. 154 qui l'a érigé en corporation. La qualité de locataire de banc (pew holder) lui donne en vertu de l'article 12 de ces réglements tous les droits et priviléges appartenant aux locataires de bancs (pew holders), suivant la constitution, les réglements, la pratique, et les coutumes de l'Eglise St. André depuis son établissement.

En 1871, l'Appelant fut élu un des officiers spirituels (elder) et occupa cette position jusqu'à l'époque du grief dont il se plaint dans sa déclaration.

Le 7 Décembre 1872, les Intimés lui firent remettre l'avis suivant : " It was resolved that in order to sus- " tain the action of the congregation taken in regard to " Mr. James Johnston (the Appellant) at its meeting of " the 4th November last, the trustees do now decline " to let a pew to him for the ensuing year. Carried--- " Mr. A. Buntin dissenting."

L'Appelant, nonobstant cet avis, informa les Intimés qu'il entendait conserver la jouissance de son banc. Afin de ce conformer à l'obligation de payer d'avance, il fit faire deux fois en Décembre 1872, et une autre fois le 2 Janvier 1873, jour de l'échéance, des offres réelles du montant du loyer du banc en question. Malgré le refus de ces offres, il continua d'occuper le banc

pendant quelque temps ; mais les syndics ayant fait mettre des placards imprimés indiquant qu'ils avaient mis ce banc à la disposition des étrangers, dont quelques-uns prirent possession malgré l'Appelant ; ayant de plus, fait enlever les coussins et les livres de l'Appelant, qu'ils firent transporter à son bureau d'affaires, ce dernier se trouva enfin forcé d'abandonner son banc pour éviter un plus grand scandale.

Les Intimés ont plaidé par dénégation générale, et aussi par exception qu'il n'avait qu'un bail d'un an pour le banc No. 68, et qu'ils avaient le droit de refuser de le lui louer pour une autre année, invoquant spécialement l'usage de la manière suivante : " That according to the " by-laws, customs and practice of the said church, the " pews therein are let each year, and from year to year,and " without notice for their termination ; that there was " no continuation of his lease, and they were under no " obligation to continue the lease to him." Ils ajoutaient qu'ils n'avaient pas jugé à propos de lui louer un banc pour l'année 1873, ni pour aucun autre temps ; que le 7 Décembre, ils avaient dans leur discrétion décidé de ne pas lui louer de banc, décision qui fut confirmée dans une assemblée générale de la congrégation.

La prétention de l'Appelant est d'après ce qui précède, que comme membre de la congrégation et comme locataire de bancs pendant plusieurs années, les Intimés n'avaient pas le droit de le priver de son banc, tant qu'il se conformerait à la condition de payer d'avance. Il prétend de plus que faute d'avis conformément à l'article 1657 du Code Civil, il y a eu continuation de son bail, par tacite reconduction.

La difficulté en cette cause repose entièrement sur la nature du bail fait à l'Appelant par les Intimés dans

l'Eglise de St. André à Montréal, d'un banc d'église sans qu'il ait été fait de conditions spéciales entre les parties. On ne peut considérer comme des baux les différents reçus donnés à l'appelant pour constater le paiement de son loyer pendant les cinq années qu'il a occupé un banc dans cette église. Ils sont tous dans la même forme, je ne citerai que le dernier :----

" St. Andrew's Church.
" No. 1----$66.50.

" MONTREAL, January 9th, 1872.

" Received from James Johnston the sum of sixty-
" six $\frac{50}{100}$ dollars, being rent of 1st class pew No. 68 in St.
" Andrew's Church, Beaver Hall, *for the year* 1872."

Ce reçu ne fait preuve que du paiement pour 1872 ; il ne contient aucune expression qui puisse faire voir quelle est la durée du bail qu'il fait nécessairement supposer. S'il y avait eu un bail par écrit de ce banc pour dix ans, pour la même somme, payable annuellement et d'avance, e reçu aurait-il été conçu dans une autre forme ? Certainement non. Le bail intervenu entre les parties en cette cause n'a pas été mis par écrit. Il est en preuve que ce n'est pas l'usage de les faire ainsi. Le seul article des règlements concernant les baux est l'article 10 ainsi conçu : " Any person who shall lease " a pew from the Trustees for one year and pay the rent " in advance shall be considered a pewholder." Le terme d'une année mentionné dans cet article n'est pas pour déterminer la durée du bail en déclarant qu'il ne sera pas de plus d'une année, mais il n'est là évidemment que pour définir la qualité de *locataire* de banc (*pew-holder*) qui donne à celui qui la possède le droit d'être considéré comme membre de l'église. Le même article

parlant d'une autre catégorie de membres, ceux qui ont droit de voter à l'élection du comité chargé du choix d'un ministre, déclare qu'ils devront avoir payé trois années de loyer; mais là encore c'est pour définir une qualification, non pas pour fixer la durée du bail. Au contraire, l'obligation de payer annuellement et d avance n'implique-t-elle pas que le bail doit avoir une durée indéfinie ? Il n'y a rien ni dans ces règlements, ni dans l'acte d'incorporation qui fasse voir qu'on a eu l'intention de déterminer la durée des baux. Ce silence n'exclut pas certainement le droit des syndics de faire des règlements sur ce sujet, mais il indique clairement qu'on n'a pas voulu en faire, parce que l'on a, sans doute, agi sur la présomption que celui qui loue un banc, le prend pour tout le temps qu'il sera membre de la congrégation. Il n'est pas supposé devoir changer d'église comme de logement. On n'a pas fixé le terme du bail parce que l'on a considéré que de sa nature il doit être pour un terme indéfini ; on y a mis qu'une seule condition, le paiement d'avance. Jusqu'ici c'est ainsi que le règlement a été interprêté et mis en pratique. La preuve établit ce fait de la manière la plus complète.

La prétention des intimés que c'est l'usage de louer les bancs annuellement a été contredite de la manière la plus formelle. Bien, au contraire, il est prouvé au-delà de tout doute que de tout temps l'usage invoqué par l'Appelant a prévalu. Je considère la preuve sur ce point comme suffisante pour me justifier d'arriver à la conclusion que le bail fait à l'Appelant, en l'absence de toute preuve contraire, est conforme à l'usage constant depuis l'existence de la congrégation. Dans l'acte d'incorporation, pouvoir est donné aux syndics de faire des règlements, etc., pourvu qu'ils ne soient pas

contraires aux lois de la province, ou aux autres dispositions de l'acte d'incorporation ou à la constitution de l'Eglise d'Ecosse telle qu'établie par la loi, en Ecosse. L'article 1er des réglements déclare que l'Eglise de St André conservera la forme de culte et de gouvernement de la dite Eglise Etablie d'Ecosse. Cette déclaration ne justifie-t-elle pas de recourir aux usages suivis dans cette église concernant la location des bancs et d'en faire l'application dans ce cas ? Je le crois, pourvu qu'il n'y ait point conflit entre ces usages et les lois du pays. Il n'en existe certainement pas. Car d'après la preuve faite en cette cause les usages suivis à ce sujet en Ecosse différeraient peu de ceux qui le sont généralement dans la Province de Québec. Ils ne sont en contradiction directe avec aucune des lois de cette province.

Pour expliquer un contrat, on peut invoquer l'usage telque le permet le code civil qui a conservé la maxime du droit romain. *In contractibus tacitè insunt quæ sunt moris et consuetudinis.*

En consultant ces usages d'après la preuve, on voit que l'Eglise St. André a adopté celui de l'Eglise d'Ecosse, de louer les bancs à des membres de la congrégation, sans terme défini, à la condition de payer le loyer d'avance.

Pour toutes ces raisons tirées de la nature du bail, de l'usage de louer les bancs dans l'Eglise St. André, de l'usage suivi en Ecosse, et que l'on peut invoquer sous les circonstances particulières de cette cause, je crois que l'Appelant était légalement en possession du banc No. 68, dont il a été injustement dépossédé.

Cette manière d'apprécier la nature du bail en question étant incompatible avec idée d'une *tacite réconduc-*

tion, je rejète la prétention émise à ce sujet par l'Appelant.

Les Intimés ont essayé, mais en vain, de prouver que la conduite de l'Appelant dans les assemblées de la congrégation et de l'église avait été telle qu'ils étaient justifiables de lui enlever son banc. Comme les faits ont été mentionnés en dét ail par ceux qui m'on précédé, je m'abstiendrai de les répéter. Si la conduite de l'Appelant méritait une censure ce n'était pas aux Intimés à la lui infliger, mais c'est devant un tribunal spirituel, le Kirk Session, qu'il devait être traduit pour en répondre. Cet avancé n'a été fait par les Intimés que pour essayer de pallier l'abus de pouvoir qu'ils ont commis par leur résolution du 7 Décembre, refusant de louer un banc à l'Appelant pour supporter l'action de la congrégation t le forcer de résigner sa charge d'*elder* et le priver du droit de prendre part aux affaires de l'église. C'est pour arriver à ce résultat qu'ils ont eu recours à l'expédient de lui refuser un banc, le mettant de cette manière hors de l'église. Mais les Intimés oubliant qu'ils ne sont que des administrateurs, prétendent qu'eux seuls forment la corporation et que l'Appelant ni aucun autre, ne peuvent réclamer l'exercise d'aucun droit comme membre de la congrégation (corporator). Cependant ils dérivent leur pouvoir de ces mêmes membres qu'ils prétendent n'avoir aucun droit ; ils ne sont que leurs agents, soumis, dans bien des cas, au contrôle des assemblées dont les membres sont les vrais propriétaires de l'église. Je répéterai à ce sujet les paroles de l'Honorable Juge en Chef Dorion :

" As commoners, the members of this congregation " have certain rights resulting from the implied contract " entered into when they joined the congregation, and

" of which they cannot be deprived arbitrarily by the " Respondents. Among these rights is that of obtain- " ing seats and pews on the same terms and conditions " as all the other members of the congregation, and of " retaining them as long as they submit to the rules " and usages of the Church."

Pour ces motifs, je concours dans le jugement infirmant celui de la Cour de la Banc de la Reine renvoyant l'action de l'Appelant, et je suis d'avis que les Intimés doivent être condamnés à payer $300 de dommages, avec tous les frais tant en Cour Inférieure que dans cette Cour.

HENRY, J. :—

The Appellant having been in the legal possession of a pew (No. 68) in St. Andrew's Church, Montreal, during the year 1872, and during the months of January, February, March and April, 1873, complains of being disturbed in his possession thereof, on several occasions during the months named by the Respondents, they having removed his books, cushions, &c., therefrom, and by placing placards therein intimating that the pew should be reserved for strangers. The Appellant is shown to be one of the congregation for whom the Respondents, as Trustees, held the title of the church (1). He had been the holder of pews in the church for several years, and of the one in question (No. 68) during the years 1869 and 1872. The church having been burnt in October, 1869, and not rebuilt and occupied till November, 1870, the Appellant occupied No. 66 instead of No. 68, from that time till the end of 1871, returning to No. 68 in January, 1872.

(1) See Art. 12 of the by-laws.

The rents of the pews were paid annually, but no written leases were granted and no letting was annually made, but those in possession continued from year to year to pay the rent, sometimes but not generally in advance. The Respondents contend that under these circumstances the leases terminate every year, that no notice to quit is necessary, and that they, as trustees, could be justified, the day after the expiration of the year, in turning out, without any previous legal notice to quit, without any other legal justification or necessary explanations, the books and furniture of any of the pewholders.

If they have that abstract right, we cannot, in an action like the present one, withhold from them the defence which that right enabled them to set up.

The arbitrary and improper exercise of a right so peculiar as that claimed, would lead to the most unpleasant consequences, and the existence of it would enable the Trustees, without legal restraint, to unseat and drive from their pews any number of the pewholders they pleased to injure, without a moment's notice.

All that would be necessary for them would be on the first day of January, in any year, to say to A, B, C or D: "We have decided that although you are an elder and communicant of the church, and one of the parties for whom we are trustees, you shall no longer hold a seat in the church." Can any one say that such should be the relative position occupied by Respondents and those for whose use they hold the title in trust? The Respondents do not avowedly claim that position, but give a reason for the commission of the acts complained of, and make an insufficient attempt at a justification.

Their justification for the acts complained of, on the ground of alleged improper conduct of Appellant, must

wholly fail, for neither the law nor the Constitution of the church, empowers them to refuse the continued occupation of a pew to which the party holding it was otherwise entitled, because they *might* have objections to his moral character or conduct. By their plea they attempt a justification on the ground that, to the best of their judgment, before the 31st of December, 1872, it had become undesirable and inexpedient to let the said pew No. 68 to the Appellant for the year commencing the first day of January, 1873, or for any other time, and in the exercise of their discretion, and in good faith, without malice or any other than conscientious motives, and with a desire to fulfil their duties, and for the preservation of peace and harmony in the congregation, the Respondents did, to wit: on the 7th day of December, 1872, decide and determine not to let *a pew* (that is, any pew,) to the Appellant. For the sake of the Respondents, it is, perhaps, to be regretted that it having become "undesirable and inexpedient, to the best of their judgment," to give any sitting in his own name in the church, does not constitute them the judges in such a case; nor does it allow them, "in the exercise of their discretion," to take the stand they did; and although they acted in good faith, and without malice, &c., there is no justification under this plea; and it is to be further regretted that the course they adopted (conscientiously, no doubt), resulted, as in many other cases where arbitrary power is exercised or attempted to be used, in lessening instead of increasing the peace and harmony of the congregation. The By-laws and Constitution of their church directly vested the power, not in the trustees (who are frequently not persons capable of deciding questions of moral conduct, &c., or versed in church discipline), but in the Session, and, by appeal, in the Synod.

The Appellant had recently been deposed as an elder by the Session, but the Synod reversed the action of that body; and at the time of the refusal to him of a seat in the church, he was, by the rules of that church, and by a decision of its highest court, an elder in full standing, and one in regard to whom the Trustees had no right to exercise their judgment or discretion so far as to refuse him a seat for the reasons pleaded; and if, in their judgment, in a matter in which they had no legal control, they thought it "undesirable and inexpedient" not to leave the Appellant in the enjoyment of his rights, but invaded them, they must abide the consequences; and if, by attempting to usurp power that properly belonged to other bodies in the church, and by disregarding the action of the Synod, whose decision should have been respected, they have produced litigation and otherwise increased discord and want of harmony in the congregation, it is but what might have been expected. The attempt by the Respondents and the Session to disrate the Appellant having failed, we can only conclude that the attempt to do so should not have been made; and if the Appellant, after the judgment of the Synod, acted improperly, a fresh case, before the proper authorities, should have been brought; but to permit the trustees, who merely hold the title for the benefit of the congregation, and who have limited powers only, as their dealing with it, to decide upon the conduct of one of its members, and an elder, too, and thereupon deprive him of a pew or seat in his church, would be to strike at the root of all proper church government, and create an *imperium in imperio* calculated to create all sorts of strifes and conflicts.

Having thus disposed of this justification, I will now

consider the case as presented by the other pleadings Much has been said at the several arguments of this case, a good deal of irrelevant testimony introduced, and many points discussed, in the judgments rendered in this case previous to the appeal to this Court; but many of those points and arguments, and a great portion of the evidence, I consider unnecessary to refer to in my view of the law that must govern the decision.

The Appellant claims that he was rightfully in the possession of the pew in question when the trespasses and wrongs were committed. 1st. Because having been in possession in 1872, he was entitled to three months' notice to quit, and without which he could hold over for the year 1873, during which year the trespasses complained of were committed. 2nd. That having continued in possession eight days after the 1st of January, 1873, under Article 1609 Civil Code, Lower Canada, he could hold possession on paying the annual rent in due time for that year by *tacite reconduction*.

The Respondents deny the correctness of these positions, and contend, as to the first, that no notice to quit was necessary, and, secondly, that they having given the notice of the 7th December, 1872, and subsequently refused to receive the rent, there was no *tacite reconduction*.

I am of opinion that there was no renewal of the lease by *tacite reconduction*, and that the notice referred to, and the refusal to receive the rent, destroy the Appellant's contention on that point. See Articles 1609 and 1610 Civil Code (L. C.) I will, therefore, proceed to consider the Appellant's first position, and in doing so must, in the first place, solve the question as to the *nature* of his holding. Was it by a lease? I feel bound

to decide that it was, and by a *verbal one*, for the receipt for the rent for 1872 does not constitute a lease. It is merely an acknowledgment of the receipt of the rent for the year, signed *on behalf* of the Treasurer, and would not be incompatible with a holding by lease, written or unwritten, for life, or from year to year, or otherwise. Besides the Treasurer had no authority to lease or let pews or make any contract therefor. The letting was a verbal one by the Respondents, as Trustees, to the Appellant, but it has been adjudged that if it were a lease, it was not of the ordinary kind. Mr. Justice Sanborn properly says:----" In St. Andrew's " Church in Montreal some persons have a *proprietary* " interest in pews----others, as Appellant, hold only by *lease*, having no ownership in a pew ;" and adds:----"As " the rights which ownership of pews gives to the " owner are peculiar, and not subject to many of the " ordinary incidents of property, so what is termed " *lease* is not an ordinary kind of lease." And further: " It is a means of contributing to the support of the " Gospel." I cannot conceive that in the relation of the parties here now, the *object* for which the pews are let, or the purpose for which the rent is applied, can in any way affect the character of the holding, or that *the application of the rents* can in any way affect the rights of the tenant who pays them; nor can it legally affect those rights, whether they are merely trustees or owners; nor are the trustees the less lessors in the ordinary sense, as between them and their tenants, because the funds derived from pew rents are only received in trust for the benefit of the congregation, and as "means of contributing to the support of the Gospel."

In support of the view taken by him, Mr. Justice Sanborn quotes Pothier (Louage ; No. 4), who says :---- " On tolère néanmois le louage des bancs et des chaises " dans les églises ; on peut dire ce n'est pas proprement " un contrat de louage, et ce qu'on donne n'est pas " donnée comme le prix d'usage de ces choses qui ne " sont pas (*not applicable*, as the Judge quotes him, but " *appréciable*,) mais comme une contribution aux " charges de la fabrique." This doctrine is held and may be properly applicable to churches under the laws of France and to Roman Catholic Churches in Lower Canada, and be totally inapplicable to churches held by a civil corporation like the one in this case. In this and other countries, churches are owned by one or more persons not necessarily belonging to the same religion as those who worship in them, and surely the doctrine of Pothier cannot be held applicable to them. If owned by a civil corporation, the same principles, I take it, would govern, as if owned by an individual, except as being the trustees and those for whom they hold. But if French law is to be enforced in one respect, why not take it in its integrity and comprehensiveness ? We would then have, under the French and Lower Canadian parochial organization which prevails with respect to the Roman Catholic Church, and even under the jurisprudence in England and Scotland in regard to the Established Church there, to decree to the Appellant, as lessee of the pew in 1872, the right to retain it as long as he resides at Montreal, on payment of the rent originally agreed upon, subject to the right of the Respondents as trustees, with the sanction of the two-thirds of the Congregation, to raise or lower it. In that view the Appellant's action would

be sustainable to recover by law compensation for the damages done to him.

The trustees in this case hold the titles, and, although restrained in some respects, they have the ordinary powers of trustees to lease; and can do so "within the "terms of the Constitution and By-laws and as incident "to their title. Corporations aggregate may make what "estates they please in their church or other lands."—(1) When that power is so exercised by them I can see no difference in principle by which their leases would, as between them and their lessees, be different from other leases by other trustees, or be subject to the application to them of different rules of law. The lessee in either case obtains the right of possession and user for the time, and pays the rent agreed on. The trusts are declared by the conveyances, the Acts of Incorporation, and its amendment and the by-laws, and the trustees have to account in the ordinary way to their *cestui que trust.* After full consideration of the position of the Respondents, in regard to their lessees, I can come to no other conclusion than that it is one incident to any ordinary civil corporation, and that the Court, without in the slightest degree trenching on the religious rights, privileges or responsibilities of the trustees or congregation, or with any discretionary power of the former, is empowered and bound to deal with the subject matter, as one purely of civil contract, and in that view to consider and adjudge the rights of parties as in regard to the proprietorship and leasehold of pews. The exercise of this power will not trench on the rights of spiritual jurisdiction, nor will it in any way affect the contracting powers of the trustees. It

(1) 2 Step.: Dom., 733.

only, in this case, is invoked to decide *upon the contract made*, and for an unlawful interference with the rights of the Appellant under it.

To sustain the proposition that the Appellant held by lease, and not a mere easement or license, it is necessary, first, to show that the subject-matter is capable of being leased, and if there be no legal prohibition, the understanding and expressed views upon that point of the parties themselves, may aid in ascertaining their respective rights under the circumstances. A lease is well defined at Common Law to be "A conveyance by which a man grants lands or tenements to another for life, for years, or at will (1) In ordinary legal intendment, tenement includes not only land, but rents, commons, and several other rights and interests issuing out of, or concerning lands. (2) By Article 1605, C. C. (L.C.) "All "corporeal things may be leased or hired, except what "may be excluded by their special destination, and those "which are necessarily consumed by the use made of "them." By Article 1606, "Incorporeal things may also "be leased or hired, except such as are inseparably con-"nected with the person, &c." The pew in this case is, in my opinion, a subject of Article 1605, and under that Article may be leased for any term within the trust. If a subject of Article 1606, it might also be leased.

By the 10th Article of the By-laws, "Any person who "shall *lease* a pew from the Trustees for one year, and "pay the rent in advance, shall be considered a pew-"holder. The rents of pews and sittings are to be paid "annually in advance, from the 1st day of January, and "are to be considered then due, &c." I have before stated that in regard to the church temporalities, the

(1) Step., Com. 512; (2) 1 Step., Com. 170.

corporation here not being an ecclesiastical one, but the creature of a special Act of Incorporation, partakes of the character of all ordinary civil corporations, and I have so decided after an exhaustive search for the leading principles to determine that point. If correct in the positions taken, it necessarily follows that the trustees had power to lease for a year, or for years, the pews in the church, and that the party leasing from them got a leasehold title, and not a mere easement or license to occupy and use, which was revokable. The right acquired by the Appellant was not, therefore, an easement; an easement lies not in livery, but in grant; and a freehold interest cannot be created or passed otherwise than by deed; "and the right of *profit à* "*prendre*, if enjoyed by a holding of a certain other estate, "is regarded in the light of an easement appurtenant "to such estate; whereas, if it belongs to an individual, "distinct from any ownership of other lands, it takes "the character of *an interest or estate in the land itself*, "rather than that of a proper easement in or out of the "same." (Washburne on Easements (1); *Grimstead* v *Marlowe*,) (2) "Easements, that is, such as stated, being "interests in land, can only be acquired by grant, and "ordinarily, by deed, or what is deemed to be equivalent "thereto, a parol license being insufficient for the pur-'pose." (Washburne on Easements, (3) "No servitude "can be established without a title; possession even 'immemorial is insufficient for that purpose." (4). "As regards servitudes, the destination made by the "proprietor is equivalent to a title, but only when it "is in writing, and the nature, the extent, and the 'situation of the servitude be expressed." (5) A

(1) P. 7; (2) 4 T. R., 717; (3) P. 18; (4 C. L. C., 549; (5) C.L.C., 551.

parol license being revokable, no term of holding could be created, and therefore the holding by the Appellant cannot be an easement or under a mere license. His holding must, therefore, be as a lessee under a verbal lease. It is now the settled legal doctrine that a corporation, just as the Respondents' corporation in this case, has all such authority as will conduce to the attainment of its ends, save such as are, by direct provision in its Act of Incorporation or other constating instruments, or by necessary inference from the same, denied it. (Bryce on Ultra Vires, 38, *et seq.*, where some decisions are quoted.)

"Ownership is the right of enjoying and disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations." (1) Then, I take it that not only had the Respondents as trustees, by the express terms of the By-laws, by the Civil Code, but also by the late decisions, the power of granting leases of pews, and that such would bind the congregation their *cestui que trust*. I will apply but two more tests:----1st. Could not the Appellant have had recourse for damages, if the Respondents, during the year 1872, had ejected him from the occupation of the pew, or have interfered with his proper use of it? Having received the rent, would they not be estopped from saying he held only by "license" when their contract was irrevocable for that year? Were they not bound, under the 3rd section of Article 1612 of the Civil Code, to give "peaceable enjoyment, &c., during the continuance of the lease?" And 2ndly, Had not the Respondents, in the language of Article 1619, for the payment of their rent and obligations of the

(1) C. C. L. C. 406.

lease, a *privileged right* upon the moveable effects which are found upon the property leased, upon which they had a *privileged claim* for any rent falling due.

Having disposed of the question as to the lease, the next point for consideration is the *nature* of the lettings as to the term granted. I have already characterized them as ordinary leases, and can find no law to make them otherwise.

We have now to consider the nature of the holding of the pews for over forty-nine years up to 1872. The trustees let the pews originally for a year, and for rent in advance, and the pewholders, whether the rent was paid or not in advance, were allowed to become lessees for a second year by *tacite reconduction*, and so on from year to year. Art. 1609 provides: "If the lessee remain "in possession more than eight days after the expiration "of the lease without any opposition or notice on the "part of the lessor, a tacit renewal of the lease takes "place for another year, or for the term for which such "lease was made, if less than a year, and the lessee can "not thereafter leave the premises or be ejected there-"from unless notice has been given within the delay "required by law." This article clearly applies to all holders of a pew for over a year. The Appellant was a lessee of No. 68 for two years ('68–'69), and during the latter year was clearly entitled to notice. He resumed possession of it in 1872, having occupied No. 66 in 1871 at the same rate as he previously paid, without any new bargain or arrangement, so far as appears. What then was, under all the circumstances, the nature of the holding under the contract? Would it not be a fair inference that he resumed his former position as to No. 68, and which was the same as that of all other pewholders who

held for over a year? And was it not the true understanding of the parties that his occupation should be identical with all the other pewholders? Did not the Respondents virtually say: "The rule and practice is to let pews, for rent payable annually in advance, and you shall have the same tenure as all the others, which is a holding as long as you pay the rent in proper time; and we having now adjudged you as a fit person to hold a pew, you can, by paying the rent in advance, continue to hold the pew until we give you notice to quit, or you are declared by the proper authorities not a fit person to do so?" I feel satisfied that, had such been submitted for the consideration of a jury in an English Court, and they found that such was the implied contract, the verdict would be sustained, and I have found no law or rule which would prevent a Judge in Lower Canada finding the same under the Code of Civil Procedure. In that case the Appellant would be entitled to a legal notice to quit. It is not, however, necessary, in my opinion, to decide positively that point; although, did the determination of the lease depend solely on it, I would not have any hesitation to do so.

That in *all* cases of verbal leases, and where the term is uncertain, a notice is necessary, appears to me unquestionable. By Article 1657, "When the term of a lease is "uncertain, or *the lease* is *verbal*, or presumed, as provided "in Article 1608, neither of the parties can terminate it "without giving notice to the other, with a delay of three "months, if the rent be payable at terms of three or more "months; if the rent be payable at terms of less than "three months, the delay is to be regulated according to "Article 1642." *When the term of the lease was uncer-*

tain. This is clearly applicable to a written lease where the term is not stated, and under which a party may hold by the year, quarter, month or otherwise. It is also applicable to verbal leases, where the term is not originally agreed upon, for the word "lease" applies to both; and nothing further was necessary to be provided for by the Code, unless a distinction were intended to be made otherwise between *written* and *verbal* leases. The Code evidently was intended to go further, and adds, "or the lease is verbal," a comprehensive term embracing all verbal leases, and so plainly mandatory that I feel bound to the consideration that, for good reasons (one of which may have been, not to leave so important a right as the ending of a lease to be resolved by verbal proof, subject, as it would be, to conflicting evidence), the framers of the Code used the words advisedly, and that they, in the employment of words so plain, and the Legislature, in adopting them, intended them to apply to *all* cases of verbal leases, and to those where the term is uncertain. Such being my opinion, I am necessarily bound to declare that, as no legal notice was given to the Appellant, as required by the Code in the case of verbal leases, and, where the term is uncertain, as I maintain it was in this case, the Respondents were not justified in the trespasses and grievances committed by them, and that the appeal should be allowed, with costs, and that the Respondents should be adjudged to pay to the Appellant the sum of $300 damages for the injuries complained of.

Appeal allowed.

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