CAIRNCROSS ET AL., ... APPELLANTS.
LORIMER ET AL., ... RESPONDENTS.

1860.
July 17th and Aug. 9th.

Acquiescence—Lapse of Time.—Where the Attorney-General sues in the Court of Chancery for the vindication of an endowed public charity, neither acquiescence nor lapse of time will be any bar to the proceeding.

A similar principle or rule appears to hold in Scotland.

But there is no such principle or rule where the suit is instituted by private persons in a matter affecting solely their own individual interests. On the contrary, in such a case acquiescence and lapse of time will be a bar.

Where a congregation of Seceders had by a formal vote united themselves to the Free Church of Scotland, and where, in pursuance of that vote, a Free Church Minister had been solemnly inducted, without any objection or dissent on the part of a small minority of four persons who had complete knowledge of all the proceedings: Held, that an action brought by them to have certain property, which had passed by the amalgamation,—restored, "was "an action instituted by them in respect of their own "individual interests; and that in respect of those "interests they were precluded by their own conduct "from maintaining the action."

THE summons prayed that it should be found and declared that the Pursuers, the above Appellants, as the "Congregation of United Original Seceders in Carnoustie," had, for themselves and such others as might join them, the sole right to the property in question, which consisted of some land, with a place of worship and a dwelling house thereon.

The Defenders, among other pleas in law, pleaded that the Pursuers were under the circumstances barred from prosecuting their action.

CAIRNCROSS v. LORIMER.

The Court of Session (Second Division) unanimously sustained the Defenders' plea in bar, and assoilzied them from the conclusions of the summons.

It was against this decision that the present Appeal was taken.

Mr. *Roundell Palmer* and Mr. *Neish* for the Appellants cited *Drummond* v. *The Attorney-General* (*a*), *The Attorney-General* v. *The Fishmongers' Company* (*b*), *Wedderburn* v. *Wedderburn* (*c*), *Macpherson* v. *Macpherson* (*d*), *Thomson* v. *The Incorporation of Candlemakers* (*e*), *The Attorney-General* v. *Munro* (*f*).

Mr. *Anderson* for the Respondents cited *Craigdallie* v. *Aikman* (*g*).

The facts of the case, as well as the principles of the final judgment, sufficiently appear from the following opinions.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*h*):

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 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 actively concurred in the union of the Associate Congregation of Carnoustie with the Free Church,—and Mr. Meek the Incumbent, having died, they had

(*a*) 2 H. of L. Ca. 837.
(*b*) 5 Myl. & Cr. 16.
(*c*) 4 Myl. & Cr. 41.
(*d*) 1 Macq. Rep. 244.
(*e*) 17 Sec. Ser. 765.
(*f*) 2 De Gex & Sm. 122.
(*g*) 6 Paton App. Ca. 633.
(*h*) Lord Campbell.

Lord Chancellor's opinion.

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, 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 show that, according to the rules which govern the proceedings of deliberative assemblies, the union of the Associate Congregation of Seceders at Carnoustie with the Free Church, the Pursuers being present, was

CAIRNCROSS v. LORIMER.

Lord Chancellor's opinion.

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 its 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 licence. We are asked what the 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 3rd 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 Reverend 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 Reverend 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 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

CAIRNCROSS v. LORIMER.

analogous class of cases in England at the head of which stands *Picard* v. *Sears* (*a*).

Lord Chancellor's opinion.

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.

Lord Kingsdown's opinion.

Lord KINGSDOWN:

My Lords, having had an opportunity of seeing 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.

DEANS AND ROGERS—DODDS AND GREIG.

(*a*) 6 Ad. & Ell. 469.