defenders doing their alleged duty, but it expressly contemplates the case of their failure in that respect, and takes the pursuer bound to Macdonald in that very covenant to do what was necessary."

The damages recovered by Macdonald cannot be considered as arising naturally, that is, "according to the usual course of things"—to use the words of Baron Alderson in *Hadley* v. *Baxendale*, 9 Exch. 354—from the company's breach of duty, but from something collateral to, and independent of it, viz., from the respondent's failure to perform his contract.

This is very different from the case of *Mansfield* v. *Campbell*, which was strongly relied upon on the part of the respondent. There the damage to which the vendor was liable was the immediate result of the non-fulfilment of the purchaser's contract. The purchaser had agreed to pay the purchase money by instalments. The vendor, relying entirely upon the performance of this promise, had given a notice to pay off the heritable bond, which, it must be observed, the purchaser knew, that the vendor must do in order to clear the title. The failure of the purchaser to perform his promise was the sole cause of the default of the vendor, upon which the creditor recovered his damages. And the damages to which the creditor was entitled were exactly those to which the vendor had been made liable by the default of the purchaser.

I should have felt much greater difficulty in this case if it had appeared, that the learned Judges of the Court of Session had distinctly determined, after argument, that this was a case for an action of relief. But their attention seems to have been principally, if not entirely, directed to the question, whether the action was incompetent on account of the damages being the subject of statutory jurisdiction, and whether the penalties prescribed by the act were not the sole measure of compensation. It is true, that their Lordships, in the consideration of the case, appear to have assumed, that the action for relief was well founded. But that there was no clear and distinct expression of an opinion upon this point appears from the note of the Lord Ordinary, for, upon the remit to him, he says, "The Lord Ordinary had been of opinion, that this was not a case for an action of relief such as the present; but, apparently, that view was considered too strict in the Inner House."

Resorting, then, to principle in the absence of authority, it appears to me, that the action of relief in a question of damages can be applicable only where the liability of a pursuer and defender are so completely co-extensive, that the defender, by standing in the pursuer's shoes in the action brought against him, would satisfy both his own and the pursuer's liability at the same time. That was not the case between the parties. The company, although liable to the respondent for their own breach of duty, were not liable to him for more, and could not be called upon to indemnify him against the consequences of an action which arose out of his own neglect to perform an independent contract into which he had voluntarily entered with Macdonald, and upon which alone Macdonald's right to recover his own peculiar damages was founded.

For these reasons, I think, that the interlocutors appealed against ought to be reversed.

Mr. Palmer.—The cause will be remitted to the Court of Session, with a direction to decern expenses accordingly. I apprehend, that will be the correct form of the order, because the expenses ought to have been given to us; we ought to have succeeded in the Inner House instead of failing.

LORD CHANCELLOR.—That will be right.

Interlocutor of Inner House reversed, and that of the Lord Ordinary of 23d February 1858 *affirmed.*

For Appellants, Grahame, Weems, and Grahame, Solicitors, London; Hope and Mackay, W.S., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, London; John Stewart, W.S., Edinburgh.

AUGUST 9, 1860.

JOHN CAIRNCROSS and Others, *Appellants*, *v.* JAMES LORIMER and Others, *Respondents*.

Church—Dissenting Congregation—Right to Chapel—Personal Bar—Acquiescence—Mora.

A congregation of dissenters, by their trustees, held the property of their church under a trust to adhere to "the original principles of the Secession."

HELD (affirming judgment), *That members of the congregation, forming a small minority thereof, were barred from claiming restitution of the church, which, by a resolution of the congregation, had been separated from the religious body to which it originally belonged, and annexed to*

another with which the congregation had formed a union, inasmuch as there had been acquiescence and consent of such minority.[1]

Certain persons as trustees, (including the pursuers Cairncross and others,) in 1829 took a disposition of a meeting house and other subjects to be held in trust for the Associate Congregation of Original Seceders in Carnoustie, in connexion with the Associate Synod of Original Seceders, and adhering to the original principles of the Secession as set forth in a book specified. One purpose of the trust was, that the houses should belong solely to those who continued "in adherence to the foresaid original principles of the Secession."

In 1842 the Associate Synod of Original Seceders, on uniting with other dissenters, took the name of "The Synod of United Original Seceders." The latter Synod in 1852 joined the Free Church of Scotland, and so did the defenders Lorimer and others. The Carnoustie congregation resolved to join the Free Church, and the defenders, as the majority, kept possession of the meeting house. Other members of the congregation, including the pursuers, raised this action to recover possession, on the ground that they alone represented the original principles of the Secession, for whose benefit the property was disponed in 1829, and that the defenders had forfeited all right to the property. The defenders pleaded, that in 1852 the congregation agreed without any dissenting voice to the junction with the Free Church, and it was too late now for the pursuers to claim the property.

The Court of Session held, that the pursuers were barred by acquiescence, and assoilzied the defenders.

The pursuers appealed, maintaining, in their case, that—1. The appellants, as members of the congregation of United Original Seceders at Carnoustie, and as the persons for whose use and benefit the chapel and other property was provided, were entitled to insist, that the property should be applied to its destined uses, and not diverted therefrom. 2. The appellants, John Cairncross and William Kidd, being two of the trustees in whom the property of the chapel is vested, it is not only their right, but their absolute duty, to maintain the purposes of the trust, and prevent them from being violated or defeated. 3. The appellants, whether as members of the congregation or as trustees for its behoof, could not bind themselves, either expressly or by implication, to consent to the purposes of the trust being altered or subverted. 4. The facts and circumstances founded on by the respondents did not support the plea of personal bar, on which the respondents relied, even supposing such plea to be relevant in the circumstances. 5. Even supposing, that the appellants had, without due consideration, assented to the union with the Free Church, or acted in such a way as to imply such assent, still, on being better advised, they would be entitled to retrace their steps, recur to the written terms of the trust, and insist on these terms being strictly carried out.

The judgment of the Court of Session was supported on the ground that—1. The appellants acquiesced in—at all events did not *tempestivè* dissent from—the union with the Free Church, and were by their conduct barred from insisting in the action. 2. The respondents, being ready to comply with the test of adherence prescribed by the title, could not, on the ground of nonadherence, be deprived of their right to, and enjoyment of, the property in question.

R. Palmer Q.C., and *Neish*, for the appellants.—The judgment of the Court below was wrong. The trust was plainly declared to be, that the property was to be held for the use of the United Original Seceders, and those who adhered to those principles, and it was competent for any of the beneficiaries to enforce the trust, or take steps to prevent its breach. It was not competent for any number of the trustees, however numerous, to alienate the property to a different purpose, against the consent of any one of the beneficiaries—the *Kirkintilloch case*, *Craigie* v. *Marshall*, 12 D. 523. In such a case it is immaterial whether the majority of the beneficiaries agreed in the breach of trust, or whether a long time has elapsed. This is like a suit by the Attorney General in England for the misapplication of charity funds—*Attorney General* v. *Munro*, 2 De G. & Sm. 122. Here the appellants were justified in raising this action, and even if some delay and misunderstanding have been established against them, they are not estopped from maintaining the action. The plea of personal bar, even if it were proved, would be inapplicable in such a case as the present—*Thompson* v. *Candlemakers*, 17 D. 765. But even admitting that a personal bar is to be admitted to proof, there was nothing in the conduct of the appellants which amounted to anything like acquiescence or waiver of their clear rights at law—*Rochdale Canal Co.* v. *King*, 2 Sim. N.S. 89; *Clarke* v. *Hart*, 6 H. L. Cas. 633.

The *Lord Advocate* (Moncreiff), and *Anderson* Q.C., for the respondents, contended, that the appellants were barred by their conduct from insisting in the action—*Craigdallie* v. *Aikman*, 6 Paton's Rep. 635; *Picard* v. *Sears*, 6 A. & E. 469.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, in this case I am of opinion, that the unanimous judgment of the Inner House in favour of the defenders ought to be affirmed. The counsel for

[1] See previous reports 20 D: 30 Sc. Jur. 611. S. C. 3 Macq. Ap. 827: 32 Sc. Jur. 711.

the pursuers at your Lordships' bar contended, that this suit was to be treated like an information in the Court of Chancery in England, in the name of the Attorney General, for the misapplication of the funds of an endowed charity, arguing, that neither consent nor lapse of time could be any bar. Upon this principle, if all the pursuers had actually concurred in the union of the Associate Congregation of Carnoustie with the Free Church, and Mr. Meek, the incumbent, having died, they had joined in the election and call of a successor, according to the rules and discipline of the Free Church, and had applied to the Free Church Presbytery of Arbroath, that the object of their choice should be instituted as the new Free Church Minister at Carnoustie, they might many years afterwards have commenced a suit to eject him, on the ground, that he did not belong to the Associate Synod of Original Seceders. We need not now inquire how far this is to be considered an endowed charity, (if we had to decide that question I should certainly consider that it is an endowed charity,) or what may be the rights, under the deed of 8th October 1829, of the Associate Synod of Original Seceders, or of members of that religious persuasion who may hereafter become inhabitants of Carnoustie. It is enough to observe, that the present pursuers bring this action as individuals, for a personal wrong which they individually suffer from the wrongous intromission of others. Therefore, in this case, first, the maxim will apply, "*volenti non fit injuria;*" and secondly, the doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated, that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. Both these defences are set up to the present action. There is strong evidence to support the first, and to shew, that, according to the rules which govern the proceedings of deliberate assemblies, the union of the Associate Congregation of Seceders at Carnoustie with the Free Church, the pursuers being present, was carried *nemine dissentiente.* But on this point there is some conflicting evidence, and there may be a difference of opinion, and therefore I do not make it the reason of my decision. I agree with the Lord Justice Clerk and the other Judges who thought, that "it is not necessary to prove concurrence on the part of the pursuers in the proceedings now challenged, and that proof of positive assent or concurrence is not necessary." I am of opinion, that, generally speaking, if a party having an interest to prevent an act being done, has full notice of it having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had, if it had been done by his previous license. We are asked what these Scotch Judges mean by *tempestivè* or *in debito tempore;* and, in analogy to the rules of negative or positive prescription, how many years, months, or days constitute "*debitum tempus*"? I answer, that it is not to be measured by any cycle of the heavenly bodies, and it must depend upon the circumstances of each particular case. The objection must be made before there has been such acquiescence with knowledge as to induce a reasonable belief, that the act will not afterwards be challenged. The owner of a mill to which all the lands in a barony are *thirled,* if he sees an occupier of land within the barony erecting a grist mill, must not placidly look on till the new mill has been completed and the miller has established a thriving business by laying out all his capital upon it, and then bring an action for damages, praying for an interdict, with a petitory conclusion, that the mill may be prostrated, as having been illegally erected. In the present case it was known to the pursuers, and to all Carnoustie, that on 3d of June 1852 there was said to be a vote of the kirk session for the union, and that, on the 6th of July 1852, the Rev. Mr. Meek had presented himself to the Free Presbytery of Arbroath, and that he had been solemnly admitted as the Free Church minister of the Carnoustie congregation, formerly attached to the Associate Synod of Original Seceders. The present action was not commenced till July 1856, and for above three years there had been not the slightest complaint by the pursuers. On the contrary, one of them had officiated occasionally as precentor in the meeting house at Carnoustie under the Rev. Mr. Meek, who had become a member of the Free Church Presbytery of Arbroath, and qualified to be moderator of the General Assembly of the Free Church of Scotland. If the objection is now made *tempestivè*, so it might be made twenty years hence, and a similar action might then be maintained by one individual, who, although he did not actively promote the union, had all along acquiesced in it, and professed, that he approved of it, while the whole of the Free Church, and the whole of the Associate Synod of Original Seceders, except himself, rejoice in the amalgamation. It would be little creditable to the law of Scotland if the confusion, and hardship, and injustice which must necessarily be the effect of such a proceeding were to meet with judicial sanction. But various authorities were cited (and they might be greatly multiplied) to prove, that in Scotland, according to well recognized principles and unquestioned decisions, such an attempt must fail. I do not consider it at all necessary to refer more particularly to these authorities, or to review the analogous class of cases in England, at the head of which stands *Picard* v. *Sears.* I confess I should have been sorry if we had

been obliged to pronounce a judgment which would have given such facility to the stirring up and the revival of disputes between the different dissenting religious persuasions into which Scotland is unhappily divided, and I feel great satisfaction in being able, according to the well established principles of Scottish law, to advise your Lordships, that this appeal be dismissed with costs. I ought to mention, that my noble and learned friend LORD WENSLEYDALE, who heard this case, dissents from the judgment that I have proposed to your Lordships.

LORD KINGSDOWN.—My Lords, having had an opportunity of hearing and considering the opinion which has just been expressed by my noble and learned friend on the woolsack, it is unnecessary for me to say more than that I concur both in the conclusion at which he has arrived, and in the principles upon which that conclusion is founded. The question is not what would be the result, if the information had been filed in this country by the Attorney General, or if a similar proceeding had been taken by the Lord Advocate in Scotland, if he had such a power (I do not know whether he has or not). I regard this as simply a suit instituted by these parties in respect of their own individual interests; and, in respect of those interests, I think that they are precluded by their own conduct from maintaining this action.

Interlocutors affirmed, and appeal dismissed with costs.

For Appellants, Deans and Rogers, Solicitors, London; James Finlay, S.S.C., Edinburgh.—*For Respondents,* Dodds and Greig, Solicitors, London; Auld & Chalmers, W.S., Edinburgh.

FEBRUARY 11, 1861.

JOHN DUMBRECK and Others, *Appellants*, *v.* The Rev. W. STEVENSON and Others (Stevenson's Trustees), *Respondents.*

Trust—Minor—Pupil—Parent and Child—Right of Administration—Payment of Child's Legacy—Process—6 Geo. IV. c. 120, § 10—Act of Sederunt 11th July 1828, § 47. *The trustees under a trust disposition paid the shares of two sons to their father, as their administrator, at the same time taking caution from him, and they also received a full discharge, by the eldest son, and the father, as his curator, and by the father, as tutor to the younger son. The sons, on arriving at majority, objected, in a multiplepoinding, to the trustees crediting themselves with these payments, averring that the father had appropriated the money to his own uses, and the cautioner had become bankrupt; and on these statements they close their record.*

HELD (affirming judgment), *That the payment of the sons' shares by the trustees to the father, who, though poor, was not bankrupt, was, in the circumstances,* in bonâ fide, *and a valid and competent act, in respect the trust deed did not exclude the father's tutorial and curatorial right of administration over the estate of the minors.*

Leave to make additional statements to the record, in an action of multiplepoinding, long after it had been closed, refused *as incompetent, in respect the proposed statements contained new grounds of action.*[1]

The objectors appealed to the House of Lords, maintaining in their case, that the judgment of the Court of Session should be reversed. 1. Because, by the terms of the trust settlement, the power of administration of the appellant's father was excluded, and the respondents were not justified in making payment to him of the provision bequeathed to the appèllant.—Williams on Executors, vol. ii. pp. 1267-8; Roper on Legacies, vol. i. p. 879. 2. Because the respondents, being aware of the embarrassed circumstances of the appellant's father, were not justified in paying over to him the appellant's share of the trust funds, but should have applied to the Court of Session to interpone its authority to the course to be followed by them, and, not having done so, they were liable in payment to the appellant. 3. Because the respondents having extra-judicially accepted of caution, and not sought judicial caution, they must take on themselves the responsibility of making that caution effectual.—*Holloway* v. *Collins*, 1 Ch. Cas. 245. 4. Because, in point of fact, payment of the legacy was made to Michael Waddell, one of the cautioners, and in whose hands the funds were placed entirely beyond the control of the legal administrator. 5. Because, in any view, the appellant was entitled to have added to the record the statements contained in the minute, No. 340 of process, before quoted.

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[1] See previous reports 19 D. 462: 29 Sc. Jur. 213. S.C. 4 Macq. Ap. 1: 33 Sc. Jur. 269.