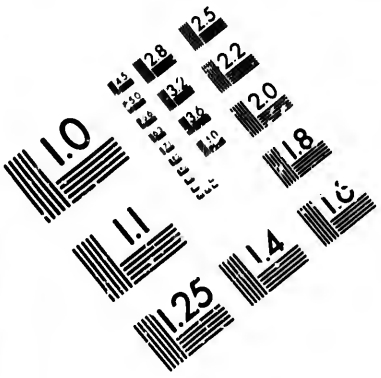

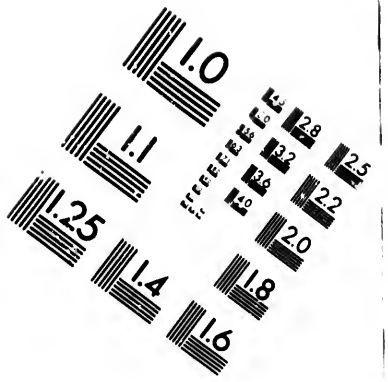

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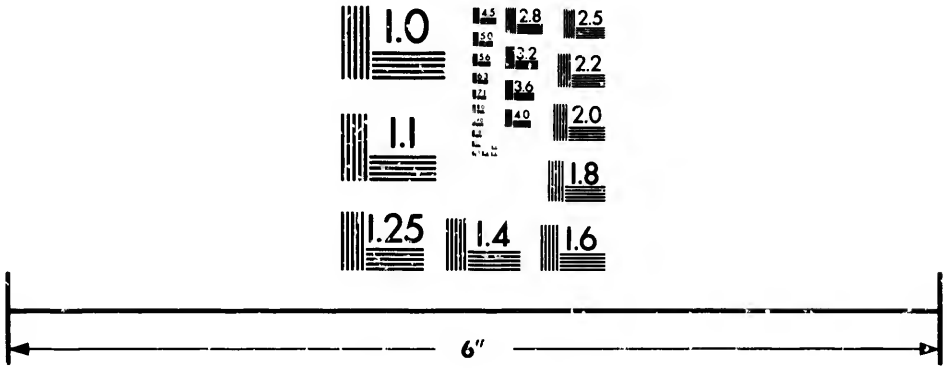

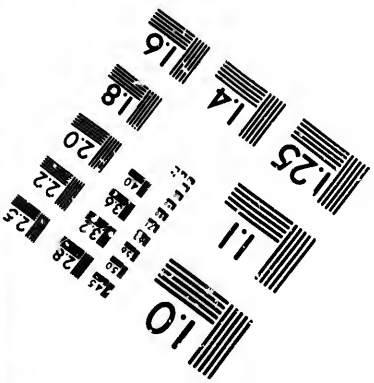

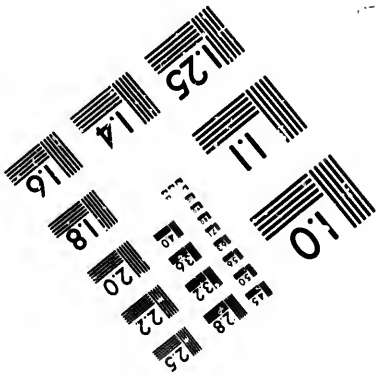

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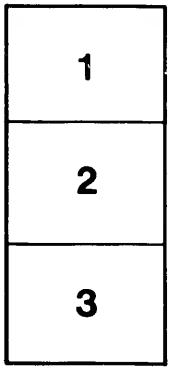

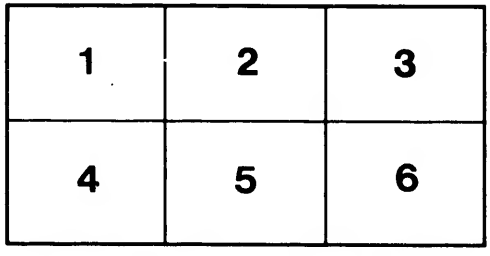

THE

GREAT PEW CASE.

A COMPLETE SYNOPSIS

OF THE

GREAT PEW CASE:

JAMES JOHNSTON (Plaintiff) - - - - Appellant,

AND

THE MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL (Defendants) Respondents:

FROM ITS INSTITUTION TO THE

FINAL DECREE OF THE SUPREME COURT OF CANADA.

COMPRISING THE PLEADINGS, AND THE JUDGMENTS, OF THE SUPERIOR COURT, OF THE COURT OF APPEALS FOR LOWER CANADA, AND OF THE SUPREME COURT OF CANADA; THE REMARKS OF ALL THE JUDGES, AND OF THEIR LORDSHIPS THE JUSTICES OF THE SUPREME COURT; WITH AN INTRODUCTION AND APPENDIX

COMPILED BY

R. D. McGIBBON, B.A.,

Student-at-Law.

MONTREAL:

DAWSON BROTHERS, PUBLISHERS.

1877.

Montreal:
PRINTED AT THE "GAZETTE" PRINTING HOUSE.

TO

THE HONOURABLE ANTOINE AIMÉ DORION,

CHIEF JUSTICE OF THE COURT OF QUEEN'S BENCH

FOR LOWER CANADA,

THIS COMPILATION IS RESPECTFULLY

Dedicated.

INTRODUCTION.

The celebrity of this case is not surprising. The peculiarities of the issues, the high position of the litigants, the exceptional character of the suit, the more than proverbial uncertainty of the litigation, the reversal of all the judgments of the Courts of the Province of Quebec by the Supreme Court of Canada—have all contributed to give it an importance which justifies its publication in book form. At the date of the institution of the action in 1873, a struggle of more than ordinary interest had commenced. Both sides were earnest and no doubt sincere in their pretentions. No effort was spared to secure ultimate success. Through each successive Court the conflict was carried with increased energy, heightened by the public interest in the case, and by the zeal of the parties. Old statutes, antiquated books, and new ones, were procured from the book-shelves of Europe and America wherewith to improvise new arguments or to embellish the old. It was, as remarked by one of the counsel, a struggle of wealth.

The Plaintiff was unsuccessful in the Superior Court, Montreal, and in the Court of Queen's Bench, but the Supreme Court of Canada awarded him $300 damages and full costs in all the Courts. The result, though a triumph for the Plaintiff, has not left the pretentions of Defendants unsupported by authority.

The Plaintiff was a member of the Church of Scotland, in Scotland, and an elder and member of the congregation of St. Andrew's Church, Montreal—a gentleman of large means and much energy. The Defendants were the wealthy Church Corporation holding and administering the church property for the congregation of St. Andrew's Church. Mr. Johnston had been a pew-holder in St. Andrew's Church continuously from

1867 to 1872 inclusive. In 1869 and 1872 he occupied pew 68. There was no express leasing of the pews to him. In 1872 he paid his pew rent and took a receipt, in the following words:

MONTREAL, January 9th, 1872.

$66.50.

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.

4½ yds. carpet, $4.68—$71.18.

St. Andrew's Church.

This humble document has been the subject of much controversy.

On the 7th December, 1872, the Trustees notified Mr. Johnston that they would not let him a pew for the following year. He tendered them the rental for the next year in advance, through a notary, and continued to occupy the pew during the year 1873. His right of tenure, however, was challenged. The Trustees placarded his pew "For Strangers"; removed his books and cushions, and seated strangers in the same pew with him. He maintained his occupation notwithstanding the disturbance, protested the Trustees for invading his rights, and vigorously asserted his title (*vide* Appendix M. N., P. R.) He based his rights:—1st. On the ground that his lease was verbal, and that he was entitled to a three months notice to terminate it, which notice he did not receive; 2nd. On the ground that there was a tacit renewal of his lease for the year 1873; 3rd. That under the By-laws and constitution and customs of the church, he was entitled to continue his lease and to occupy a pew on paying the rental annually in advance. He claimed $10,000 for the torts of the Respondents.

The Trustees contended that under the By-laws, customs and usages of the church the leases were only for a year; that they had a discretion to terminate the leases at the end of each year; that it had become expedient and desirable not to let a pew to Mr. Johnston for the year 1873; that in good faith they refused him a pew, and that their action had been approved by the congregation. It was proved that there was no express letting of the pews each year to those already in occupation. The custom was

to continue the occupation by payment of rent in advance under the 10th By-law of the church.

The views of the Judges in the different Courts, even of those concurring in the judgment of the Supreme Court, are widely divergent. The receipt thoughtlessly given by the Church Porter has formed the subject of the most refined reasoning—some of the Judges holding it to be "a lease;" others, "evidence of a lease;" others, that it is not a lease; others, that it is a mere receipt for the payment of rental for a specific term, not incompatible with the existence of a written or verbal lease for several years. One of the Honourable Justices treated the receipt as if it were a written lease, and declared that Mr. Johnston was not entitled to any notice of its termination under Article 1658 Civil Code:—"The lease, if written, terminates of course, and without "notice, at the expiration of the term agreed upon." But the lease is silent upon "the term agreed upon" for the duration of the lease. No agreement as to its term was proved. Custom had left the term indefinite. There being no express agreement how far might usage and custom be interpreted into the implied contract existing between the parties? More than one of the Honourable Judges held the lease to be verbal. Another Honourable Judge declared the lease to be verbal, but held that the Plaintiff was not entitled to three months notice, required to terminate verbal leases under Article 1657 (Civil Code), as there was in the receipt itself an express agreement as to the term, and no uncertainty as to its duration; whilst another Honourable Judge held the lease was verbal, and that a compliance with the article of the Code requiring three months notice to terminate it was essential. But the Bench even disagreed as to whether a pew in a church can be the subject of a lease in the ordinary sense, some Honourable Judges holding that it was not; others that a pew-holding was merely a right of usage (*droit d'usage*); another that it constituted an easement. Some of the Judges held that Plaintiff had rights as a *corporator* and *commoner* of which he could not be deprived by the Trustees; others, that the powers of the Trustees were absolute as to letting or refusing to let. A majority of Judges in the Supreme Court were of opinion that under the By-laws, custom

and usage and constitution of St. Andrew's Church, Plaintiff was entitled to a continuance of his lease for the year 1873. There is no doubt but that much of the difficulty in the present case has originated from the vagueness of the constitution and By-laws of St. Andrew's Church. But apart from the consideration of Plaintiff's rights under the By-laws, customs and constitution, the diversity of opinion among the Judges as to the application of the law to pews and church seats, as to what constitutes a lease, as to what constitutes a receipt, and how far custom should prevail in the absence of an express lease—is surprising. If the compiler might venture an opinion, based not merely on consideration of law, but of convenience, he would suggest that under the law of the Province of Quebec, no exceptional provisions exist establishing a different tenure for pews from that of other property. The terms of the code are plain and clear. Both "corporeal" and "incorporeal" things may be leased. Why not a pew in a church? Is it not a "corporeal" thing under Article 1605 of the Code? Why, then, should we adulterate the plain text of our jurisprudence with the abstruse considerations of rights and usages, or the still more abstruse and alien right of easement? These are abnormal grafts, which sap the vigorous trunk. Taking the law as declared in the code, the question of the title is simple of solution. The nature and duration of the tenure should be regulated by the terms of the lease. If the lease were written it would be governed by the terms of Article 1658: "The lease, if written, terminates "of course, and without notice. at the expiration of the term "agreed upon."

But if the lease be verbal or of uncertain duration (the alternative is worthy of notice) then let Article 1657 apply: "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." Much difficulty would be avoided by following the law as it is.

A lease should not be mistaken for a receipt, nor a receipt for a lease. There should surely be no misapprehension as to what

constitutes a receipt and what a lease. The unilateral instrument acknowledging the payment of a sum of money affords an imperfect substitute for the duality of a consent essential in a contract.

The present case presents to the legal profession a profound discussion from almost every imaginable standpoint of the law relating to pews and church seats. To the general public, and especially to Churchwardens, Trustees and managers of ecclesiastical property it is invaluable. From the *plethora* of authorities cited, and the elaborate though diversified opinions expressed, the professional and business man may discover the simplest manner of regulating the tenure of church property and of avoiding disputes that unhappily too frequently mar the deliberations of ecclesiastical councils.

Altogether, the case is one of the most remarkable that has been decided in this country, and deserves to be preserved as a distinct record. The declaration and pleas disclose the real issues between the parties. The evidence, being very voluminous, has been omitted, but the exhibits and extracts chiefly relied upon by the parties, are set out in the Appendix. The original judgments have been inserted in order to make the case more complete. The arguments of counsel which traversed the ground taken by the Judges, have been omitted, partly to avoid monotony and partly because a condensation of them in keeping with the dimensions of this work would be unjust to the pleaders. The opinions of the Judges require to be carefully read and studied. They constitute an enduring monument of legal knowledge on the subject matter of the case not to be found in the jurisprudence of any modern nation.

The compiler begs to acknowledge his obligations to R. Cassils, Jr., Esq., Registrar, and to George Duval, Esq., *Précis-writer* of the Supreme Court of Canada; and to L. W. Marchand, Esq., Clerk of the Court of Queen's Bench for Lower Canada.

R. D. McGIBBON.

Montreal, August 1st, 1877.

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CANADA,
Province of Quebec,
District of Montreal.

SUPERIOR COURT.

No. 2291.

JAMES JOHNSTON,

PLAINTIFF.

vs.

THE MINISTER & TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL,

DEFENDANTS.

PLAINTIFF'S DECLARATION.

JAMES JOHNSTON, of the city and district of Montreal, wholesale merchant, *Plaintiff*, complains of THE MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL, a body politic and corporate, situate and being in the said city and district of Montreal, and there having their principal place of business and meeting, duly incorporated by public acts of the Legislature of the heretofore Province of Canada, *Defendants*, and declares:

That at all the times and periods hereinafter mentioned the Plaintiff was a wholesale dry goods merchant, at the city of Montreal, and the said Defendants were a body politic and corporate, having their principal office and place of business or meeting at the said city of Montreal.

That during the years from 1867 to 1873 inclusive and continuously, the Plaintiff was the lessee of pews in St. Andrew's Church, Montreal, having leased the same from Defendants.

That for the year commencing the first day of January, 1872, and ending the 31st day of December, 1872, the Plaintiff was the legal lessee and holder of the pew number 68 in said

Church, which said pew was let to Plaintiff by Defendants, and was occupied by Plaintiff and his family for and during said year, at a yearly rental of $66.50, which sum was duly paid by Plaintiff to Defendants.

That thereby, as well as by the leasing of other pews in said church from Defendants, Plaintiff became and was a pew holder in the said St. Andrew's Church under the tenth By-law * made under the Act of incorporation of Defendants and amendments thereto; † a copy of which being the Constitution and By-laws of said St. Andrew's Church is herewith fyled as Plaintiff's exhibit number one.

That the Plaintiff's holding of said pew for and during the year from the 1st day of January, 1872, to the 31st day of December, 1872, was by verbal lease.

That on the 7th day of December last past the Plaintiff received notice from Defendants that the said Defendants declined to re-let Plaintiff a pew for the year commencing the first day of January, 1873, which said notice was in words following; to wit :—

"Montreal, 7th Dec., 1872.

"Extract from the minutes of meeting of the Trustees of St. "Andrew's Church, held in the Vestry on Saturday, the 7th "Dec. inst. It was resolved:

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

That thereupon the Plaintiff in this cause wrote a friendly letter to Defendants, saying that he, Plaintiff, was anxious to

* *Vide* Appendix B. † *Vide* Appendix A.

continue the lease of said pew for another year; but being a / in informed by Defendants that they would not let him, Plain ff, a pew, and considering that he had not received sufficient legal notice to leave said pew, he caused a tender to be made of the sum of $66.50 to the treasurer of Defendants, James MacDougall, Esq., on or about the 20th day of December, 1872, as and for the amount of rental for the year commencing the first day of January, 1873, for said pew number 68, being the fixed annual rental therefor, and no greater sum being demanded from Plaintiff, which said amount Defendants' said treasurer refused to accept, and further refused to let a pew to Plaintiff for any sum.

That subsequently to wit, on the 27th day of December, 1872, Plaintiff caused the Defendants to be notarially protested by the ministry of H. B. Wright, Esq., Notary Public, to deliver said pew to Plaintiff for the year commencing the first of January, 1873, tendering the said amount of rental for said pew to the said treasurer of Defendants, which amount Defendants refused to accept, and further refused to let said pew or any other pew in said Church to Plaintiff. A true copy of the said last mentioned protest is herein fyled as Plaintiff's exhibit number two.

That subsequently to wit, on the 2nd day of January, 1873, the first juridical day of the year 1873, when the rental for said pew became due, according to article 10 of said By-law of St. Andrew's Church, Plaintiff again caused Defendants to be protested notarially by the ministry aforesaid (H. B. Wright, Notary Public), to let, lease and continue to Plaintiff as lessee, said pew number 68 in said St. Andrew's Church, tendering by said protest the sum of $66.50, currency of Canada, to said Treasurer of Defendants; to which protest and request Defendants refused to accede or to accept said sum as rental for said pew. A true copy of said last mentioned protest is herein fyled as Plaintiff's exhibit number three.

That notwithstanding said refusals, Plaintiff, who was an Elder and member of Session of said Church, was present at divine service on the first day of January, 1873, and occupied said pew, No. 68, and continued to occupy it during the first ten days of

January without any protest, notice, or objection or interference by or on the part of the said Defendants during said first ten days of January last past. That Plaintiff thus became the legal lessee of said pew for the year commencing the first of January, 1873, and ending the 31st December, 1873, by the tacit renewal (*tacite reconduction*) by law provided.

That Plaintiff always hath been and now is ready and willing to pay the yearly rental for said pew, number 68, to wit, the sum of $66.50, or any additional sum properly imposed by said Defendants as rental therefor.

That subsequently to the 10th day of January, 1873, to wit, during the months of January, February, March and April last past, 1873, the Defendants persistently and maliciously disturbed and molested Plaintiff in the enjoyment and occupation of his said pew, No. 68, to such an extent that Plaintiff's family was driven from attendance at divine service in said church; and that Plaintiff held said pew and during said period continued to occupy it, on Sundays at divine services under most disagreeable circumstance, having been greatly discommoded, molested and disturbed in his occupation and enjoyment thereof, and greatly wounded in feeling and brought into ridicule by Defendants' conduct towards him.

That, among other things, during the said months of January, February, March and April last, the Defendants repeatedly, wrongfully and maliciously removed, or caused to be removed from said pew the books ordinarily used at divine services by Plaintiff and his family, and did not return the same thereto at the date of the institution of this action, but placed other books for the use of strangers therein.

That, among other things, during the said months of January, February, March and April last, the Defendants repeatedly, wrongfully and maliciously removed, or caused to be removed, from said pew, the cushions and hassocks, used by Plaintiff and his family therein, and sent, or caused the same to be sent, by the ministry of a carter, to the warehouse of the firm of James Johnston & Co., in the said city of Montreal, in which said firm Plaintiff is a partner, without explanations of any kind; the said

cushions and hassocks having been so delivered and left as aforesaid at said warehouse in the presence of the partners and numerous employés of said firm, and that Defendants have not sent for or returned, or explained the reasons for removal of said cushions and hassocks, though the Plaintiff communicated with them by letter on the subject.

That, among other things, during the said months of January, February, March and April last, notwithstanding that the Plaintiff had never been unwilling to accommodate strangers with sittings in his pew, when left to his free will, the Defendants repeatedly, wrongfully and maliciously ignored Plaintiff's right of occupancy and enjoyment in or to said pew, by seating or causing to be seated therein, strangers, without asking Plaintiff's permission, and in such numbers as to discommode and disturb Plaintiff in his enjoyment of said pew, and to prevent Plaintiff's family from going to said pew, lest they should be insulted by Plaintiff's right of occupancy therein and enjoyment thereof being thus questioned before the large and respectable congregation, that is in said church accustomed to assemble for divine service.

That, among other things, during the said months of January, February, March and April, 1873, the said Defendants repeatedly, wrongfully and maliciously, and more particularly on a Sabbath, about the beginning of February, printed or caused to be printed, paper placards, containing the words "For Strangers"* thereon, and further put and pasted and gummed, or caused to be put and pasted and gummed, in conspicuous places in different parts of Plaintiff's said pew, No. 68, amongst others, on the book board thereof, the said placards containing the said words "For Strangers" printed thereon, the whole in full view of said congregation, and of all present at divine service therein, Plaintiff's pew being in a central and conspicuous part of St. Andrew's Church, the said Defendants meaning and intending by the writing; posting and affixing said placards on said pew to announce to Plaintiff, and to publish and announce to all who might worship in said St. Andrew's Church, that said pew, No.

* *Vide* Appendix P.

68, was for the occupation and enjoyment of strangers, to wit, persons who had no pew in said church, and who were casual and accidental attendants thereat; that Defendants by the printing, posting and affixing said placards, containing the words "For Strangers" on Plaintiff's said pew, did wilfully, wrongfully and maliciously publish and announce to all present at Divine worship in said Church, that Plaintiff had no right in said pew, and that Plaintiff was an intruder therein, or entered therein as a stranger.

That during the whole of said period, when Plaintiff was molested and ridiculed as aforesaid, he was an Elder of said St. Andrew's Church, and the Rev. Gavin Lang, one of the Defendants, was the minister and incumbent thereof.

That notwithstanding the molestation and great annoyance and disturbance caused as aforesaid by Defendants to Plaintiff, Plaintiff has persistently and continuously occupied said pew, Sunday after Sunday, at Divine Service, since the first day of January last to the present time.

That during said months of January, February, March and April last, Plaintiff, on one occasion, removed the books for strangers placed in his pew by Defendants, to a table near by, and shortly afterwards received the following communication from Defendants' Secretary, the original letter being herein fyled as Plaintiff's exhibit No. 4:

"MONTREAL, 4th March, 1873.

"SIR:

"It having been brought to the notice of the "Trustees of St. Andrew's Church that you removed the books "out of the Strangers' pew, the Secretary was requested to write "to you, desiring you for the future not to remove the books "placed in this pew by the Trustees for the use of strangers.

"Yours truly,

"J. WARDLOW,

"Secretary St. Andrew's Church.

"To JAMES JOHNSTON, Esq., Montreal."

That on the receipt of said last mentioned letter from the Trustees, Plaintiff answered the same, by letter dated the 6th day of March last past (1873), complaining of the matters herein complained of, a true copy of which letter is herewith fyled as Plaintiff's exhibit No. 5,* declaring his rights in said pew, and protesting against the annoyance and insult to which he had been subjected, of the contents of which said letter Defendants took no notice, but continued said insults and annoyances and disturbances as aforesaid.

That subsequently, to wit, on the 27th day of May last past (1873) Plaintiff again addressed a letter (a copy of which is herewith fyled as Plaintiff's exhibit No. 6) to Defendants, calling upon them to apologize for the matters herein complained of, on or before the 15th day of June instant. †

That Defendants made no answer to the Plaintiff's said letter of the 27th day of May last, calling for an apology on or before the said 15th day of June, and gave no explanation whatever of their said conduct towards Plaintiff, though well knowing that they had acted illegally, improperly, maliciously, and to Plaintiff's injury, disparagement, annoyance and disturbance.

That the said Defendants acted, as aforesaid, maliciously and knowingly, and with intent to bring Plaintiff into contempt, ridicule and disgrace, not only with the congregation of St. Andrew's Church, Montreal, but with Plaintiff's friends and acquaintances, the clergy of the Church of Scotland in Canada, and the public generally; and after being forewarned by Plaintiff of his rights in said pew, and with intent to injure Plaintiff socially and pecuniarily.

That by reason of the said illegal, unjust, scandalous, malicious, defamatory and unchristian conduct of Defendants, Plaintiff hath been and is greatly injured in his good name, and fame and reputation, and is and hath been brought into scandal, ridicule, contempt and disgrace, not only with the Plaintiff's friends, but with the large and respectable congregation attending St. An-

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* *Vide* Appendix N. † *Vide* Appendix R and S.

drew's Church, and the many strangers that go there to worship, and with the public generally, who have become aware of Defendants' conduct to Plaintiff; and that Plaintiff's right of access to and enjoyment of said pew as lessee has been called in question, and Plaintiff held out to all who worship in said St. Andrew's Church, and the public generally, as an intruder and trespasser in said pew, as having no right therein, and as entering therein as a stranger, whereby Plaintiff hath been and is greatly wounded in feeling, and hath been disturbed and molested in the occupation and enjoyment of said pew, 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.

That the said Plaintiff hereby brings the amount of said rental tendered as aforesaid for said pew No. 68, to wit:—the sum of $66.50, current money of Canada, into this Honourable Court, and deposits the same with the Prothonotary thereof for Defendants' acceptance, subject to the order of this Court.

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, *distraits* in favor of the undersigned A[illegible].

(Signed), D. MACMASTER,
Plaintiff's Attorney.

Montreal, 28th June, 1873.

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* Plaintiff afterwards desisted from his option of a trial by Jury.

DEFENDANTS' PLEA.

The said Defendants without admitting, but on the contrary expressly denying all, each and every of the allegations of the Plaintiff's declaration in this cause, nevertheless for plea to the action and declaration of the Plaintiff in so far as may be necessary to answer the same, say:—That on the allegations of said declaration, if even the same were well founded (which the Defendants expressly deny), they, the Defendants, could not be held responsible beyond, or otherwise than for, a breach of contract in not maintaining the Plaintiff in the enjoyment of pew No. 68 of St. Andrew's Church, under the alleged lease, which Plaintiff sets forth in his said declaration, and which Defendants with regard to said alleged lease, do aver that the Plaintiff was not a pew holder in said St. Andrew's Church, nor lessee of pew number 68, on or after the 31st day of December, 1872, and the Defendants say that they had a right to refuse to lease to the said Plaintiff the said pew No. 68 on and after the said 31st day of December, 1872, and the Defendants further say that according to the By-laws, custom and practice in the said Church, the pews are let each year, and from year to year, and the lease expires at the end of each year, and the Defendants are under no obligation to continue the lease, nor is there any continuation thereof without their consent, nor is there any notice required to terminate such leases at the end of each year; and the Defendants further say that at the time Plaintiff received the said notice on the 7th of December last, that the said pew would not be leased to him for the year 1873, and frequently afterwards, he, the Plaintiff, acknowledged the right of the Defendants to refuse to lease him the said pew, and thereby waived any pretentions to have notice, and admitted that he was not the lessee of said pew.

And the Defendants say that, to the best of their judgment, before the said 31st day of December, 1872, it had became undesirable and inexpedient to let the said pew, No. 68, to the 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 or about the 7th day of December, 1872,* decide and determine not to let a pew to the Plaintiff, which action of the Defendants was ratified and confirmed by the congregation in a general meeting held in the lecture hall of the said St. Andrew's Church, on the 25th day of December, 1872, † at which Plaintiff was present, and in the proceedings whereof he participated; and 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 the Defendants say, that in the whole matter they acted in good faith, and in accordance with the practice and By-laws, rules and regulations of the said Church. Wherefore the Defendants pray judgment, and that Plaintiff's action may be hence dismissed with costs.

(Signed), CROSS, LUNN, DAVIDSON & FISHER,
Attorneys for Defendants.

Montreal, 12th September, 1873.

The Defendants also pleaded the general issue.

The Plaintiff's answer and replication were general. Upon these issues the parties went to proof

The case was heard by the Honourable Mr. Justice Johnson, in the Superior Court, and on the 30th December, 1873, the following Judgment was rendered, dismissing Plaintiff's action:

* *Vide* Appendix E. † *Vide* resolution and amendment Appendix K.

JUDGMENT OF THE SUPERIOR COURT, MONTREAL.

MONTREAL, 30th December, 1873.

PRESENT:

THE HONOURABLE MR. JUSTICE JOHNSON.

The Court having heard the parties by their counsel respectively, as well upon the merits of this cause as on the two motions made by the Plaintiff on the 4th day of November last, to reject documents from record, having examined the proceedings, proofs of record and evidence adduced and maturely deliberated:

Considering that the Plaintiff has failed to establish by evidence the essential allegations of his declaration, and more particularly has failed to establish either that by the terms of his lease from the Defendant of pew No. 68 in St. Andrews Church, or that by the law or usage of the said Church, or that by tacit renewal of his said lease, he had any right to the occupation of the said pew, after the 31st day of December, 1872, but on the contrary, it appears by the express terms of the paper, Plaintiff's Exhibit marked C,* produced and fyled by him on the 4th day of November, 1873, that the Plaintiff on the 9th day of January, 1872, paid to the Defendants $66.50, as and for the rent of the said pew No. 68, for the year 1872, and that the contract thus evidenced, between the parties by its express terms, limited the right of the said Plaintiff in the said pew to the duration of the year 1872.

Considering that by Law the said lease under such circumstances terminated of course, and without notice at the expiration of the term agreed upon.

Considering further that on the 7th day of December, 1872,

* *Vide* Appendix C.

the Defendants gave notice to the Plaintiff that they would not let to him the said pew for the following year; that on the 27th day of December, 1872, the Plaintiff, through a Notary Public, tendered a sum of money as for the rent of the said pew for the year 1873, and that the Defendants again refused to let it to him; and that again on the 2nd day of January, 1873, the Plaintiff repeated the same request with the same result; and that therefore the said Plaintiff was well aware of the Defendants' refusal aforesaid and cannot pretend that there was any consent on their part, without which consent a tacit renewal of the said lease could not and did not take place.

Considering that after the said several notices to the Plaintiff, and the said several means of knowledge by him of the Defendants' refusal to let him the said pew, he cannot be admitted to misconstrue the tolerance of the Defendants, in respect of his presence in the said pew at New Year's time, into a tacit renewal of his lease. Considering therefore that the said lease was not renewed, and considering that the Plaintiff has shown no right under the law, or the usage of the corporate body, here Defendants to wit, the Minister and Trustees of St. Andrew's Church, Montreal, to have, use or occupy the said pew after the 1st day of January, 1873.

Considering therefore that the Plaintiff has not shown any violation of his right on the part of the Defendants, nor any illegal conduct or malice on their part, but that on the contrary the Defendants have established the allegations and pretentions of their plea, by them firstly in this cause pleaded, and are entitled to have and maintain the conclusions of their said plea, doth maintain the said plea of the said Defendants, and doth dismiss the Plaintiff's action with costs; and further adjudicating upon the said motions, made on behalf of the Plaintiff on the 4th day of November, 1873, doth dismiss the said motions with costs.

(Signed), HUBERT, PAPINEAU & HONEY,
Prothonotaries of the Superior Court.

Montreal, 19th January, 1874.

The remarks of the Honourable Mr. Justice Johnson are reported at page 113 of the 18th volume of the Lower Canada Jurist, as follows:—

REMARKS OF THE HON. MR. JUSTICE JOHNSON.

JOHNSON, J.

JAMES JOHNSTON *vs.* THE MINISTER AND TRUSTEES OF ST ANDREW'S CHURCH, MONTREAL.

The Plaintiff complains, that being a pew-holder in St. Andrew's Church in this city, for the year 1873, he has been maliciously disturbed in the occupation of his pew; and, in fact, driven from the Church, and injured, and brought into contempt by the Defendants, from whom he asks a condemnation for $10,000 damages. The circumstances under which this action has arisen are peculiar and painful. The Plaintiff is evidently acting under strong feeling, whether of injury or resentment. The Defendants resolutely maintain they have acted within the limits of their right I shall offer no opinion upon anything but strict legal rights and liabilities of the parties; but to do this intelligibly, requires reference to their respective pretentions, and to the grounds on which they rest. The Plaintiff represents that he has attended St. Andrew's Church ever since 1867, during all which time he has leased and occupied one or more pews in it. That from 1st January, 1872, to the 31st of December of that year, he was the lessee and holder of pew No. 68, paying annual rent for it to the amount of $66.50. That he was therefore a pew holder under the 10th By-law of the corporation of the church, and held under a verbal lease. That on the 7th December, 1872, the Plaintiff received notice from the Defendants that they declined to let him a pew for the following year; whereupon he addressed to them a letter expressing his wish to renew the lease of his pew for another year; but being again informed that he could not get it, he caused a tender of $66.50 to be made to the treasurer of the Defendants, as rent for the year to come, which was, however, refused; that officer further

declining to let the Plaintiff a pew for any sum whatever. Subsequently, on the 27th Dec., he again, through a notary, tendered the money, and required delivery of the pew, and again met with a refusal. That on the 2nd January, 1873, pew rents being payable annually in advance, the Plaintiff repeated the same request, with the same result. That notwithstanding these refusals, the Plaintiff persisted in attending the church, and sitting in pew No. 68 on New Year's Day, 1873, and occupied it for the first ten days of the month without any interference by the Defendants; by which the lease was, as the Plaintiff contends, renewed by *tacite reconduction*. That after the first ten days of the new year, during January, February, March, and April, the Defendants maliciously disturbed and molested the Plaintiff in his enjoyment and occupation of the pew No. 68, which, however, he continued to hold under most disagreeable circumst nces—such as having his books removed and others put there for the use of strangers; having the cushions and hassocks sent down to his office; having strangers shown into his pew and having a printed placard with the words, "For Strangers," stuck upon it. The Plaintiff then proceeds to say that notwithstanding all these things, he persisted in occupying his pew up to the bringing of this action in June last. He then reverts to something that had occurred in March, 1873. The books that had been put in the pew 68 for the use of strangers, having been removed by Mr. Johnston, he shortly afterwards got the following letter from the Secretary of the Church:—

"SIR,—It having been brought to the notice of the Trustees of St. Andrew's Church, that you removed the books out of the stranger's pew, the Secretary was requested to write to you desiring you for the future not to remove the books placed by the Trustees for the use of strangers

Yours truly,

J. WARDLOW,

Secretary."

Up to this point in the recital of the Plaintiff's wrongs, it is quite intelligible that he contends for two things: 1st, that he was lawfully the tenant of pew No. 68, after the 1st January, 1873; and 2nd, that the Defendants, being without right in what they did, moreover did it in a vexatious manner, entitling him to greater sympathy, and heavier damages. If they really were, or even if he thought they were, wrongs that he had to complain of, (which is the one question to be hereafter considered) it is quite conceivable that the Plaintiff should deem himself entitled to complain of them; but it is not so easy to understand, under these circumstances, why he should continue to complain that having received the Secretary's letter, certainly a very civil one on the face of it, he answered it on the 6th March reasserting his rights, and received no reply to his remonstrances. He complains alike when the Defendants do write to him, and when they do not; and as if determined to have as many complaints as possible, he proceeds still further to set up in his declaration, that after this, again on the 7th of May last, he wrote still another letter to the Defendants, and that they have not even taken any notice of that. So that we have before us on the Plaintiff's side an assertion of right on his part, and of a violation of it by Defendants, not only by what they did, but by what they refrained from doing. They once let him a pew in their church, for a year, he says, and as long as he continues to pay the rent in advance he continues to hold that pew That when in the exercise of what they considered their right the Defendants put out his books, returned his hassocks, and stuck up a notice that the pew was for strangers, and supplied it with books for their use, they were using means that denote malice on their part; and not only that, but that when Mr. Johnston ejected the books, he has a right to complain of them for writing him a letter on the subject; and when he writes to them he has an equal right to complain if he gets no answer. The Defendants encounter this action by pleading, 1st. That the Plaintiff was not lessee of the pew No. 68 after 31st December, 1872, and they had a right to refuse to let it to him for the next year. 2nd. That under the by-laws, custom and practice of the church, the pews are let each year, and for one

year only, and the Defendants are under no obligation to continue the leases, nor is there any continuation of them without their consent, nor any notice required of their determination. 3rd. That the notice of the 7th of December was unnecessary; and the Plaintiff frequently aknowledged the Defendants' right to dispense with notice, and admitted that he was not the lessee. 4th. That in the exercise of a discretionary power, and in good faith, and for the sake of peace and harmony in the congregation they determined not to re-let the pew to the Plaintiff; and their determination has been ratified by the congregation in general meeting on the 25th December, 1872, at which meeting the Plaintiff participated, and admitted he was without right to the pew. 5th. The Defendants put in issue the truth of the Plaintiff's allegations, and expressly deny any malice on their part. In the view that I take of this case, I must say that I think much evidence and much argument have been expended unnecessarily. I do not consider that it presents any question as to the power of disfranchisement, or of amotion. I have had time fully to consider the matter, and I adhere to the opinion that I intimated at the trial, when I asked, whether there was in reality more than one question before the Court, viz.: "Had the Defendants a right to do as they did?" For, if they had, the Plaintiff cannot complain that they exercised it unless such exercise was a mere cloak for express malice; and, if they had not, all the best motives in the world would not give it. If after the 1st January, 1873, pew No. 68 was legally in the possession of the Defendants to do as they pleased with it, it is obvious that they might put out of it, any body else's property that they found there, and might placard it to let or for the use of strangers; but if all this time the law gave this pew to the Plaintiff, as a consequence of the nature or the terms of his previous lease of it, acts of ownership by the Defendants would be unauthorised and offensive. The fact that the Defendants gave notice on the 7th of December that the pew would not be re-let for the following year is unquestionable. The reasons they may have had for coming to this determination, whether they are good ones or bad ones, may serve to characterize their conduct; but cannot change

the fact itself. The Plaintiff knew on the 7th of December that the pew he occupied in St. Andrew's Church would not be let to him after the expiration of the year, as far as the Defendants could settle that question. He must then rely upon the nature and terms of his previous contract to hold it against their will; and he does so. He says he had a verbal lease; that it entitled him by law and usage to hold the pew as long as he continued to pay in advance in the manner prescribed by the By-laws of the church; that the Defendants let him know that he could not have it when the year was up, but that he defied them. He went there as usual, and for some days—the opening days of the year, the pre-eminent season of peace and good will—the Defendants would not openly assert their right, and this he construed for a time to mean that they acquiesced in his view of their mutual obligations; but he is soon undeceived; for after a very short interval of seasonable forbearance on their part, they openly exercise ownership and give him plainly to understand that he has no right there. The Plaintiff must show that he had a right, either, 1st, by the express terms of an unexpired lease; or, 2nd, by the tacit continuation of it; or 3rd, by the law and invariable usage of the Church. The Plaintiff produced at the *Enquête* on the 4th November three papers with a list of exhibits describing them. The name given to these papers is unimportant. We have to look at what they make proof of; and they undeniably make proof as between these parties that the Plaintiff rented successively three pews from the Defendants. So much is this the case, that it is observable in the words of the descriptive list of these exhibits which the Plaintiff himself furnishes, that he calls the first paper "A *lease* for pew 68 in St. Andrew's Church for the year 1869." Then the word "lease" is barred by a stroke of the pen, and the word "receipt" is substituted. The reason of this alteration is manifest. The Plaintiff in his declaration had set out that he held under a verbal lease, and to admit that he held under a written one would have bound him to its terms. But however this may be, the fact or series of facts is established. He paid pew rent in 1869, for pew No. 68. *For the year* 1870 *no payment is proved;* but in 1871, there is proof of the payment of $66.50

for pew No. 68: and in 1872 there is also proof that he paid the same sum for pew No. 68, which is the one he last occupied. This last receipt is dated January 9th, 1872, and acknowledges receipt of the money, "*being for rent of* 1*st Class Pew, No.* 68, *in St. Andrew's Church, Beaver Hall, for the year* 1872." If this is not evidence of the intention of the parties (at least as far as it goes), it would be difficult to say what does constitute evidence. I do not mean to say that it must necessarily exclude, under all circumstances, positive and clear proof, of an invariable usage entitling the Plaintiff to a renewal of the lease on the same terms; but that is a separate question; and in the absence of legal evidence of this usage (a point I will presently notice), this paper, whether called "lease" or "receipt," conclusively shows that the money was taken for a specific thing that was given, viz., the enjoyment of the pew for the year 1872, and no longer. We must then apply the law which, in such case, is found in Art. 1658: "The lease, if written, terminates, of course, and without notice, at the expiration of the term agreed upon." So much, then, for the terms of the lease. Then as to *tacite reconduction:* this pretension is equally unfounded. There can be no *tacite reconduction* except under a presumption of the consent of both parties, and the very contrary is made decisively apparent by the notice of the 7th of December; the fact of the Plaintiff being suffered at New Year's time to sit in the pew, though in the *absence of notice*, it might be important, if not decisive, can have no weight under the circumstances. The Plaintiff is therefore driven to rest his case upon the law and usage of the Church, and in this attempt I think he has completely failed. We must not confound a voluntary organization like this one, exercising corporate powers under certain regulations, *with the church in Scotland from which it sprung*. We have not imported the Scottish Parish Church and all its usages here. It is because we *had not got these things* that we were obliged to shift for ourselves, and get incorporated, and *agree among ourselves how we should be governed*, all which appears to have been well and wisely done. The fact so highly creditable to St. Andrew's Church, that in few or no instances have refusals been given to renew leases, as long

as the rent is paid in advance, is a very distinct thing from the invariable obligation to renew them in all cases. It merely shows that the congregation has hitherto been harmonious, and that this is the first time a discordant note has been heard. I hold, therefore, in the present case, that the Defendants have established their right under the term of the lease, and I am therefore relieved from considering their reasons for exercising it, and I entirely fail to see any indication of *express* malice. According to this view of the matter I ought properly to decline noticing this subject any farther; and I certainly shall do so, as far as the merits of that question are concerned: but as mere information for the parties, which may not be entirely useless to them, and as disclosing the general principles upon which courts of justice act in *pari materia*, I would refer to a book published in New York in 1868, by Mr. Murray Hoffman, upon the ecclesiastical law of that State. It treats of questions connected with the incorporation of religious societies under the statutes of that State—questions which, the author observes, are often influenced by the ecclesiastical system of the church or body in connection with which they arise; and it contains an historical notice of all those churches which had a place of any importance in the colony before the revolution. At pages 275–6, the principle will be found laid down, both by the courts of several of the States and by the Lord Chancellor of England—in the case of Forbes vs. Eden, in the House of Lords, that courts will not interfere with the determination of the majority of the body of which the complaining party is a voluntary member, except in certain strictly defined cases of disposal or misappropriation of property in trust; and it is only when civil rights as to property are involved, that the secular tribunals will examine so far as to see that the fundamental rules of law have been observed. These principles have guided me in disposing of the present case; and having satisfied myself that under the law applicable to the terms of his lease, the Plaintiff has suffered no violation of his right, his action for damages for such violation must be dismissed with costs. There was a motion made to reject answers to interrogatories, and also to reject a paper produced with one of these answers. These

are disposed of by the judgment also, both of them being dismissed.

On the 30th December, 1873, the date of the foregoing Judgment, an appeal was taken to the Court of Queen's Bench for Lower Canada (Appeal side). The case was argued on the 21st and 22nd September, 1875, before the Honourable Chief Justice Dorion, and the Honourable Justices Monk, Taschereau, Ramsay and Sanborn. Before the rendering of Judgment the Honourable Mr. Justice Taschereau was elevated to the Supreme Court of Canada, and a re-argument was ordered and had on the 15th December,, 1875, before the Honourable Chief Justice Dorion, and the Honourable Justices Monk, Ramsay, Sanborn, and Tessier.

At the hearing in the Queen's Bench, *Mr. D. Macmaster* appeared as counsel for the Appellant; *Mr. Alex. Cross, Q.C.*, and *Mr. C. P. Davidson, Q. C.*, for the Respondents.

On the 3rd of February, 1876, the following Judgment was rendered:—

JUDGMENT OF THE COURT OF QUEEN'S BENCH.

CANADA
Province of Quebec,
District of Montreal. } COURT OF QUEEN'S BENCH, (Appeal side.)

MONTREAL, Thursday, 3rd February, 1876.

Present:

The Honourable Mr. Chief JUSTICE DORION.
" " Mr. JUSTICE MONK.
" " Mr. JUSTICE RAMSAY.
" " Mr. JUSTICE SANBORN.
" " Mr. JUSTICE TESSIER.

The Court of our Lady the Queen, now here, having heard the Appellant and Respondents by their counsel respectively, examined, as well the record and proceedings had in the Court below, as the reasons of appeal fyled by the Appellant, and the answers

thereto; and mature deliberation on the whole being had: Considering that there is no error in the judgment appealed from, to-wit, the judgment rendered by the Superior Court for Lower Canada, sitting at Montreal, in the District of Montreal, on the 30th day of December, 1873, doth affirm the same with costs to the Respondents against the said Appellant; The Honourable Chief Justice Dorion and Mr. Justice Ramsay dissenting. And on motion of Messrs. Cross, Lunn & Davidson, Attorneys for Respondents, the Court doth grant them distraction of their costs on the judgment this day rendered in this cause.

(Signed) C. DE GRANDPRÉ,
D. Clerk of Appeals.

The following remarks were made by the Honourable Justices of the Court of Queen's Bench, sitting at Montreal, at the rendering of Judgment.

REASONS AND OPINIONS OF THE HONOURABLE CHIEF JUSTICE DORION:

DORION, C. J., dissenting.—The Appellant (Plaintiff in the Court below) has been a member of the congregation of St. Andrew's Church, Montreal, since 1870. Soon after joining the Church he was elected an elder and a member of session, and became a pew holder in the church.

The Respondents form a corporation under the provisions of an Act passed in 1849, 12th Viet., cap. 154. They are invested with the property, and are charged with the administration of the temporalities of the church for the use and advantage of the congregation. They are elected by the pew-holders residing in the parish of Montreal, who have the right to hold meetings to inspect the register of the proceedings of the Trustees and to control the alienation of the church property.

In the year 1872, several meetings of the congregation were held, at which the Appellant toook a prominent part, and by his

course of action gave offence to the majority. This led to a resolution passed on the 4th of November, by which he was requested to retire from the eldership of the session of the Church.

On the 7th December following the Respondents also passed a resolution to the effect "that in order to sustain the action of the congregation taken in regard to Mr. James Johnston at its 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."

This resolution was communicated to the Appellant, who insisted upon retaining the pew he then occupied, and in order to do so he tendered the rent payable for the year 1873. The offer was rejected by the Respondents, and their action was, subsequently, approved of by the congregation.

The Appellant continued to occupy the pew after the beginning of 1873, but being disturbed by the Respondents, who invited other parties to sit in it, and had placards or notices posted on it indicating that the pew was reserved for strangers, he finally brought this action, by which he alleges that the Respondents have persistently molested him in the enjoyment of his pew, renews his tender of the amount of the rent for 1873, and claims damages to the amount of $10,000.

The action was dismissed by the Court below, and the Appellant now seeks before this Court the reversal of the judgment.

The pretensions of the Appellant are, that as a member of the congregation, and for several years a pewholder in the church, he could not be deprived of his pew as long as he paid the usual rent. He also contends that from want of a proper notice, as required by Article 1657 of the Civil Code, his lease was continued for the year 1873 by *tacite reconduction.*

The Respondents, on the other hand, claim that the pews in St. Andrew's Church are leased from year to year, that no notice is required to terminate them, and that having the entire control of the temporalities of the church, they at their will, and in the exercise of their discretion, had the right to refuse to the Appellant a renewal of the lease of his pew for another year—that in fact all the pews fall within their control at the end of each year; that

no corporate rights are vested in the congregation, and that the Appellant is not a member of the corporation which is exclusively composed of the Respondents.

It is impossible to apply to the lease of a pew the rules applicable to an ordinary lease of a house or other real estate. The lessee of a pew has no actual and continuous possession in the ordinary legal meaning of the term. He only has the right to use or occupy it for attending divine service and the extent and duration of this right is determined by the terms of his lease or by the usages of the church, if there be no lease or agreement in reference to it. There can be no *tacite reconduction* of a pew such as that contemplated by art. 1657 with regard to other property.

In this case there has been no written lease and from the evidence adduced it appears that the Respondents are not in the habit of giving written leases to the pew holders of their church. A receipt dated 9th January, 1872, has been produced showing that the Appellant paid the rent of his pew for the year 1872 and the Respondents claim that this receipt constitutes an agreement limiting to one year only the holding by the Appellant of his pew. This receipt is a mere acknowledgment of money paid, and no such inference as that which the Respondents contend for, can be drawn from it, for the receipt would be in the same terms whether the lease was for one or for twenty years, provided the rent was payable annually.

The Respondents have in their factum cited Durand de Maillane to establish that church wardens had the right to cancel the lease of a pew on their returning the price paid for it. This is undoubtedly true but the rule is subject to this restriction that the pew so taken by the church wardens must be required to make some alteration in the church or for the purposes of divine service, and even then the destination of the pew can only be changed with the assent and by the authority of the Parishioners (Reid and les Curés et Marguilliers de la Paroisse de Chateauguay, 6 L. C. Reports 290).

Under the parochial organisation which prevails in the Province of 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 ordinances have even extended that right to the widow of a deceased lessee and have also given to his eldest son a right of preemption at the highest bid or offer made for the pew (2 Edits & Ord—1723, p. 434; Borne & Wilson—Stuart's Reports 133; Nouveau Denisart *vo.* Banes dans les Eglises, § 4, No. 1—No. 4 & No. 7). If therefore, this case had to be decided by the rules which govern leases of pews in Roman Catholic Churches in the Province of Quebec, there could be no difficulty in determining that the Respondents had no right to deprive the Appellant of his pew, as long as he was willing to pay the usual rent, and the decision would likely be the same, if the jurisprudence prevailing in England and in Scotland, were to be followed here. It is however contended that these rules are peculiar to a parish organisation and that they were not intended for voluntary associations, such as the congregation and the corporation of St. Andrew's Church; that these voluntary associations are subject to no other rule but that of the will of the majority of its members.

Without questioning the fact, that the rules applying to parochial churches, were not made for voluntary associations such as St. Andrew's Church, I can not admit that the will of the majority is the only authority to settle difficulties with regard to the rights of individual members of such associations. In the absence of any positive law or of any judicial adjudication on the points raised here, those rules followed in other churches must be received as the expression of what is generally considered as just and reasonable in the settlement of similar claims, and as such must have their due weight. As there are no regulations in St. Andrew's Church as to the leasing of pews, the usages which in Church and Ecclesiastical matters are always of great authority must be consulted. (Senecal & Jarred dit Beauregard 4 L. C. Jurist 223, also note in 3 Barn. and Ald. 245). The evidence adduced establishes that in St. Andrew's Church, those members of the Congregation who have once obtained a pew, have always been considered as entitled to retain it as long as they continued to be members of the church and to pay the usual

rent;—that the case of the Appellant is the only instance in which a pew has been refused to a member of St. Andrew's Church; the only other case being that of three young men who were deprived of the pew leased to the Appellant, but they were not the lessees of the pew, and only occupied each a seat in it, under what seems to have been considered a temporary arrangement, to last until the whole pew could be leased. It is further established that in the Church of Scotland, from which St. Andrew's Church sprung, and with which it claims to be in connection, no member of the church can be deprived of his pew except by the Kirk Session. The Respondents have also attempted to prove that the conduct of the Appellant, both at the meetings of the congregation and in the church, was such that they were justified in depriving him of his pew. It must be observed, however, that there are no allegations in the pleadings to that effect, and to which such evidence could apply. In their *factum* the Respondents admit that their object was that indicated by their resolution of the 7th of December, that is, to sustain the action of the congregation and thereby to force the Appellant to retire from the Eldership of the church, and to deprive him of the right of either speaking or voting at the meetings of the congregation. This admission of the Trustees is of itself a condemnation of their course. They had no authority to exclude the Appellant from the meetings of the congregation, nor to expel him from the church. The congregation itself could not do it, and yet the Respondents seek to obtain the same object by ejecting him from his pew, which is tantamount to expelling him from the church altogether. If the Appellant deserved to be censured or to be expelled from the church, he was amenable for his conduct to a superior authority, that of the Kirk Session, but not to that of the Respondents. For the purpose of sustaining their extreme pretensions, the Respondents claim that they alone form the Corporation, that no corporate rights are extended to or vested in the congregation; and from them they draw the conclusion that they can dispose of the pews and lease them or not, just as they may deem proper. The logical consequence of this would be that they might close the church altogether, without the

congregation having any right to interfere or complain. It is true that the Respondents constitute the Corporation, but this Corporation has been created to replace the Trustees who before the Act of Incorporation acted under a trust deed, and for the purpose of holding the church property in trust for the congregation, and of administering it for the use, benefit and advantage of all the members of the congregation indiscriminately. They are mere administrators appointed by the congregation and subject in many respects to the control and direction exercised by the meetings of the Congregation. The members of the Congregation are in fact the real owners of the church property, although the title of it is vested in the Respondents in their corporate name and capacity, in the same manner as other church properties are vested in the Curé and Marguilliers or churchwardens of a parish. As *commoners* the members of the 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 obtaining 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.

It has been contended that the action was not properly brought, but I have failed to discover any fatal error or omission in it. It is an action on the case, warranted by the circumstances disclosed, and which can be supported by numerous authorities. (Durand de Maillane Dict. De Droit Canonique vo. Banc, p. 271, 1st Col.; Auger and Gingras, Stuart's Rep. 135; Stocks & Booth, 1 Term Rep. 428). Dareau, in his Traité des Injures, 1 vol., p. 317, cites a judgment rendered in a case of Bechet and Pollier, by which the Defendant, who was the parish priest, was condemned to heavy damages for attempting to exclude Bechet from a pew in the church.

An action of damages is a proper remedy against undue interference with private rights, whether such rights consist in that of holding a pew in a church or any other property.

I would, therefore, reverse the judgment of the Court below,

and maintain the Appellant's action by allowing him a small amount of damages.

REASONS AND OPINIONS OF THE HONOURABLE MR. JUSTICE RAMSAY:

RAMSAY, J., dissenting:—This appeal is from a judgment of the Superior Court, dismissing an action for damages brought by Appellant against the Respondents, for refusing, without justifiable grounds, to allow him to continue in the occupation of pew No. 68, in St. Andrew's Church, in this city.

The Respondents, Defendants in the Court below, are a corporate body, under the terms of an Act of 1849, 12th Vic., c. 154. The preamble of that Act sets forth sundry reasons for its being passed, into the correctness of all of which it is not necessary now to enter. Suffice it to say that the original body, as recognized by that preamble, was the congregation worshipping in a church commonly called St. Andrew's Church, situate in St. Peter street, Montreal, and destined "for the public worship and exercise of the religion of the Church of Scotland."

As they were not a corporate body, they acted by two Trustees, the late Alexander Rea and William Hunter, in whom the property was vested "for the *benefit and behoof* of the said church *and congregation*, and for no other purpose whatsoever."

Rea dying, at a general meeting of the whole congregation, other Trustees were appointed for holding the said property along with the said William Hunter, the then surviving Trustee. From time to time the *congregation* named other Trustees, till at length the body appears to have centred in the Rev. Alexander Mathieson, D.D., John Smith, John Boston, William Edmonstone, John Frothingham, and James Gilmour, Trustees of the said church, and these gentlemen, the minister and Trustees, petitioned Parliament, and obtained the Act in question.

The history of this body prior to its incorporation, thus legislatively established, is not without importance, for the dispositions of the Act are not perfectly clear. By section 1 it is the

minister and trustees who are incorporated, and they have the power to make, alter and amend such (*sic*) By-laws, ordinances, and regulations as shall not be contrary to the constitution and laws of the Province, the Act of incorporation, or to the constitution of the Church of Scotland as established by law in Scotland.

But in spite of this disposition of section 1, it does not appear that the minister and Trustees constituted the whole corporation. In other words corporators' rights existed elsewhere, which really reduced the minister and Trustees to the condition of administrators of the corporate estate, and legislators subject to the freehold proviso above mentioned. They were not limited by the objects of the corporation only, but they were subject to deprivation by removal and other causes, and they could not fill up the vacancies occurring. There was then a body superior to them, and who had inalienable rights.

There is some difficulty in defining who their constituents were. Section 5, which describes the general course of proceeding with respect to the filling of the offices of minister and Trustees, says, it shall be such person or persons as shall be elected "by a majority of the proprietors of one year's standing, to wit, of pews in the said Church, not in arrears of pew rent, at a meeting to be convened as hereinafter mentioned."

Section 6 enacts how the meeting is to be convened in case of the vacancy happening by the death, or removal, or change of residence of the minister, and how it is to be composed. It is to be called by the Kirk Session, and to be composed of "proprietors, pew-holders, and members of the said church, not in arrears of rent." And this meeting is to elect a committee of nine, *by a plurality of votes*, evidently of this meeting, of which nine shall be proprietors of, at least, one year's standing, in full communion with the church; and the other three may be pew-holders, in full communion, who have paid rent for three years.

Section 7 enacts: Three trustees shall be chosen from proprietors in communion with the church, by proprietors not in arrears of rent. It is not said whether communicants or not.

Setting aside Section 5, which appears to be needless, and

looking at the dispositions of Sections 6 and 7, we find several persons recognized by the Act as having rights:—Proprietors of one year's standing, in communion with the church; proprietors not in arrear of rent; pew-holders not in arrear of rent; members of the said church not in arrear of rent; pew-holders who have paid rent for three years.

The condition of proprietors and of pew-holders is clear enough, but who form the class of "members of the church?" It seems to me, it must be the communicants and persons attending the services of the church, more loosely described in the preamble as the "*worshippers.*" This view is further sustained by the 12th By-law, which is in these words: "The term congregation in these By-laws implies the proprietors of pews, pew-holders, *members in full communion with the Church and regular sitters*, whose names are entered in the church books, collectively." We have, then, a body of somewhat undefined extent, having rights in the corporation, and the members of which are chiefly distinguishable by the community of their religious belief, and from the fact that they worship together.

The Appellant, Plaintiff in the Court below, is a member of the Church of Scotland as it exists in Canada, and particularly does he fall into the category of being a member of the particular Church erected for the public worship and exercise of the religion of the Church of Scotland, and incorporated under the name and style of "The Ministers and Trustees of St. Andrew's Church, Montreal." In addition to this, he was a pew-holder in the said Church, and particularly from January, 1871, to the 31st of December, 1872, he was the occupant of the pew No. 68. He, moreover, held an official position of a spiritual character in connection with that very congregation, perfectly well known to the ecclesiastical law of the Church of Scotland, recognized by the Act of 1869, which spiritual office is held by that law *ad vitam*, or *ad culpam*. He was, therefore, indisputably a corporator, and as such had common rights with the other corporators, subject to the Statutes and the By-laws. I may here add that it is not for a moment pretended that his position as a worshipper, as a communicant, or as an elder could be in any way lawfully

affected by any action of the Trustees; in fact it is clearly established, and unquestionably the law of the Church of Scotland, recognized by the Acts of incorporation, that in matters of conduct he was only amenable to the Kirk Session. But it is contended that the Trustees could refuse a pew to a member of the church, already a pew-holder, he not being under any disability, financial or otherwise, but on the contrary having duly paid his pew rent for the past, and tendering it for the future in advance, according to the rules and By-laws. Of course, if the Trustees can do this arbitrarily and without assigning any cause, there is an end of the matter, and Mr. Johnston has no remedy; and though something new like this was advanced in the pleas and at the Bar, this extreme position was not at first unequivocally taken up, nor does it appear to be confidently relied on. In their notice of the 7th of December, informing Appellant that he could not have his pew, a reason is ostensibly given. The notice is in these words:—"It was resolved—That in order to sustain the action of the congregation taken in regard to Mr. James Johnston at its meeting on the evening of the 4th of November last, the Trustees do now decline to let a pew to Mr. James Johnston for the ensuing year."

Now, in order to form some idea of whether the desire to sustain the action of the congregation on the 4th of November is a *bona fide* reason, it becomes necessary to enquire what the action of the congregation on the 4th of November was. We are enabled to satisfy ourselves on this point completely, for we have been furnished with a minute of the proceedings, and we have also elaborate testimony as to an altercation which took place at the meeting, and which explains the latter part of the minute, and the observations of the Chairman.

The minute then goes on to say, that after considerable discussion it was moved, seconded, and resolved: "That in virtue of the fact that Mr. Johnston has not acted harmoniously with his brother Elders, he be requested to resign his position as Elder."

The motive, then, of the Trustees, in refusing Appellant a pew, was to force him to resign as an Elder. No one will, for a moment, pretend that the deposing of Elders was a portion of

the duties of the Trustees, and they were, therefore, using the power conferred on them for one purpose arbitrarily and vexatiously, to gain another end. What renders this peculiarly objectionable in the present case, is the fact that the Minister—the Chairman of the meeting of the 4th November, who denounced Mr. Johnston to the meeting—and who was the person with whom Appellant had an altercation on that occasion and others, it would seem—was himself one of the Trustees. In short, it looked as if the Trustees determined to coerce Appellant into a resignation of his Eldership, because he had offended a Trustee. But their excuse is no better, legally speaking, if deprived of this suspicion; for the meeting of the 4th November had no more right to summon Appellant to resign his Eldership than the Trustees had the right to coerce him into it. It may not be altogether without importance to note that on the 8th November, four days after the order which sought to compel Appellant to resign his position as Elder, Mr. Lang, the chairman of both meetings, wrote a letter to Mr. Johnston, urging on every possible consideration, for his wife's sake, for his own, and above all, "for his soul's sake," to bend before the storm which Mr. Lang himself had directed against him. We have not to enquire whether Mr. Lang feared that a new prosecution in the Kirk Sessions would be as fruitless as on a former occasion; but, to say the least of it, the proceeding exhibits an eagerness which it would have been more prudent to conceal, if it could not be overcome.

Unsatisfactory as is the reason given by the Trustees on the 7th December, for refusing Appellant a pew, that pleaded in the action is still more curious. They no longer desire to sustain the action of the congregation, because Appellant did not work "harmoniously with his brother Elders," but they say that, "*to the best of their judgment*, it had become undesirable and inexpedient to let the said pew, No. 68, to the Plaintiff for the year commencing the 1st January, 1873." This plea, then, is a return to the pretension of the Respondents' arbitrary right to refuse to a member of the corporation the common right to lease a pew. But, as it has been said, this was not relied on, for we have

evidence of all the squabbling which took place (the rights and wrongs of which it would perhaps not be very easy to balance), and we have, superadded, pretended improprieties of conduct of Mr. Johnston in church, not alleged, not amounting to a great deal, and which, even if they had been more important, were not within the jurisdiction of the Trustees, but within that of the Kirk Session.

The Respondents' argument at the Bar amounts to this:—That a church in a colony is nothing more than a voluntary association, from which the members may be removed at the pleasure of the administrative body or by the members, and this without any reason; at least so I understood it.

In support of this view, and as even a more extreme example, the case of a member recently expelled from a London club was cited.

It is not altogether easy to seize the precise value of "voluntary association" as an absolute term; but it seems to me to be singularly infelicitous when used to signify the association of persons for religious purposes. Not one man in a hundred chooses his religion, and consequently I cannot see any kind of analogy between the tie that binds co-religionists together, and that which exists between the members of a social club.

The case of a man being refused a box in a theatre would have been nearer the question from the Respondents' point of view.

But even if applicable, the club cases do not bear out Respondents' pretentions. All that has ever been said is that in a club established for social purposes, a member may be expelled according to the By-laws and in good faith. In the first of these cases reported, Hopkinson *vs.* The Marquis of Exeter, L.R., 5 E. 63, Lord Romilly said:

"These clubs are very peculiar institutions. They are societies of gentlemen who meet principally for social purposes, sometimes of a literary nature, sometimes to promote political objects, as in the Conservative or the Reform Club, but the principal objects of which are social—the others being only secondary. It is therefore necessary that there should be a good understandiug between all the members, and that nothing should occur that is likely to disturb the good feeling that ought to subsist between them."

It follows that a club is a partnership of a kind different from any other. The Master of the Rolls then goes on to show that the nature of such partnership required the existence of a By-law of a very stringent nature for the removal of objectionable members. The case of Richardson-Gardner *vs.* Fremantle (Fisher's Dig. Vo. Club, Sup. 1871), was decided on the same principle.

It may, however, be said there is no By-law limiting the rights of the Trustees, from which it can be decided that they have exceeded their powers, and that no conclusion can be arrived at from the laws and usages of the Church in Scotland, because in the parish churches the seats are distributed under a parochial system, and in the Chapels of Ease the matter is regulated according to a model adopted by the General Assembly in 1826. But can it be maintained seriously that, because the congregation of St. Andrew's Church has had so little foresight as not to reduce to writing a special rule on this matter, we are, therefore, to presume an understanding among its members of a system which never could have been approved by reasonable people? However desirable it might be to get rid of Mr. Johnston, it is evident that those who were against him would hesitate to affirm a resolution to the effect that the Trustees may, at their discretion and without cause, discontinue the lease of a pew to any pewholder.

We see, then, in the cases invoked as a parallel, that, without cause, even the majority could not exclude a member. There must be the By-law, common to all, and the cause together.

Respondents felt their weakness, and they say that they have not excluded Appellant from worship. and that they have only denied him a pew. It seems to me this is a disingenuous pretext. As a commoner, he had an equal right to all the advantages of the church—of a pew, if one was vacant—to his pew while he fulfilled the conditions imposed in reference to a new-comer—*a fortiori* in preference to strangers. I have already said that I thought the illustration of a social club in some respects unfortunate, but as it has been selected by Respondents to maintain their position, at the risk of appearing trivial, I shall give an example which has, at all events, the merit of being entirely in

point. A member of a club orders his dinner. The committee want to get rid of him, because he had a quarrel with a popular member, and they decline to let him have his dinner, so that he may be induced to resign. Would not an action lie for this trespass? And what should we say of a defence of this sort on the part of the club? "We never expelled you from the club; you were permitted to wander about the club, read the newspapers, and pick up a precarious subsistence from the plate of biscuits, but we are not obliged to give you dinner, because you have no vested right in any particular mutton chop or potato." Ridiculous as this case may appear, the answer I put into the mouths of the club-committee is not more absurd than that of the corporation of St. Andrew's Church.

To contend that if Mr. Johnston had not been driven from the church, other persons would have left it, seems to me merely to avow that there were other people in the congregation open to the same kind of reproach the majority had directed against Mr. Johnston.

To resume, then, the assertions that Mr. Johnston had interrupted the services of the church, had insulted the clergymen, and not worked harmoniously with his brother elders, are neither here nor there in this suit. If the Trustees are irresponsible, these assertions are of no consequence; and if they have to justify without a decision of the Kirk Session, their opinion is of no avail.

In their *factum* the Respondents try to make another point. They affect to consider the action as an action of common lease. This pretension appears to me to be on a par with the whole proceedings of the Trustees. The word lease is certainly used through the action, and a point is made that Appellant had *tacite reconduction*; but it is plain that there was no contract of ordinary lease, and that the law of *tacite reconduction* does not apply. However, the action does not necessarily depend on that. The whole story is set forth in the declaration, and that is all that is required in our system of pleading. Appellant expressly says that he was a corporator; a pew-holder for years, and a member of the Kirk Session; that he had had pew 68 for the current year; that he desired to continue to occupy it, and tendered the

rent in advance, and that the Respondents knowingly and maliciously, and in order to bring Appellant into contempt, refused to let him have the pew.

The Respondents perfectly understood that this was the main question, and they answered it as well as they could. They set up the By-laws, customs and usages of the said church. The By-laws do not touch the matter, and the usages and customs of the church were against them. They plead that it had become undesirable and inexpedient to let the said pew to Appellant (not less a special excuse because a bad one), and they conclude by averring that "in the whole they acted in good faith and in accordance with the practice, By-laws, rules and regulations of the said church."

It is precisely on this issue thus presented the judgment will go, from which I dissent. Why then pretend that it is a question of pleading? And if it was only a question of whether the lease of a pew was a common lease or not, why try to prove that Mrs. This or Mrs. That had been all but terrified into a faint by the eccentricities of Mr. Johnston? Is it not too plain that this illegal evidence was dragged in to bolster up an impossible justification? I trust no one will be deluded by this shallow artifice; what this case in effect decides is that every member of every congregation holds his pew at will of the Trustees or the churchwardens. I think, then, the Appellant is entitled to some damages, but they should be little more than nominal. In the first place, he has not proved any special damages, and his conduct was not such as to entitle him to any exemplary damages. Although the conduct of the trustees appears to me to be illegal, they were no doubt exposed to a species of obstructiveness which was almost turbulent. The accusation that he had called Mr Lang a liar, if not correct as to the words used, was certainly justified by the only inference which could be drawn from Mr. Johnston's words. He accused Mr. Lang not only of untruthfulness, by saying that the reverse of what Mr. Lang had stated was true, and that Mr. Lang knew it, but he also accused him of a deceitful manœuvre. How far such an accusation in such a place, made without foundation, is open to ecclesiastical censure,

is a question I am not prepared to decide; but it certainly, as a gross provocation, decreases the Appellant's right to damages, and I would give him 50s. and costs in the Court below, and the costs of his appeal.

REASONS AND OPINIONS OF THE HONOURABLE MR. JUSTICE SANBORN:

SANBORN, J.:—This is an action whereby the Appellant demands of the Respondents, as a body politic and corporate, the sum of $10,000 as damages. His action is based upon the pretension that he was entitled to the use, as lessee, of a certain pew in St. Andrew's Church in Montreal, from the 1st of January, 1873, to the 1st of January, 1874, being pew numbered 68. Appellant alleges that he was lessee of a pew as a pew-holder from 1867 to 1873, and of this particular pew, numbered 68, during the year 1872; and that he tendered to the Respondents, in advance, the rent for said pew No. 68, being $66.50. This tender was made on the 26th December, 1872. It appears that the Appellant had had difficulties with the congregation, and that they had found his participation in the business affairs of the congregation so disagreeable that the Trustees, on the 7th December, 1872, resolved not to lease Appellant a pew for the ensuing year. This was apparently done to prevent Appellant's possessing the right of a pew-holder under Art. 10 of the By-laws, which declares that any person who should lease a pew from the Trustees for one year, and pay the rent in advance, should be considered a pew-holder. The rent of pews and sittings is to be paid annually in advance, from the 1st of January, and is to be considered then due. It is contended that this pew was held under a verbal lease, and that the Appellant had a right to three months' notice of the cessation of said lease, and not having had this, he was the lessee and rightful holder, as lessee of said pew, for the year 1873, having offered the rent in advance, and that he had been troubled in the possession of said pew by Respondents, who had

caused his cushions and books to be removed, and the pew to be labelled "For strangers," and strangers to be placed therein, and that the Appellant had been, by the action of Respondents, put to contumely and disgrace, and subjected to great pain of mind and annoyance, for which Respondents are responsible.

It must be observed that the Appellant treats the Respondents as the parties with whom he contracted, and as the responsible parties having control of the temporalities of the church and congregation. Without reference to any incidental questions that arise in this case, the Appellant's action must depend upon his being a lessee; and the law relating to lessors and lessees applying to a church like St. Andrew's Church, in Montreal, governed according to the laws and usages of the Presbyterian Church of Scotland, so far as these usages have been proved in the case. It may be remarked that pews are not claimed as property in the strict sense of the word. "Parishioners acquire *quasi* property "in the seats or area for the special purpose of Divine Service."—1 Bell's Dictionary, 203. "The right which is sometimes acquired "by private persons in the seats of a church is not, in strict speech, "a right of property, but is confined to the special purpose of at- "tending Divine service, and may be taken from the acquirer if he "removes to another parish, and if the increase of the parishioners, "to all of whom the common use of the church belongs, makes "the division of the area necessary."—Erskine's Principles of the Law of Scotland, p. 116. This has reference to pew owners and to parish churches in Scotland. 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. 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.

It is a means of contributing to the support of the Gospel. It, in this case, gives a voice in the appointment of Trustees, who are annually chosen to administer the temporalities of the church and congregation. It cannot well be subject to *tacite reconduction*, because the occupancy is only when services are held, and

if from any cause they should be omitted for one Sabbath at the commencement of the year, there would be no means of establishing either a holding over or a tacit renewal of the lease.

The Trustees are not lessors, in the ordinary sense, because the funds derived from pew rent are only received in trust for the benefit of the congregation. The *droit de gagerie* could not well exist or be exercised, as the lessee could not be expected or required to garnish the pew to secure the rent. Pothier, Louage No. 14, says: "On tolère néanmoins 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 donné comme "le prix d'usage de ces choses qui ne sont pas applicables, mais "comme une contribution aux charges de la fabrique." If this is a lease, it is not one which falls within the application of Art. 1657, C. C. It is not such a verbal lease as is contemplated 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 vs. Lamontagne, decided in this Court on the 21st September, 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 known it without such receipt.

Before the expiration 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 ordinary lease to prevent a contract of *tacite reconduction*. This appears to have been an exceptional proceeding, and without grave reasons, it would seem as oppressive, as it is admitted to have been unprecedented.

The question, however, which we have to determine, is not one of taste or propriety, or one of notice, but one of right. As I shall have occasion afterwards to remark upon the powers of the Trustees of this church, I will only say here that I consider they had, during their term of office, control of the church pro-

perty and the administration of the temporalities of the church, and, as such, had a right to rent pews, and the discretion to determine who should and who should not become lessees. This case as it is presented, and the facts proved, according to my understanding of it, give this Court no power to enquire into the discipline of the church, or the relations of the Appellant, as an elder of the church. These are spiritual matters, entirely distinct from the administration of church property, and could only be considered, under any circumstances, in order to enforce mutual contracts, made by By-laws or resolutions of agreement, to which all parties assent in becoming members of a church. The Appellant bases his claim entirely upon the fact of his being a lessee from Respondents; and he seeks to enforce an agreement with Respondents, and demands of them damages for breach of such alleged contract. He claims no prescriptive right or faculty, he does not even claim under a three years' occupancy, from which he might contend that he had a right to a pew in St. Andrew's Church, so long as he remained a member of the church and congregation, but he claims damages against Respondents for refusing to lease him the particular pew No. 68. He does not at all base his pretentions upon the fact that he is a member of the church, or that he is an elder in the church, and we can only determine his claim as he has presented it. The Presbyterian Church in Canada being an outgrowth of the Church of Scotland, like all Protestant churches here, is a mere voluntary association; and the members and adherents of that church may acquire rights, as well from its constitution, as from the usages of the Presbyterian Church of Scotland, from which their polity originated, when adopted by them. These rights and usages, when proved and invoked, doubtless may be enforced by the Civil Law, by virtue of the contract of association. This was clearly settled by the judgment in the Privy Council in the cases of Long *vs.* The Bishop of Cape Town, 9 L. J. N. S. p. 809, and in *Re* Bishop of Natal, 11 L. J. N. S., p. 353, where it was decided, "that in places where there is no church established by law, "the Church of England is in the same relation with any other "religious body, in no better, but in no worse position, and the

"members may adopt, as the members of any other communion "may adopt, rules for enforcing discipline within their body, "which will be binding on those who have expressly, or by impli- "cation, assented to them." This places the Presbyterian Church here in the same position as it is in the United States, and there is an obvious difference, as was remarked by the Honourable Judge, who rendered judgment in the Court below, between the position of a member of St. Andrew's Church, in Montreal, and that of a member, as parishioner, of the Established Church of Scotland. The church here is not a church for any particular area, as a parish, but has to do only with those who voluntarily become members of it. Where the church is affiliated with the State, and a member or adherent has rights, as resident of a particular parish, the loss of which affects his legal status as a citizen, the case is very different from this, where no such relations exist. The cases decided in many of the United States, and particularly in the State of New York, are very numerous, determining almost every variety of questions that can arise between churches and church corporations and members or adherents. It has been determined in cases of incorporated Presbyterian churches, under a similar act to that under which Respondents are incorporated, that Trustees represent the church and congregation, in the same sense as bank directors represent a bank, and have control of all the temporalities of the church, and of church property, during the continuance of their office. The doctrine has been well settled there that the Trustees, and not the congregation, have full control of the church property. This will be found, amongst other cases, in German Reformed Church *vs.* Buche, 5 N. Y. Rep., p. 666 (Sanford); Law *vs.* Cifferly, 7 Paige 281; Petty *vs.* Trustees, &c., Belfort (Smith), N. Y. Rep. 267; Houlan *vs.* First Reformed Dutch Church (New Jersey), 4 U. S. Digest 452; Madison Avenue Church *vs.* Baptist Church, Oliver street, 3 Robertson N. Y. Rep. 597. In the case of Robertson *vs.* Bullions, 11 N. Y. Rep. 265, the relations and powers of the Trustees of a corporation of a Presbyterian church, very similar to the Corporation of St. Andrew's Church, are fully discussed. These cases are not cited

as having the binding force of law here, but as reason, and the result of the mature deliberation of judges of high legal attainments, upon a state of facts such as is disclosed in the present case. Aid cannot be sought from English decisions to any great extent because a similar state of facts can scarcely be found there The powers and relations of Trustees to a dissenting church in England seem to be recognised in much the same manner there as in the American cases cited, see Cooper *vs.* Whitehouse, 6 C. & P. 545; Rex *vs.* Dagger Lane Chapel, 2 Smith 20; Rex *vs.* Barker, 3 Burroughs 1265. From the view taken by me of this case, as presented, it is unnecessary to decide whether the Trustees have exceeded their powers or whether the action taken by them was justifiable, under the circumstances; but if we were compelled to decide whether they had the power to do what they did, I should have no hesitation in saying they had. If the power did not rest in them I am at a loss to see where it lay. As to the mode in which they exercised their discretion, we certainly have nothing to do in this case. The issue has not been invoked, as the action is upon a contract. If it were, it would be very questionable if the Court exercise an appellate jurisdiction on a subject confided to their discretion. There can be no difficulty, as between them and the congregation, because their action was approved by the congregation. It is said the power of the Trustees was not plenary, it required action of the congregation. It is shewn that their act respecting App[illegible]t was in accordance with the wish of the congregation, and that, nearly [illegible] unanimous wish. If the Appellant had any remedy, it would be to assert his right, as a member and officer in the church, to a seat therein as a faculty, a proceeding *in rem* to be assigned a seat or pew or to be maintained in possession of one, not an action of damages for breach of contract. But had it been presented in this form, I should find great difficulty in coming to his relief. Where a church is a voluntary association, and a person may withdraw from it at pleasure, so far as his civil right is concerned, I do not well see how it can be denied to the large majority of a congregation, that they may separate from him—in other words, refuse him participation in the advantages of the church, and of the

reasons to justify them in so doing, it would seem, they must be the judges. Of course, where there is a contract, or an implied contract by the constitution to which all have assented, the rules adopted must be observed. I think the judgment of the Court *a quo* correct which dismisses Appellant's action, and it is confirmed.

REASONS AND OPINIONS OF THE HONOURABLE MR. JUSTICE MONK:

MONK, J.:—did not desire to add much to what had fallen from his colleague. Mr. Justice Sanborn had so clearly expressed the view which he entertained, that he would simply state the grounds on which he concurred in the judgment. The Court had to do simply with the questions of law and fact raised in the case. Adhering strictly to the points raised by the pleadings, he would remark that Mr. Johnston wanted three things. First, he wanted this Court to declare that there was a lease, and that he was entitled to notice. And if there was any difficulty about the notice, he wished the Court to declare that there was *tacite reconduction*, because he occupied the pew for eight or ten days against the will of the Trustees and the congregation. Upon the declaration, the Court had to declare whether the Trustees had a right to terminate the occupancy of a pew. The occupation of a pew could not be viewed as a lease. The occupant got a *droit d'usage* for a year; it terminated at the end of the year. Whether it was a lease or a *droit d'usage*, it expired on the 1st January. Mr. Johnston was so entirely aware of this, that he applied to the Trustees for the continuation of his lease of pew 68 for another year, and offered to pay the rent. This was a recognition that the Trustees had this right of exclusion, and so they had. They had control over the temporalities of the church. If they had not, who had? Mr. Johnston recognized the right, and now he said though he did recognize it, he had a right to the pew, notwithstanding the refusal of the Trustees to

go on for another year and if not, there was *tacite reconduction*. But if he occupied this pew beyond the year, he did so in a sanctuary where it is not always convenient to bring in a policeman and have a fight during the services. The Trustees took every precaution; they wrote to him; they warned him; they put up notices on the pew. Nevertheless Mr. Johnston persisted in going to this pew, and he created serious disturbance in the church. His pretensions that he had a lease, or that there was *tacite reconduction*, did not apply for a moment. It was proved that Mr. Johnston, long before the action of the Trustees was taken, did conduct himself in a very excited manner. It did not involve moral wrong; but he was a very eccentric man. He was disturbing the church. The congregation met on the 4th November, and said they could not allow this to go on. The Trustees were abundantly justified in their course, and the judgment dismissing the action should be confirmed.

REASONS AND OPINIONS OF THE HONOURABLE MR. JUSTICE TESSIER:

TESSIER, J.:—Je ne dois ajouter que quelques mots aux observations de mes collègues. La question se résout à savoir, si M. Johnston a établi le droit qui forme la base de sa demande. Il n'a prouvé aucun droit de propriété dans le banc en question, mais il a allégué qu'il était le locataire de ce banc et qu'il avait le droit de continuer à occuper le dit banc après le 1er Mai, 1873. A-t-il prouvé un bail écrit ou verbal? Non. Il produit un simple reçu pour l'occupation du banc durant l'année 1872. On ne peut pas assimiler l'occupation des bancs dans une église au bail des maisons ou d'immeubles. Ce n'est qu'une simple permission d'occupation qui a pris fin le 1er Janvier 1873, parceque le demandeur M. Johnston n'a prouvé aucun bail ou permission d'occuper ce banc après le 1er Mai 1873. Il a été au contraire, averti par écrit dès le 7 Décembre 1872 que les syndics ne voulaient pas lui louer ce banc pour l'année 1873. Cette notice était suffisante.

Il est vrai que M. Johnston invoque et prouve un certain usage dans cette Eglise de laisser les occupants de bancs continuer leur occupation d'année en année; mais cet usage ne peut pas constituer un droit positif à l'encontre des droits absolus et nécessaires des syndics de cette Eglise. Il n'y a pas de tacite reconduction, ni prescription en matière de banc. L'usage ne peut être qu'interprêtatif de l'exercise d'un droit qui n'existe pas. C'est bien à raison de cela que le demandeur a eu le prudence de ne pas conclure à être remis en possession du dit banc, mais il a porté un simple action en dommages.

Il est possible qu'il n'a pas été traité avec tout le ménagement que méritait son rang dans l'église, mais son droit à des dommages ne peut d'écouler que d'action illégale des syndics de lui refuser la continuation d'occupation de ce banc. Si les syndics, comme je le crois, avaient le droit de refuser à M. Johnston l'occupation comme locataire de ce banc après le 1er Janvier 1873, c'est M. Johnston qui a agi illégalement en persistant à vouloir conserver la possession du banc en question; c'est là la cause de ses troubles, et s'il a agi illégalement il ne peut réclamer de dommages. Je concours donc dans le jugement de cette cour qui rejète l'appel et confirme le jugement de la Cour Inférieure.

TESSIER J. (Translation):—I need only add a few words to the observations of my colleagues. The question is resolved into knowing whether Mr. Johnston has established the right which forms the basis of his action. He has not proved any right of ownership in the pew in question, but he alleged that he was the lessee of this pew, and that he was entitled to continue to occupy it after the 1st May, 1873. Has he proved a lease, written or verbal? No. He produces, simply, a receipt for the occupation of the pew during the year 1872. The occupation of a pew in a church cannot be assimilated to the lease of a house, or of immoveable property. This is only a mere permission of occupation which ends on the first of January, 1873, because Mr. Johnston, the Plaintiff, has not proved any lease or permission to occupy the said pew after May 1st, 1873. He was, on the contrary, notified in writing, on the 7th December, 1872, that the

Trustees were unwilling to lease this pew to him for the year 1873. This notice was sufficient. It is true that Mr. Johnston invokes and proves a certain custom prevalent in this church, of allowing the pew holders to continue in occupation from year to year; but this custom cannot constitute a positive right contrary to the absolute and necessary rights of the Trustees of this church. There is no tacit renewal or prescription of leases. Usage cannot be invoked to explain a right which does not exist.

It is on account of this that the Plaintiff has been prudent enough not to pray in his conclusion to be reinstated in possession of his pew; but he has brought a simple action for damages. It is possible he has not been treated with all the consideration due to his rank in the church, but his right to damages could only arise from the illegal action on the part of the Trustees of refusing him the continuation of the occupation of his pew. If the Trustees had, as I think, the right to refuse to Mr. Johnston the occupation, as lessee of this pew, after the 1st January, 1873, it is Mr. Johnston who acted illegally in persistently desiring to retain possession of the pew in question. This is the cause of his troubles, and if he has acted illegally he cannot claim damages. I concur in the judgment of this Court, which dismisses the appeal and confirms the judgment of the Court below.

PROCEEDINGS IN THE SUPREME COURT OF CANADA.

From the judgment of the Court of Queen's Bench an appeal was instituted to the Supreme Court of Canada, and the case came up for hearing on the 16th January, 1877, in the Supreme Court, in the Parliament Buildings, Ottawa, before their Lordships the Honourable Chief Justice Richards, and the Honourable Justices Ritchie, Strong, Taschereau, Fournier, and Henry.

Mr. Macmaster and *Mr. W. H. Kerr, Q.C.*, were heard in support of the appeal. *Mr. C. P. Davidson, Q.C.*, and *Mr. Cross*

Q.C., contra: and *Mr. Kerr* in reply. The arguments of counsel lasted three days. Their Lordships reserved judgment.

On the 28th June, 1877, the Supreme Court decreed in favour of the Appellant—reversed the judgments of the Superior Court, Montreal, and of the Court of Queen's Bench for Lower Canada, and condemned the Defendants to pay to Appellant the sum of $300 damages, and the costs in all the Courts.

The following remarks were made by their Lordships on rendering judgment:

REASONS AND OPINIONS OF HIS LORDSHIP THE HONOURABLE CHIEF JUSTICE RICHARDS:

RICHARDS, C. J. (dissenting):—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 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 Statutes 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, c 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 property 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 arrears 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*, *pew-holders*, and *members* of the church *not in arrears 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 pew-holders 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 arrears 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 *pew-holders*, 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 arrears of rent, and pew-holders who have paid rent for the two years preceding, one of which auditors must be a proprietor, and the other may be a pew-holder, *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 they 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 pew-holder 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 arrears for rent may transfer their pew, but no transfer is to be valid except on the express condition of the pew 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 member 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. 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 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 increased 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 the By-law 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. Aricle 13.—The term church in the 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, the names of the proprietors of pews, pewholders and sitters; where 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 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 pewholder 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 congregations 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 purpose. His rights being of a limited character may be subject to modification which would not attach to other interests coming out of lands. The fee simple in the property on this as in most of the churches in this country, is vested in the Trustees, whether under the name of Trustees or minister and churchwardens, and they hold according to 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 $^{00}/_{100}$ 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 contemplated 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 as in "the case of Webster *vs.* 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 expiration 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 ordinary 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 their 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 require 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 right 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 haivng purchased a pew in the church, having paid for the same and who shall produce a deed duly executed by the Trustees as a proprietor and entitled to the privileges of a proprietor as specified by the By-law. Proprietors not in arrears 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 pew-holders 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 pew-holders who have paid rent for three years. Suppose a pew-holder neglects to pay his rent, can he continue to hold his 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 meantime is he a pew-holder? And is the pew to be considered in his possession? Or is the pew in the possession of the Trustees? When is it considered to be 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 *pew-holder* has this 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 pew-holder 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 pew-holders 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 pew-holders would very much embarrass the management of the church. Suppose the pew-holder 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 prejudices 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 their 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 pew-holders 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 congregation. Any reasonable or necessary changes may be made at the end of the year, when each pew-holder 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 pew-holder the next year after the By-law 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 pew-holder 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 pew-holders for the last 25 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 by the pew-holders 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 by the pew-holders 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 pew-holder who desired it, does not, to my mind, prove that it was because the pew-holders 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 exists 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 the right to occupy for another year, each year, through the receipt given for the rent, it 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 pew-holders by refusing to renew

the letting of them. I do not think it is contended that the Trustees could compel a pew-holder 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 pew-holder 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 pew holder the right to occupy the pew for the year for which he bargained and paid, 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 pew-holder 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 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 Trustees to refuse to approve of the sale; they, however, declined doing so, but compelled the young men who had sittings No. 68 to leave that seat in order to give it to Appellant. I understand these young men had paid for the lettings just as the pew-holders 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 their 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 to 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 on 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.

NOTE.—His Lordship The Honourable Mr. Justice Ritchie next expressed his reasons and opinions. These are inserted immediately after the remarks of His Lordship The Honourable Mr. Justice Henry.

REASONS AND OPINIONS OF HIS LORDSHIP THE HONOURABLE MR. JUSTICE STRONG:

STRONG, J. (dissenting):—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 pretention. It becomes material then to ascertain, in the first place, what was the Plaintiff's title to this 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 to this pew, as a lessee for the year ending on the 31st

December, 1872, under a verbal contract with the Defendants, at a rental of $66.50. By the law of the Province of Quebec, in accordance with the modern and ancient French law, a lease for a short time, 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 law 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 *vs* Charlton L. R.; 2 C; p. 104.)

Article 1606 of the Civil Code of Lower Canada contains a provision not in terms expressed in the Code Napoléon, 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 the 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 favour of another property, to use a right of way or passage.

In all these cases I find several of the commentators on the Code Napoléon 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, &c."

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.

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, makes 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.

This 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 "specifying 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 this conclusion:—"Il faut donc "dire que le congé sera ou non sera necessaire, selon que la con- "vention (écrite ou verbale, peu importe) laisse ou non, indefinie "la durée du bail."—(Vol. 6, p. 481. See also Duvergier 1, p. 485; Duranton 1, p. 116; Troplong 2, 404; Zachariæ 3, p. 23, and Demante 7.)

This, I gather from the judgment of Mr. Justice Sanborn, was also discussed and decided in the case of Webster v. Lamontagne, 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. Moreover, the receipt of the 9th January, 1872, though not of itself a lease, would be a written evidence of it, at all events a good commencement of proof. 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 tenders 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 to the loss 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 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 Parliament 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 overrule 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 pew-holders in this church are to be assimilated rather to those of other voluntary religious associations than to those of pew-holders in Scotland This is the principle enunciated in the two cases of Long vs. Bishop of Cape Town, 9 L. J. P. 8, 1869, and Re Bishop of Natal, 11 L. J. (N), p. 353, and it is one which is entirely applicable to the present case. Then it has been argued that some usage or custom not to disturb a pew-holding 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 L. C., which correspond respectively to Articles 1160 and 1135 of the French Code, 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 obligation of a contract " extends not only to what is expressed 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 dispositions of the parties may be overruled or extended by usage.

President Larombiere, in his commentary on Article 1160 (corresponding to 1017) states this very decisively. He says (Larombiere : Obligations, vol. 1, p. 629:) " Mais uniquement des- " tiné à suppléer le silence du contrat, l'usage ne peut prévaloir " contre les dispositions expresses des parties, ni contre les dis- " positions 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 it, instead of it having been made verbally, it had been made in the most solemn and authentic manner known to the law, a notarial instrument, in which the contract of the parties was recorded for 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. Leake on Contracts, pp. 111–115; Webb and Plummice, 2 B. & Ald. 746; Clarke vs. Roystone, 13 M & W., 752. 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 law, which I apprehend finds a place in all systems of ju-

risprudence. *Nemo damnum facit nisi qui id facit, quod facere jus nisi habet.*—(Dig: de Reg: Jur: L., 151.)

There can therefore be no enquiry *quo animo* a party exercises his undoubted right. At all events, this is the law of England (Williams' Notes to Saunders, pp. 18, 19), 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—David vs. Thomas. 1. L. C. Jurist, p. 69. I think the appeal should be dismissed with costs.

REASONS AND OPINIONS OF HIS LORDSHIP THE HONOURABLE MR. JUSTICE TASCHEREAU:

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 pew-holder, under the 10th By-law in the Act of Incorporation of Defendants, and amendments. 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 Saturday, the 7th "Dec. inst. It was resolved:

"That in order to sustain the action of the congregation, taken "in regard to Mr. James Johnston at its 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 1st January, 1873, 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 Appellnt'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 pew-holder 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 usage 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 Respondents 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 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 disposed to allow the appeal. I say that Appellant was entitled to his pew, and could not be deprived of it in such way as 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 vexa-

tions he has been subjected to, by the conduct of the Respondents, with full costs in all the Courts.

REMARKS AND OPINIONS OF HIS LORDSHIP THE HONOURABLE MR. JUSTICE FOURNIER:

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 règlements adoptés pour la régie des affaires de cette congrégation et l'acte de 12 Vict. Ch. 154; qui l'a érigé en corporation. La qualité de locataire de banc (pew holders) lui donne en vertu de l'article 12 de ces règlements tous les droits et privilèges appartenants aux locataires de bancs (pew holders), suivant la constitution, les règlements, 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 1873, les Intimés lui firent remettre l'avis suivant: "It was resolved that in order to sustain the action of the "congregation taken in regard to Mr. James Johnston (the Appel-"lant) 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 se 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 comme les syndics ayant fait mettre des placards imprimés indiquant qu'ils mettaient 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, afin d'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 lui louer pour une autre année, invoquant spécialement l'usage de l'Eglise 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 with- "out 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 le 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 d'avance, le 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 pew-holder." 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 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 sans doute 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 sans doute l'on a 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 fixé le terme du bail parce que l'on a considéré que de sa nature il doit être pour terme indéfini, et on y a mis qu'une seule condition, le paiement d'avance. Jusqu'ici c'est ainsi que le règlement a été interprété et mis en pratique. La preuve éta-

blit ce fait de la manière la plus complète. La prétention des Intimés que c'est l'usage de louer des bancs annuellement a été contredite de la manière la plus formelle. Bien au contraire c'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 règlements 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 contractis tacite insunt quæ sunt moris et consuetudinis.*

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

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 détail par ceux qui m'ont 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 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 et 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'exercice d'aucun droit comme membre de la congrégation (corporator). Cependant ils dérivent leur pouvoir de ces mêmes membres qu'ils prétennent n'avoir aucun droit, ils ne sont que leurs agents, soumis, dans tous les cas, sujets 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 "obtaining 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 raisons, je concours dans le jugement infirmant celui de la Cour du Banc de la Reine renvoyant l'action de l'Appellant, 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.

FOURNIER, J. (Translation) :—The Appellant has, from the year 1867 until the year 1872, inclusive, continuously occupied

a pew in St. Andrew's Church, Montreal. In 1872 he was the legal occupant of pew No. 68, as a member of this congregation, in virtue of a verbal lease, granted to him by the Respondents, at the rate of $66.50 per annum, payable in advance, according to the By-laws adopted for the management of the affairs of this congregation, and the Act 12 Vict., Ch. 154, which constituted it into a corporation. The quality of pew-holder gives him, by virtue of Article 12 of these By-laws, all the rights and privileges belonging to pew-holders, according to the Constitution, the By-laws, the usage and custom of St. Andrew's Church, since its establishment.

In 1871 the Appellant was elected one of the spiritual officers, and occupied this position until the period of the trouble of which he complains in his Declaration. On the 7th December, 1873, the Respondents had the following notice sent him: "It "was resolved, that in order to sustain the action of the congre- "gation taken in regard to Mr. James Johnston (the Appellant) "at the meeting of the 4th November last, the Trustees do now "decline to let him a pew for the ensuing year. Carried. Mr. "A. Buntin, dissenting." Notwithstanding this notice, the Appellant informed the Respondents that he intended to retain the enjoyment of his pew. In order to comply with the necessity of paying in advance, he caused tenders of the amount of rent of the pew in question, to be made twice in December, 1872, and again on the 2nd January, 1873, when the rent was due. In spite of the refusal of these offers, he continued to occupy the pew during a considerable period; but as the Trustees caused printed placards to be posted on his pew, indicating that they placed the pew at the disposal of strangers, some of whom sat therein in spite of the Appellant, and had, further, the cushions and books of the Appellant removed to his warehouse, the latter found himself obliged to abandon his pew, in order to avoid a greater scandal. The Respondents pleaded a general denial, and also an exception, to the effect that there was only a lease for one year for the pew No. 68, and that they had the right to refuse to lease it to him for another year, specially invoking the usage of the church, as follows: "That according to the By-laws, cus-

" toms and practice of the said church, the pews therein are let " each year, and without notice for their termination; that there " was no continuation of his lease, and that they were under " no obligation to continue his lease to him." They added that they did not deem it proper to lease him a pew for the year 1873, nor for any other time; that on the 7th December they decided, in their discretion, not to lease him a pew, a decision which was confirmed by a special meeting of the congregation.

The pretention of the Appellant is, according to what precedes, that, as a member of the congregation and a pew-holder for several years, the Respondents had not the right to deprive him of his pew, inasmuch as he had fulfilled the condition of paying in advance. He pretends further that in default of notice conformably to Article 1657 of the Civil Code, there was a renewal of his lease by *tacite reconduction*.

The difficulty in this case lies altogether in the nature of the lease given to Appellant by Respondents, at St. Andrew's Church, Montreal, of a church pew, without there having been any special conditions agreed to by the parties.

The various receipts given to Appellant, in token of the payment of rent, for the five years during which he occupied a pew in this church, cannot be considered to be leases. They are all in the same form. I will only give the last:

" MONTREAL, January 9th, 1877.

" ST. ANDREW'S CHURCH. No. 1.

" $66.50.

" 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."

This receipt only makes proof of the payment for 1872; it contains no expression which makes it evident that the duration of the lease must necessarily be taken to be. Had there been a written lease of the pew for ten years, for the same sum, payable annually in advance, would the receipt have been drawn in a different form? Certainly not. The lease between the parties in this cause has not been put into

writing. It is proved that it was not the custom to do so. The only article of the By-laws touching leases is No. 10, in the following terms:—"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 term of one year mentioned in this article is not meant to determine the duration of the lease, by declaring that it shall not be for more than a year, but it is evidently only intended to define the quality of pew-holder, which gives to each one who possesses it, the right to be considered a member of the church. The same article, speaking of another class of members—those who have the right to vote at the election of the committee to be entrusted with the choice of a minister—says that they must have paid three years' rent; but here *again* it is to explain a qualification, not to fix the term of the lease. On the contrary, does not the obligation to pay annually in advance imply that the lease has an indefinite term? There is nothing either in these By-laws or in the Act of Incorporation to show that there was an intention to fix the length of duration of the lease. This silence, undoubtedly, does not deprive the Trustees of the right to make By-laws on the subject, but it indicates clearly that they did not wish to make them, because, without doubt, they acted on the presumption that every lessee would take his pew for as long a time as he remained a member of the congregation. It is not to be imagined that people change their churches as they do their houses. The term of the lease was not fixed, because it was considered, by the nature of the case, that it should be an independent term, and there is only one condition attached, viz., payment in advance. It is thus that the By-law has been interpreted, and put in practice. The proof establishes this fact in the most complete manner. The pretention of the Respondents [illegible] that the custom of leasing pews annually has been contradicted in the most formal way. On the other hand, it is proved beyond a doubt that the custom invoked by Appellant has always prevailed. I consider the proof on this point as sufficient to justify me in arriving at the conclusion that this lease given to Appellant, in the absence of all proof to the

contrary, is to be regulated by the constant usage in force since the existence of the congregation.

In the Act of Incorporation, power is given to the Trustees to make By-laws, &c., provided they be not contrary to the laws of the Province, to the other dispositions of the Act of Incorporation, or to the Constitution of the Church of Scotland, as established by law in Scotland.

Article 1 of the By-laws declares, that St. Andrew's Church is to preserve the form of worship and government of the Established Church of Scotland. Does not this declaration warrant a reference to the usages of this church concerning the letting of pews, and an application of them in this case? I think so, in so far as there is no variance between these usages and the laws of the land. For, by the proof made in this case, the usages of the Established Church of Scotland on this point differ very slightly from those which obtain in the Province of Quebec, and they are not opposed to any of the laws of the Province. In order to explain a contract a usage may be invoked as permitted by the Civil Code, which has preserved the old maxim of the Roman Law : — *In contractis tacite insunt quæ sunt moris et consuetudinis.*

In consulting these usages according to the proof, we see that it is the custom of St. Andrew's Church, and of the Church of Scotland, to lease pews, at the option of the members of the congregation without a fixed term, on the condition of payment of rent in advance

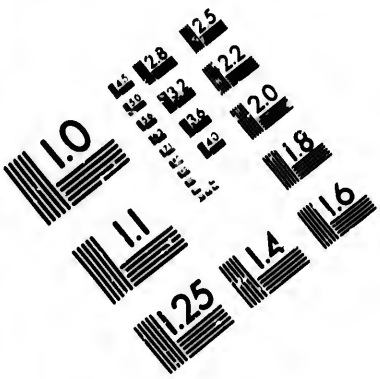
For all these reasons, based on the nature of the lease, on the custom of pew-letting in St. Andrew's Church, on the usage followed in Scotland, which may be invoked under the peculiar circumstances of this case, I believe that the Appellant was legally in possession of pew No. 68, of which he was unjustly deprived.

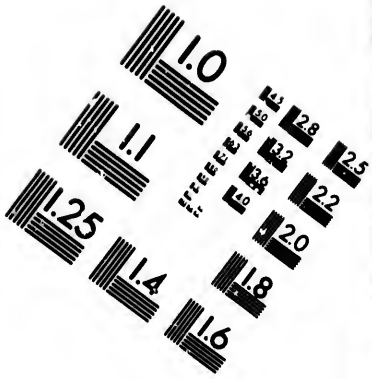
The Respondents have in vain tried to prove that the conduct of the Appellant, at the meetings of the congregation and in church, was such that they were justified in depriving him of his pew. As the facts have been mentioned in detail by those who have preceded me, I will refrain from repeating them.

Even had the conduct of the Appellant deserved censure, it was not the province of the Trustees to pass it upon him; he should have been brought to answer any charges before a spiritual tribunal—the Kirk Session. This move has only been made to endeavour to palliate the abuse of power which they had committed by their resolution of the 7th December, refusing to let a pew to Appellant, in order to sustain the action of the congregation, and to force him to resign his office of elder, and to deprive him of the right of taking part in the affairs of the church. It was in order to obtain this result that they had recourse to the expedient of refusing him a pew, and expelling him in this way from the church. But the Respondents, forgetting that they were only administrators, pretend that they alone form the corporation, and that neither the Appellant or any one else can claim the exercise of any right as member of this congregation (corporator). Nevertheless, they (the Trustees) derive what rights they have from these same members, who, as they pretend, are without rights; they are only their agents, and subject, in every instance, to the control of a meeting of the true proprietors of the church. I will repeat the remarks of the Honourable Chief Justice Dorion on this subject:

"As *commoners* the members of the congregation have certain "rights resulting from the implied contract entered into when "they joined the congregation, and of which they cannot be de- "prived arbitrarily by the Respondents. Among these rights is "that of obtaining seats and pews on the same terms and condi- "tions as all the other members of the congregation, and of re- "taining them as long as they submit to the rules and usages of "the church."

For these reasons I concur in the judgment reversing that of the Court of Queen's Bench, which dismissed Appellant's action, and I am of opinion that the Respondents should be compelled to pay $300 damages, with costs both of the Court below and of this Court.





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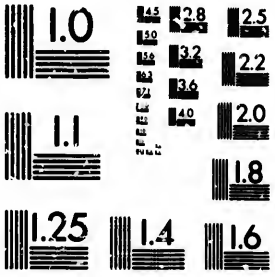

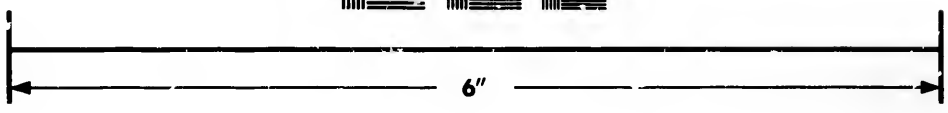

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REMARKS AND OPINIONS OF HIS LORDSHIP THE HONOURABLE MR. JUSTICE HENRY:

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. (See Art. 12 of the By-laws.) 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. 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 pew-holders.

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 pew-holders 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 be referred 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 the 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 contri- " buting 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 purposes 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 rent 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 donné comme le prix d'usage de ces choses qui ne sont " pas (*not applicable*, as the Judge quotes him, but *appreciable*,) " 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 Churches 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 power of Trustees to lease; and can do so "within the terms of the Constitution "and By-laws and as incident to their title. Corporations aggre- "gate may make what estates they please in their church or other "lands."—(2 Step; Com., 733.) 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 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."—(Step; Com., 512.) "In ordinary legal intendment, tene- "ment includes not only land, but rents, commons, and several "other rights and interest issuing out of, or concerning lands." (1 Step; Com., 170.) 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 con- "sumed by the use made of them." By Article 1606, "Incorporeal "things may also be leased or hired, except such as are inseparably "connected 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.

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 corporation here not being an ecclesiastical one, but the creation 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 position 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. The right acquired by the Appellant was not, therefore, an easement; an easement being "an interest in and over "the soil. It 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, it is regarded in the light of an easement appurten-
" ant to such estate ; whereas, if it belongs to an individual, distinct
" from any 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." (Wasburne on Easements, 7 ; Grimstead vs. Marlowe, 4 J. K., 717.) Easements, that is, such as stated, " being interest 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 purpose." (Wasburne Easements, p. 18.) " No servitude can be established without a " title ; possession even immemorial is insufficient for that purpose." (C. C. L. C., 549.) " 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." (C. C. L. C., 551.) A 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."—C. C. (L. C.,) 406. 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 then *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 where 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 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 pew-holders, 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 cannot thereafter leave the premises or be ejected "therefrom 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 pew-holders 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 pew-holders? 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 termination 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 is uncertain.* 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 otherwise made 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 lease 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, 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.

REMARKS AND OPINIONS OF HIS LORDSHIP THE HONOURABLE MR. JUSTICE RITCHIE:*

RITCHIE, J.:—I have given this case a great deal of consideration; I have felt throughout the argument and throughout the investigation I have made, that the case is surrounded with a great many difficulties, and my mind has doubted and fluctuated in it from time to time; but after most careful consideration, I have arrived at the conclusion, that the principle upon which Chief Justice Dorion, in the Court below, decided this case, is the correct one. This church, I think, dated a far greater distance back than twenty-five years; I look upon it as dating back to 1805. This church was deeded to certain persons as Trustees; and what was it so deeded for? It was deeded for the benefit and behoof of said congregation, and for no other purpose whatever. It was found afterwards at the date of this charter of 1849, that it was necessary that the church should be enlarged, and that legislation should be obtained with a view to enable them successfully to carry out the trusts and objects contemplated. A

* Owing to the absence of his Lordship, the Honourable Mr. Justice Ritchie from Ottawa, the compiler has been compelled to take a newspaper report of his Lordship's remarks, which does not contain the authorities cited.

charter was granted, and it was for the use and behoof of the congregation of the church. Under this charter, this church was subsequently erected, and certain By-laws, rules and regulations were made for the government of the church; but it is clear that this church was for the benefit of the congregation, according to the laws and government of the Established Church of Scotland. Now, I think it is very much to be regretted, indeed, that either in this Act which was passed in 1849, or in the By-laws which were passed in 1851, all questions, such as this, had not been put upon a footing more clearly enunciated, so that these difficulties might not have arisen. Now, I think that this church was not given to these Trustees for the purpose of letting or not letting—for the purpose of doing, with reference to that congregation, as it seemed right in their own eyes—but I think they held the church for the benefit of the congregation at large, and those persons who worshipped in it; and I think they had no arbitrary discretion in the matter. I think, to find out what rights the congregation had in this church, we must look at what rights congregations have in the Church of Scotland, according to the form of worship and government of that church, but I cannot take judicial notice of what the rules and regulations of that church are. They must be proved. I regret that in this action the law was not proved in a clearer and more distinct manner, so that it could be easily understood, and we could be governed and guided in the matter by something more distinct than appears in this case. The very words quoted by the learned Chief Justice, with reference to the minister of the church, show how little reliance can be placed upon that clergyman's idea of what the duties of those 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. We must know something more than that with respect to it. When I turn to the evidence of the Rev. Mr. Campbell in this case, I find he puts it there on what I think is a very intelligible footing. He says, in effect, the rights of this church and the congregation of it are to be, as near as may be, analogous to the government 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. I take that in connection with what was said by Chief Justice Dorion in his judgment (which, I understand, is quite concurred in by my learned brethren on this Bench from Quebec), and that is, that the pews are let to the congregation, the rent payable in advance; when they pay the rent in advance, they continue to occupy the pew until some good cause can be shown why they should be deprived of it, and thereby, of the benefits secured to that congregation by the first deed, and the statute passed in 1849, without some good reason. In addition to that, I put this: The learned Chief Justice says, for twenty-five years they appear to have acted in this way in this church, but as I date back the origin of this church to the year 1805, so far as I read the evidence, for seventy years there was a continuous acting up to that principle which the Rev. Mr. Campbell puts forward—to that principle which was enforced in the Province of Quebec with reference to the largest church in that Province, and appears to have worked without the occurrence of any one of all those numerous difficulties, suggested as possible to arise by the learned Chief Justice. Was there any wrong done in this case that they should occur? I think not.

It is absolutely necessary that I should make some reference to 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 this gentleman 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 that church in changing the forms or modes of worship in the church, which was distasteful to the Appellant in this action, 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 those circumstances, I do not mean to say there may not be such changes as they might not be bound to submit to, but I think their feelings—nay, even what may be regarded as prejudices—ought to be dealt with leniently. It appears, growing out of those changes, other difficulties arose. There is no doubt the Appellant in this case put forward a statement without sufficient foundation for it, 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 that, was far more wrong when he openly, at a public meeting of the church, said 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 gentleman really, honestly and sincerely believed the statement to be incorrect, and it was a matter of discussion in the church at that time, it seems to me he would have been wanting in independence if he had not pointed out the incorrectness of it, but he should have taken good care his information was correct, and the manner in which he did so should also have been carefully guarded. Then, after that, there seems to have been other discussion, and then the Trustees, it appears, desired to get rid of the gentleman as an Elder of the church, and, so far as the evidence in this case goes, it appears that with reference to Elders of the church the Trustees have nothing to do. With reference

to their displacement or their office, they are subject to the laws of the church courts, and to be tried there and removed by their decrees. It seems that for any misconduct of a member of the congregation, inconsistent with the proper conduct of such a member, 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. It appears that course was adopted, and Mr. Johnston was tried, and was at first condemned; but, upon appeal to the church tribunal, it appears he was entirely acquitted, and he remained in his office of Elder, not subject to the control of the minister or dismissal by the Trustees, or to the control of the Trustees in any way. But it appears they and a large majority of the congregation were desirous of getting rid of this gentleman. It is my opinion, with reference to this matter, if they desired to get rid of him legally and properly, they had a right to take such action as would accomplish the object in view; 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 let him leave his pew, and thereby prevent him from continuing to be a member of that 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 that purpose. Therefore I think that where they adopted that course they were not exercising a reasonable discretion—they were not withholding the pew from Mr. Johnston for any reasonable, legitimate or proper cause, and that they were endeavouring to gratify their own feeling with regard to his (to them) 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, with the original deed in this church, the charter of the church and the articles of the church never contemplated Trustees should use it. It was never contemplated that they 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 speak this with reference to damages. The very circumstance

of their feeling, and avowing, they were accomplishing one object in that way which they had tried before and could not accomplish by legal means, should have made them pause, and, therefore, their conduct was very irregular, and in my opinion very improper.. The way in which they carried it out was equally objectionable. Considering this gentleman was an elder in the church; considering the number of years he belonged to the church and his position in the church; without any notice, sending all those articles used in his pew in the church, and by a common carter, 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 would have a right to expect. This and the placarding of his pew afterwards was all done with one object—to drive him from the eldership and from the church. I think, up to this time, 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 done; I think it is contrary to the spirit and government of the church.

I might have mentioned also, I find in these articles the idea of continuation of occupancy of pew-holders is recognized, because certain rights and privileges are given to them. Whoever paid rent for two preceding years is enabled to elect certain officers in the church; I find, also, instead of saying that the Trustees shall make the rents and fresh agreements every year, renting the church 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 would not be necessary if they were to be leased every year, because this clause would not be necessary. If they were leased only for a year, and paid for in advance, there would be an end of the matter; but it goes on, "the rents of pews and sittings are to be paid annually in advance." What does that mean? It means, that having got the right of pre-emption—if I may use the term—they go on using it. Why is it to be considered due, if it all rests on one individual agreement to be made at the time? There would be nothing due, in that case,

until the agreement was made—nothing due if the rent must be paid in advance. I put this in connection with the usage of the church, and I think it clearly shows the conclusion at which I have arrived, though I am sorry it is left to inference. It may be, all the difficulties suggested by the learned Chief Justice may have arisen, but they have not arisen in this church in seventy-three years, and it is clear they did not arise from any of those causes put forward by the learned Chief Justice in the present case, but, as I have shown, from the Trustees (and possibly the congregation also) desiring to do indirectly what they could not do legally and directly against him.

In view of all these circumstances I am constrained to the conclusion that this man 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 in this case as, while not of a vindictive character, will serve to warn those persons entrusted with such delicate positions against such an improper exercise of their powers. 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 is that men's feelings are always seen on matters of this kind, and persons in office in a church should not step out of their duty and deprive people wrongfully of their rights in the church. If they do, they should be so deterred that they shall not do it again. There is nothing more unseemly than a congregation at variance among themselves. It seems to be 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 say, have not arisen in this case to justify the action of the Trustees) should become apparent, all I can say is, if 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 those parties will re-consider this matter and that it will lead to an amicable arrangement among them. I believe this man 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 by the learned Chief-Justice 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 Trustees, 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.

FINAL DECREE

OF THE

Supreme Court of Canada.

IN THE SUPREME COURT OF CANADA, THURSDAY, THE TWENTY-EIGHTH DAY OF JUNE, A. D. 1877.

L.S.

Present:

The Honourable THE CHIEF JUSTICE,
" " MR. JUSTICE RITCHIE,
" " MR. JUSTICE STRONG,
" " MR. JUSTICE TASCHEREAU,
" " MR. JUSTICE FOURNIER,
" " MR. JUSTICE HENRY.

Law Stamps.

JAMES JOHNSTON (Plaintiff), - - - - - - *Appellant*,

and

THE MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL (Defendants), - - *Respondents*.

The appeal of the above-named Appellant from the judgment of the Court of Queen's Bench for the Province of Quebec (appeal side), rendered in the above cause on the 3rd day of February, A. D. 1875, affirming the judgment rendered in the Superior Court for the said Province, sitting at Montreal, in the District of Montreal, on the 30th day of December, A. D. 1873, having come on to be argued before this Court on the 16th, 17th and 18th days of January, A. D. 1877, in presence of counsel as well for the Appellant as for the Respondents; whereupon and hearing what was alleged by counsel aforesaid, this Court was

pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this Court did order and adjudge, that the said appeal should be, and the same was, allowed, and that the said judgment of the said Court of Queen's Bench for the Province of Quebec (appeal side), rendered on the said 3rd day of February, A. D. 1876, in the said cause, and also the said judgment of the said Superior Court for the said Province, rendered on the 30th day of December, 1873, in the said cause, should be, and the same were reversed; and this Court further orders and adjudges that the said Respondents should be, and they were condemned to pay to the said Appellant the sum of three hundred dollars ($300) current money of Canada for damages, together with the costs incurred in the said cause by the said Appellant in the said Superior Court for the Province of Quebec, in the said Court of Queen's Bench for the Province of Quebec (appeal side), and also in this Court.

Certified.

(Signed) ROBERT CASSELS, JR.,

R. S. C. C.

APPENDIX.

A

Extract from the Act of Incorporation of St. Andrew's Church, 12 Vic., cap. 154, sec. 1, Canada.

"*The Ministers and Trustees of St. Andrew's Church, Montreal,*" shall be a perpetual Corporation, and shall have perpetual succession, and a Common Seal, with power to break, change and alter the same, from time to time at pleasure, and shall be in law capable of suing and being sued, pleading or being impleaded, defending or being defended, answering or being answered unto, in all Courts of Judicature, in all manner of actions, suits, complaints, matters and causes whatsoever, and also of contracting and being contracted with, *relative to the funds of the said Corporation, and the business and purposes for which it is hereby now constituted as hereinafter declared;* and may make, establish and put in 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 by law established, and as may appear to the said Corporation necessary or expedient for the interests thereof; provided always that three of the members of the said Corporation shall form a *quorum* for all matters to be done and disposed of by the said Corporation.

B

Extract from By-Laws of St. Andrew's Church, Montreal.

ARTICLE I.

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 X.

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 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.

C

Plaintiff's Exhibit. C.—Receipt for Pew Rent for 1872.

ST. ANDREW'S CHURCH.

No. 1. $66.50.

MONTREAL, Jan. 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.

For the Trustees.

J. CLEMENTS.

4½ yds. carpet, $4.68.—$71.18

ST. ANDREW'S CHURCH.

D

Resolution of Meeting of 4th November, 1872.

Resolved.—"That in view of the fact that Mr. Johnston cannot "work harmoniously with the minister and his brother elders, he "be requested to resign his office as elder."

E

Extract—Resolution of Trustees of 7th December, 1872.

Resolved.—"That in order to sustain the action of the congre- "gation taken in regard to Mr. James Johnston at its meeting, on "the evening of the 4th November last, the trustees do now "decline to let a pew to Mr. James Johnston for the next year. Carried. Mr. A. Buntin dissenting."

F

Plaintiff's Letter in Answer to Resolution of Trustees ; 10th December, 1872.

MONTREAL, 10th December, 1872.

JAMES WARDLOW, Esq.,
Secretary of Trustees of St. Andrew's Church, Montreal.

DEAR SIR:—

I received your letter of the 7th inst. (yesterday), informing me of the action of the trustees regarding my pew in St. Andrew's Church.

In answer thereto I have only to say that I desire to again lease the pew I now occupy for the coming year, as Miss Pollock, Miss Johnston, Mrs. Johnston and myself, "members in full communion," and family, are sitters in it.

I am,
Yours most respectfully,
(Signed) JAS. JOHNSTON.

G

Defendants' Acknowledgment of Plaintiff's Letter.

MONTREAL, 11th December. 1872

JAMES JOHNSTON, Esq., Montreal.

DEAR SIR:—

I beg to acknowledge receipt of your letter of the 10th inst. I have handed it to the Trustees.

I am,

Yours most respectfully,

(Signed) JAMES WARDLOW,

Secy. St. Andrew's Church.

H

Defendants' Answer to Plaintiff's Letter of 10th December, 1872, dated 12th December, 1872.

MONTREAL, 12th December, 1872.

JAMES JOHNSTON, Esq., Montreal.

DEAR SIR:—

I am instructed by the Trustees of St. Andrew's Church to inform you that if Mrs. Johnston, Miss Johnston or Miss Pollock are desirous of leasing a pew in St. Andrew's Church, the trustees will be happy to lease them one.

Your obedient servant,

JAMES WARDLOW,

Secy. St. Andrew's Church.

K

Extract from Minutes of Annual Meeting of the Congregation of 25th December, 1872.

Moved by Mr. Thomas Darling, seconded by Mr. A. W. Ogilvie, "That this meeting object to the action of the Trustees in "notifying Mr. Johnston that the lease of his pew for the year "1873 will not be renewed, because such action is calculated to "interfere with the free and conscientious expression of opinion "of the members of this congregation upon matters that may be "brought before them."

It was then moved in amendment by Mr. Andrew Wilson, seconded by Mr. Joseph Hickson:

"That the action of the trustees in refusing to lease a pew to "Mr. Johnston be approved of."—Carried. Forty for the motion and four against it.

L

Mr. Johnson's Tenders and Protest of Rent

27th December, 1872.—Notarial Protest of Plaintiff against Defendants, demand of continuance of pew, and tender of rental ($60.50) for year 1873.

2nd January, 1873.—Renewal of Notarial Protest of Plaintiff against Defendants, demand of continuance of pew, and tender of rental ($66.50) for year 1873.

M

Defendants' Letter of 4th March, 1873.

MONTREAL, 4th March, 1873.

SIR:

It having been brought to the notice of the Trustees of St. Andrew's Church that you removed the books out of the strangers' pew, the Secretary was requested to write to you,

desiring you for the future not to remove the books placed in this pew by the Trustees for the use of strangers.

Yours truly,

J. WARDLOW,
Secy. St. Andrew's Church.

To James Johnston, Esq., Montreal.

N

Plaintiff's Answer of 6th March, 1873.

MONTREAL, 6th March, 1873.

J. WARDLOW, Esq.,
Secretary of St. Andrew's Church, Montreal.

SIR:

I am in receipt of your letter of the 4th instant informing me that it is the wish of the Trustees that I should not remove the books placed in what you call "the Stranger's pew" in St. Andrew's Church.

I wish to inform the Trustees through you that I hold the pew which I now occupy, and have hitherto occupied, under the Constitution and By-Law of St. Andrew's Church, and that while I am willing as I have always been to accommodate with a sitting in my pew, persons who may come to the church to worship, yet I reserve my right of absolute ownership therein.

Furthermore, I wish to express my unqualified dissent against the Trustees placing any placards on my pew, as they have hitherto done, viz., by putting a placard on it with "For Strangers" printed on it or otherwise, and I also dissent against the sending of the cushions, &c., used by myself and family in said pew with a carter to my warehouse. Such conduct on the part of the Trustees, I regard as calculated and intended to bring me into contempt and ridicule not only with the congregation of St. Andrew's Church, but with my partners, employés and the public generally, and which I am determined not to leave pass unnoticed, and must in the meantime characterize it as unnchristian and contemptible.

I am, sir, yours respectfully,

JAS. JOHNSTON.

P

FAC-SIMILE OF PLACARDS STUCK ON PLAINTIFF'S PEW.

R

Plaintiff's Letter of 27th May, 1873.

MONTREAL, 29th May, 1873.

TO THE
Minister and Trustees of St. Andrew's Church, Montreal.

GENTLEMEN:

I desire to call your attention to the following matter coming within your functions in connection with St. Andrew's Church, Montreal:—

You are doubtless well aware that during the year preceding the first of January last I occupied pew No. 68 in said church, and that I am still the lawful holder and lessee of this pew. You are doubtless further aware that, as the lessors of pews, you are bound to see that every pew-holder is protected in his rights. These are obligations which any lessee may claim the fulfilment of. Instead of your protection you are well aware that you have heaped insult and indignity upon me as a pew-holder in said church, and indirectly upon my family, by your discourteous conduct toward me.

By your instructions, placards were placed on my pew containing the words "For strangers," and my holding and right of occupancy thereof were brought into question before the congregation, and myself into ridicule and derision. By your instructions my books, cushions and hassocks were removed from my pew, and sent with a carter to the warehouse of the firm of which I am a partner. All this have I endured for five or six months while I was only acting within the scope of my rights in quietly occupying my pew. I will not speak of the unpleasantness I have suffered in being thus treated by you, or of the pain your conduct has caused my family. I only wish to show now that time has given opportunity for reflection, that you have acted in an unseemly and discourteous manner,—in a word, that you have done wrong, and I must request that you should repair that wrong as gentlemen and Christians should do.

I must therefore ask that you will send me a written apology

for your conduct in the premises; and as the insults were offered publicly and repeatedly in presence of the congregation, I must ask that the apology be in like manner made by you publicly at Sunday morning service in the presence of the congregation, and before the Benediction is pronounced, on or before the 15th day of June next.

From all blame for the conduct of the Minister and Trustees I wish to exonerate Alex. Buntin, Esq., one of your number, who dissented against your proceedings from the beginning.

I enclose copy of my letter of 6th March last.

I am, very truly yours,

(Signed) JAMES JOHNSTON.

S

Plaintiff's Letter to Secretary of Defendants, 29th May, 1873.

MONTREAL, May 29th, 1873.

JAMES WARDLOW, Esq,,

Secretary of Trustees of St. Andrew's Church, Montreal.

DEAR SIR:

Will you have the kindness to bring the enclosed letters of this date and of the 6th March last under the attention of the Minister and Trustees of St. Andrew's Church with as little delay as possible, and oblige

Your obedient servant,

JAS. JOHNSTON.

T

Defendants' Acknowledgment of same; dated 3rd June, 1873.

MONTREAL, 3rd June, 1873.

JAMES JOHNSTON, Esq., Montreal.

DEAR SIR:

I am instructed by the Trustees of St. Andrew's Church to acknowledge the receipt of your letters of the 29th ult. and 2nd instant.

I remain,

Your obedient servant,

(Signed) J. WARDLOW,

Secy. St. Andrew's Church.