

workman would necessarily be taken into account, but he cannot get a weekly payment diminished because the workman's age is increasing. I agree that we are not bound to answer the second question, but would say this, that if the workman was entitled at the time of the accident to the maximum compensation he is no less entitled to it now.

LORD M'LAREN—If it would make any difference in the result, it would be material to inquire whether this is an application under sec. 12, or under sec. 1 (b), of Schedule I. of the Act. On that point I should rather be inclined to agree with Lord Adam that the case comes here under sec. 12. Sec. 12 enacts that any "weekly payment may be reviewed at the request either of the employer or of the workman." I think that the "weekly payment" which may be reviewed may be either a sum arrived at by agreement of parties, or a payment settled as the consequence of arbitration. By the statute a weekly payment by agreement is put on a par with a weekly payment fixed by arbitration. It provides that if the amount cannot be settled by agreement, then it is to be settled by arbitration. But it makes no difference in the result whether this case is to be looked at as an application under section 12 or section 1 (b), because the conditions, so far as the first question is concerned, are the same. The two heads of the first question are whether the Sheriff was right in taking into account the fact that there had been a large decrease in miner's wages since the appellant sustained the injury, and whether he was right in taking into account the appellant's increased age. These are both supervening circumstances, which apparently could only be taken into account in an application for review. There are two elements to be considered in assessing compensation in an application in a case of total incapacity—a positive element and a negative. The positive element is the amount of the applicant's average weekly earnings; the negative element is that the compensation is not to exceed half of what he actually earned, and in any event is not to exceed one pound per week. As regards the positive element, I see no ground for taking supervening circumstances into account; the only things to consider are what was the man earning, and then that the weekly payment is not to exceed half the amount of those earnings, or £1 a-week. If that is right, it follows that the weekly payment should neither be increased nor reduced by a rise or fall in wages, or by the increased age of the workman. When in an application for review you have to consider wage-earning capacity, that is a thing which may vary from time to time, and if this were a question of wage-earning capacity it might be right for the arbiter to consider the present rate of wages. But there is no question of wage-earning capacity in the present case, because the workman is blind and unable to earn any wage, and not likely ever to do so. For these reasons I am clearly of opinion that the first question should be answered in the negative.

As regards the second question, I agree with your Lordships that it is unnecessary to make any finding upon it. No other elements tending to reduce compensation, except those referred to in the first question, are mentioned in the case. There might have been such elements—for instance, the 20s. limit. But as the facts stand it may be left to the Sheriff to consider whether, as the first question has been answered in the negative, there is any alternative open except to fix the compensation at one-half of the sum agreed on as the workman's average weekly earnings.

LORD KINNEAR concurred.

The Court answered the first question in the case in the negative, and found it unnecessary to answer the second question.

Counsel for the Appellant—Salvesen, K.C.—Wilton. Agent—P. R. M'Laren, Solicitor.

Counsel for the Respondents—G. Watt, K.C.—W. Thomson. Agents—Anderson & Chisholm, Solicitors.

Thursday, June 11.

FIRST DIVISION.

[Sheriff of Dumfries.

JARDINE v. PEEBLES.

Church—Seats—Allocation of Sittings—Rights of Heritor in Allocated Sittings—Interdict.

The proprietrix of lands in a parish, who was a heritor but did not reside in the parish, having had allocated to her in respect of her lands certain sittings in the Parish Church, including 7 feet 11 inches in a pew the total length of which was 10 feet 9 inches, brought a petition in the Sheriff Court against a parishioner resident in the parish for declarator that the right to use the pew in question to the extent of 7 feet 11 inches belonged to her, exclusive of any right thereto on the part of the defender, and for interdict against the defender from occupying that portion of the pew, or any part of that portion, either by himself or his family, or others having his authority, and from interfering with her, or those having her authority, in the full use thereof. The pew in question was not occupied by the complainer or her tenants or dependants, but she had given permission gratuitously to another person to occupy, by himself or his household, the space allocated to her in the pew. A particular part of the church area had, in the allocation, been assigned to the lands on which the defender resided.

Interdict *refused*, in respect (1) that the complainer's right in the portion of the pew allocated to her was not such as could support the absolute and exclusive right asserted by the complainer,

and (2) that no interdict which the Court might be justified in granting in order to protect the complainer's right from infringement was reconcilable with the unqualified terms of the prayer of the petition.

Mrs Margaret Isabella Irving or Peebles, Redding House, Linlithgowshire, proprietrix of the lands of Hazelberry and Tundergarth Mains, in the parish of Tundergarth, Dumfriesshire, with the concurrence of Benjamin Beattie, tenant of the said lands of Hazelberry, for any interest he might have, brought a petition in the Sheriff Court of Dumfries and Galloway at Dumfries against Charles Jardine, a ploughman on the farm of Shaw, residing at Foulraw, in the parish of Tundergarth, in which she craved the Court "to find and declare that the right to use the pew or seat No. 19, in the area of the Parish Church of Tundergarth, to the extent of 7 feet 11 inches, belongs to the pursuer, and that exclusive of any right thereto on the part of the defender; to interdict the defender from occupying the said portion of 7 feet 11 inches of the said pew or seat No. 19, or any part of said portion, and that either by himself or his family, or others having his authority, and from interfering with the pursuer, or those having her authority, in any way in the full use and enjoyment thereof; and to find the defender liable in expenses, but that only in the event of his entering appearance to defend."

The pursuer was a heritor in the parish of Tundergarth. An allocation of sittings in the Parish Church of Tundergarth took place in October 1900. By that allocation there were allocated to the pursuer's lands certain sittings, which included 7 feet 11 inches in pew No. 19, the total length of which was 10 feet 9 inches. The tenant of the pursuer's lands at Hazelberry did not worship in the Parish Church. The pursuer did not reside in the parish. She did not by herself or her tenants or dependants occupy the sittings allocated to her in pew No. 19, as they were not at present required for her own use or the use of any parishioners on her lands. She granted permission gratuitously to William Sanders of Rosebank meantime to occupy the sittings allocated to her in pew No. 19 by himself or his household or servants so long as she did not require them for herself or her tenants. William Sanders was a heritor and a tenant in the parish, and an elder in the Parish Church. He did not reside in the parish.

The defender was a residenter on the lands of Shaw, in the parish of Tundergarth. Sittings in the Parish Church were allocated to the lands of Shaw.

The pursuer averred that William Sanders or his household or his servants had availed themselves of the said permission to occupy said sittings in pew No. 19, but had been deliberately obstructed in the occupation thereof, and frequently prevented from occupying same owing to the action of the defender. The pursuer further averred as follows—“(Cond. 5) The defender is entitled to sitting accommodation in the part of the

church allocated to the lands of Shaw belonging to the heritor thereof, where there is quite sufficient room to accommodate him and his family, but notwithstanding this, and in spite of repeated warnings to desist, he claims the right to occupy said sittings, and contumaciously intrudes upon the pursuer's sittings in said pew No. 19, and persists in occupying the same, with his family, to the exclusion of the pursuer or those to whom she has granted permission. By allowing the said William Sanders to occupy said sittings the pursuer does not in any way curtail the accommodation provided for the defender or any of the other parishioners, for whom there is abundant room in the church elsewhere, there being a large number of free sittings.”

The defender admitted that he might be entitled to a bottom room in the part of the church allocated to the lands of Shaw, but explained that the sittings so allocated were either occupied or were unsuitable for the defender. He also admitted that he had occupied sittings in pew No. 19, and that his wife and children, as parishioners, had also done so, but stated that neither he nor they had forced themselves into said pew when they found it occupied. The defender also explained further that “neither defender nor his family have occupied pew No. 19 to the exclusion of the pursuer, her tenants, or their dependants.” He denied “that he has ever asserted or claimed a right to do so. Pursuer and her tenants, or their dependants, have never desired personally to occupy the sittings in said pew.”

The pursuer pleaded, *inter alia*—“(1) The pursuer being, in virtue of her titles, and in accordance with the scheme of allocation of sittings settled on 23rd October 1900, entitled to the use and enjoyment of the sittings in said pew No. 19, to the extent of 7 feet 11 inches, she is entitled to decree of declarator as craved. (2) There being ample room for the defender and all other parishioners in the church exclusive of said sittings, the pursuer was entitled to gratuitously allow the said William Sanders, or his household or servants, to occupy said sittings. (3) The defender having no right to occupy the pursuer's said sittings in the said pew No. 19, the pursuer is entitled to interdict against him as craved.”

The defender pleaded, *inter alia*—“(1) The pursuer has no title, or alternatively no interest, to sue. (4) The averments of the pursuer are irrelevant, and insufficient to support the prayer of the petition. (5) The defender never having, as against the pursuer, her tenants, or the dependants of herself or her tenants, asserted any right to use and enjoy or obtain the use or enjoyment of the sittings in pew No. 19 to the extent of 7 feet 11 inches, he is entitled to be assoilzied, with expenses. (6) The right to enjoy such sittings being *primo loco* in the pursuer, her tenants and their dependants, and *secundo loco* in the parishioners of Tundergarth, the defender as such parishioner is, along with the other parishioners, entitled to use said sittings, so long as the pursuer, her tenants and dependants,

do not require them. (7) The pursuer holding said sittings not as property or on property title, but only in trust for herself and persons residing on her said lands, cannot allot, allocate, grant, or let them to any other, and cannot create preferences in their occupation either in favour of parishioners who are not resident upon her lands, or upon strangers, and the defender ought therefore to be assiozied."

On June 24th 1902 the Sheriff-Substitute (CAMPION) pronounced an interlocutor finding "(1) that when the new Parish Church of Tundergarth was erected an allocation of sittings among the heritors took place in October 1900; (2) that by said allocation the pursuer, who is proprietrix of the lands of Hazelberry and Tundergarth Mains, in the parish of Tundergarth, was found entitled to certain sittings in the area of said church, including 7 feet 11 inches in pew No. 19; and (3) that the sittings in pew No. 19 thus allocated to her not being at present required for her own use or the use of any parishioners on her lands, the pursuer has gratuitously granted the use of them meantime to Mr Sanders of Rosebank: Finds that the defender has no right to take the use of or occupy the sittings allocated to pursuer in pew No. 19: Therefore sustains the pleas-in-law stated for the pursuer: Repels the pleas-in-law stated for the defender, and finds and declares and grants interdict against the defender, all in terms of the prayer of the petition," &c.

On appeal the Sheriff (FLEMING), on 25th August 1902, refused the appeal and pronounced an interlocutor in these terms:—"Refuses the appeal: Recals the interlocutor of the Sheriff-Substitute of 24th June 1902 complained of: Finds in fact (1) that the pursuer is proprietrix of the lands of Hazelberry and Tundergarth Mains in the parish of Tundergarth; (2) that by allocation of the sittings in the Parish Church of Tundergarth in October 1900 there were allocated to the pursuer's said lands certain sittings which included seven feet eleven inches in pew No. 19; (3) that the defender is a residenter on the lands of Shaw in said parish; (4) that there are sittings allocated to the said lands of Shaw which are not required by residents on these lands and are available to the defender; and (5) that the defender has asserted a right to occupy, and has occupied, the sittings, or part thereof, allocated to the pursuer in said pew No. 19: Finds in law that the defender, having right to a seat elsewhere, has no right to exclude the pursuer, or others having her authority, from said sittings in said pew: Therefore interdicts the defender, so long as he has right to a seat elsewhere in said church, and all others acting under his authority, from occupying the said pew No. 19 in such manner or to such extent as to interfere with the pursuer or others having her authority in the full use and enjoyment of the said portion of seven feet eleven inches of said pew, and decerns."

Note.— . . . "I understand the position the defender now takes up to be that any parishioner has a right to sit in any seat in

the church which he may find legally unoccupied, and the legal occupation which he admits as being a higher right than his is occupation by the heritor to whose lands that seat has been allocated, or by any parishioner who can demand a seat from that heritor. I did not gather that he would insist on other occupants turning out of the seat to make way for him, but he stated that while he would turn out for anyone with a better right, he would decline to turn out for what he called strangers. The pursuer is non-resident, and one of her present tenants does not worship in the Established Church. Her part of pew 19 is thus at present not required by her, or by any parishioners resident on her lands. She has permitted a Mr Sanders, who is an heritor and an elder in the parish, though resident beyond its boundaries, to use during her pleasure, and gratuitously, that pew by himself or his servants. This permission the defender says confers upon Mr Sanders no right which can compete with him should he desire to occupy the pew, and he has as matter of fact put his own cushion in the pew and occupied it to the exclusion of Mr Sanders' servants. The pursuer, finding her right to give a permission to use these seats challenged, has raised the present action.

"The defender's argument is that from the earliest times the right to the whole area of the church not reserved for the clergy was in the parishioners. That the shifting of the burden of the maintenance of the fabric at the Reformation on to the heritors, and the corresponding control given to them, was in trust for the whole parishioners. That the allocation of the area among the heritors did not deprive the parishioners of their right over the whole area, but made it subsidiary merely, so that the individual heritor held the area allocated to him in trust primarily for the parishioners on his estate, and secondarily for the remaining parishioners in the parish. That if the heritor has seats which neither he nor parishioners on his estate require, he holds these seats in trust for the other parishioners, and cannot delegate the right to use them to any other than a beneficiary.

"I think this argument is not well founded. The Lord President, in the Jedburgh case (*Roxburgh and Others*, 3 R. 728) says that the church buildings are only the property of the heritors in trust 'for the whole body of the parishioners within the parish, and when in the division of the area among the heritors the accommodation in the Parish Church comes to be appropriated so much to one heritor and so much to another, I think in like manner each individual heritor becomes trustee for those of the parishioners that reside upon his estate.' And again, 'Each individual heritor after the division is made is equally a trustee for a portion of the parishioners, as the whole heritors before the division was made were trustees for the entire parish.' I read this as implying that whereas before division an individual parishioner had to claim from the whole

body of the heritors a seat in any part of the church, after division his right becomes defined and limited to a claim against an individual heritor for a seat in that portion of the area which has been allocated to that heritor. It may be gathered from Lord Craigie's judgment in *Gavin v. Trinity House of Leith*, 2nd June 1825, F.C., that if a heritor's portion of the area is fully occupied, and a parishioner resident on his lands cannot be given a sitting, the other heritors may be called upon to provide him room out of their surplus accommodation. But even in that case the heritor's clear inability to give him a sitting is a condition-precident to his claiming a sitting elsewhere. In this case the defender is not in such a position. He admits that there are sittings allocated to the heritor on whose lands he is resident which are occupied by strangers, and which could be made available for him, and that being so, I am of opinion that the only seat in this church to which he has any right is the seat which his heritor may set aside for him out of that portion of the area of the church which has been allocated to the lands on which he is resident.

"I am further of opinion that the defender having a seat thus available for him has no interest in the use which may be made by other heritors of the seats allocated to them, but I may add that I agree with the Sheriff-Substitute that the passages which he quotes seem to me to establish the legality of the pursuer's action in granting, in the circumstances, the use of the pew in question to Mr Sanders.

"While I have come to the conclusion that the defender is wrong in his claim, I have some difficulty in following the Sheriff-Substitute in granting interdict in the terms craved. The pursuer is entitled to protection from interference in her occupation by herself, or others having her authority, of the sittings allocated to her, so long as the defender can be provided with sittings by his own heritor, but circumstances might change, and the seats allocated to the lands of Shaw might become insufficient to accommodate all the parishioners there resident. While I do not say that in such circumstances the defender would have a right to select a seat for himself, I think the interdict should be so framed as not to prevent any claim he may then be advised to make."

The defender appealed.

Argued for the defender and appellant—The heritors to whom the seats in a church were allocated were not proprietors of the seats, and had not the rights of proprietors in the seats, but were merely trustees for the whole parishioners—*Earl of Marchmont v. Earl of Home* (Eccles. Case), December 17, 1776, M. 7924 (*sub. voce* Kirk, No. 14); 2 Hailes' Dec. 734; 7 Fac. Dec. 336. A heritor could not shut up a seat or let a seat for hire; his right was merely a right of administration on behalf of the parishioners—*Skirving & Young v. Vernon*, June 21, 1796, Morr. Dict. 7930; *Gavin v. Trinity House of Leith*, F.C., June 2, 1825; *Duke of Roxburghe* (*Jedburgh case*), June

1, 1876, 3 R. 728, *per* the Lord President at p. 734, 13 S.L.R. 498; *Mackay v. Wood*, November 7, 1889, 17 R. 38, 27 S.L.R. 43. There was a certain order of preference in the claims to seats among the parishioners, the tenants and dependants of a heritor on particular lands having a claim to the seats allocated to the heritor in respect of such land. But after the claims of these preferred persons were met, the whole parishioners, the examinable persons in the parish, had a right to the seats in a parish church—*Minister of the Parish of Tingwall v. The Heritors*, June 22, 1787, M. 7928; Ersk. ii. 6, 11. The parishioners were entitled to attend the parish church, and in so far they were exclusively interested in and attached to that church (*per* Lord President in *Duke of Roxburghe*, *supra*). The defender was here really asserting a right of property in pew No. 19—an exclusive right to the pew not only for herself or her tenants and dependants but for any stranger to whom she might give permission to occupy it, for Mr Sanders, though a heritor, was outside the class of persons for whom the pursuer held the seat in trust. The pursuer had no title to bring this interdict, the effect of which would be to eject the defender and his family from the seat, to make room for any licensee whom the pursuer might choose. The pursuer did not set up any right to occupy the seat in question as against the pursuer or her tenants or dependants. All the defender claimed was a right after the pursuer and her tenants and dependants were accommodated. The interdict granted by the Sheriff was clearly incompetent. The defender was interdicted from occupying 7 feet 11 inches of the pew. It was unworkable, as no one could tell which portion of the pew was subject to interdict and which was not.

Argued for the pursuer and respondent—The defender had no right whatever to sit in the part of the church which was allocated to the pursuer—*Stiven v. Heritors of Kirriemuir*, November 14, 1878, 6 R. 174, 16 S.L.R. 100. A heritor had certain recognised rights in seats allocated to him, if they were not occupied by him or his tenants and dependants—*Duncan's Parochial Law*, 2nd ed. p. 222, *et seq.*; *Black's Parochial Law*, p. 91; *Mackintosh v. Fraser*, February 8, 1825, 3 S. 508. These rights had been recognised by the Lord President in *Duke of Roxburghe* (*supra*), and in *Stephen v. Anderson*, November 18, 1887, 15 R. 72, 25 S.L.R. 70; and *Edinburgh Ecclesiastical Commissioners v. Kirk Session of High Kirk* (*St Giles case*), July 18, 1888, 15 R. 952, *per* Lord Young at p. 961, 25 S.L.R. 684. The pursuer admittedly could not let the seat for hire, but she could delegate her right to sit there, or in other words, she could confer on anyone as a favour the right to sit in that seat which was not needed by her tenants and dependants. It was a widespread custom for heritors to grant such a right in seats which had been allocated to them. This right might be subject to the claim of the parishioners, including the defender, to a seat in the church, but

the defender could find ample accommodation in other seats in the church, and there was no averment that there was not room for him and his family in the seats allocated to the lands of Shaw, on which lands he was employed. If the defender or any other parishioner insisted on going out of the seats so provided for him, he was in no better position than a stranger. It was only when a parishioner could not find room in his own area that he had a preference over a stranger. Mr Sanders, too, being a heritor and an elder was not in the position of a stranger. He was within the definition of "parishioner." The right of a heritor in the seat allocated to him was more than the right of a trustee. The fabric of the church belonged to the heritors; it was a part and pertinent of their estates. A heritor's right to his seats was really a right of property, with a burden affecting it to the effect that he must provide sittings for his tenants and dependants, and possibly after them for any parishioner who could not be otherwise provided for. That obligation being performed, the right of administering the seats allocated to him rested solely with the heritor, and a licensee of a heritor was entitled to occupy the seat in preference to any parishioner, provided the parishioner had (as was the case here) a seat allocated to him in another part of the church. The defender by insisting in occupying this seat No. 19 was, accordingly, infringing the right of the pursuer, and interdict should be granted. If the interdict granted by the Sheriff was not in proper terms, it was competent and proper to protect the pursuer's right from infringement by the defender by granting interdict in slightly altered terms within the scope of the prayer of the petition.

LORD ADAM—This is an action at the instance of Mrs Peebles, who, as proprietrix of the lands of Hazelberry, is a heritor in the parish of Tundergarth, against Charles Jardine, who is a ploughman on the farm of Shaw and is resident in the parish of Tundergarth. Mrs Peebles is not herself resident in the parish, but as proprietor of lands in the parish certain sittings were allocated to her use—the whole of the pew No. 29, and 7 ft. 11 in. in pew No. 19, and 1 ft. in pew No. 9. No question is raised as to her right in pew No. 29, which is her family pew. The question is as to her right in pew No. 19. The question arises in this way—This particular pew has been allocated to one of her farmers, a Mr Beattie. Mr Beattie and his family do not attend the Parish Church. The result is that those 7 ft. 11 inches in pew No. 19 are not required and are not occupied by herself. In these circumstances Mrs Peebles claims the right to give a licence to anybody she chooses to occupy the sittings. Mr Jardine is a parishioner and is resident in the parish, and there had been assigned to the land on which he resided a particular part of the church area also. It is a matter of some doubt whether there has been a particular seat in that area allocated to him, but whether or not, he

prefers to sit in pew No. 19 when it is otherwise unoccupied. This proceeding of his in occasionally occupying part of this pew with his wife and family was apparently resented by Mrs Peebles, and in these circumstances Mrs Peebles brings this interdict. The claim she sets out is a wide one. She asks the Court, as introductory to giving the interdict, to "find and declare that the right to use the pew or seat No. 19 in the area of the Parish Church of Tundergarth, to the extent of 7 feet 11 inches, belongs to the pursuer, and that exclusive of any right thereto on the part of the defender." She goes on to ask interdict against the defender "from occupying the said portion of 7 feet 11 inches of the said pew or seat No. 19, or any part of said portion, and that either by himself or his family or others having his authority, and from interfering with the pursuer or those having her authority in the enjoyment of the seat. She thus asserts an exclusive right to the use of this pew, not only for herself and her tenants but to prevent any parishioner occupying it in preference to any licensee to whom she might give right. On the other hand the defender explains that neither he nor his family have occupied pew No. 19 to the exclusion of the pursuer, her tenants, or their dependants, and denies that he has ever asserted or claimed a right to do so. In spite of this declaration the pursuer insists on interdict.

Accordingly the pursuer's claim comes to this, that she not only claims to have exclusive use of this pew for herself, dependants, and tenants, but the exclusive use for any licensee to whom she was pleased to give permission.

Now the question is whether that is the extent of her right. So far as this interdict is concerned, it turns on the words "or those having her authority." Was she entitled to a general interdict to that extent? Was she entitled to say "Here is an unoccupied pew; I have given a right to it to other people, not parishioners but outsiders and strangers, and if they choose to come to occupy it, although you are a parishioner and may be sitting in it, you are bound to turn out?" We are not dealing here with any question of the right which she might have given to Mr Sanders as an heritor in the parish, or whether or not an exclusive right might have been given to him, his tenants, and dependants. There is no interdict asked against interfering with Mr Sanders. Interdict is asked against interference with any licensee of the pursuer, whether he might be a parishioner or not, or whether he might be resident in the parish or not. I am bound to say I do not think there is any law whatever to support the assertion of a right so extensive.

The Sheriff-Substitute granted interdict as craved. The Sheriff, however, did not grant the interdict craved; he made a distinction. He finds that "the defender has asserted a right to occupy, and has occupied, the sittings, or part thereof, allocated to the pursuer in said pew No. 19." This is a mistake as to the facts, for, as I have

pointed out, the pursuer has never asserted such a right. All the pursuer contends for is a right after the pursuer and her tenants are accommodated. The Sheriff goes on to find in law that "the defender having a right to a seat elsewhere has no right to exclude the pursuer, or others having her authority, from said sittings in said pew." This turns on the fact that the defender has a seat elsewhere in the church; but that fact is not admitted. The Sheriff's view seems to be, that as you have a seat elsewhere, although it may be a very uncomfortable and inconvenient seat, and this seat may be empty, you are not entitled to go and occupy it, although any stranger may do so. That does not seem to me a very logical conclusion. Then the interlocutor went on to interdict him from occupying that seat, "so long as he has a seat elsewhere in said church"—did the Sheriff mean that if he ceased to be a parishioner and left the parish he might go back and occupy that seat? That seems to be the logical conclusion. Further, I do not see how interdict can be granted in the terms asked. What we are asked to do is not to interdict the defender from occupying a particular pew, but from occupying 7 ft. 11 in. of a larger space. Now, who could tell whether a man sitting in that pew was occupying part of the 7 ft 11 in. or whether he was occupying part of the remainder of the seat which was not interdicted. If the petitioner had said on a particular occasion "You interfered with Mr Sanders; we will interdict you from interfering again with him," that would have been a different matter—but that is not what is asked. It is an interdict against the defender interfering with anybody in the world, whether he knew or had any reason to know that they had the authority of the pursuer or not. They might be absolute strangers. Was he to ask everyone, Have you authority from Mrs Peebles? Was he bound to admit them all—if they said they had—under the risk of being brought up for breach of interdict and punished. Again, interdict is asked not only against the defender, but also against his wife and family. In this respect, too, the interdict is much too wide, and I think we should recal the interlocutor already pronounced and refuse interdict.

LORD M'LAREN—In this action of declarator and interdict the Sheriff-Substitute granted decree in terms of the prayer of the petition. It was conceded, however, that in the actual circumstances of the case it was impossible for the pursuer to maintain the right to declarator and interdict in the unqualified terms in which decree was sought.

The Sheriff, coming to the consideration of the case with a conviction that the pursuer had a right which was being infringed, has endeavoured to find within the scope of the conclusions of the action a remedy of a more qualified nature than that granted by the Sheriff-Substitute. I cannot say that he has been altogether successful in this attempt. Indeed, I do not think that the counsel for the pursuer

were able to defend the terms of the interdict in the precise terms in which the Sheriff had granted it. They rather seemed to invite the Court to make a further attempt to define the complainer's rights consistently with the prayer of the petition. Now I should have been quite disposed, if possible, to endeavour to define the right of the complainer if the action had admitted of it, because I cannot help thinking that the complainer has rights in the pews which were allocated to her or to her predecessors when the church was built. But I agree with Lord Adam in thinking that it is impossible to reconcile any interdict which we should be justified in granting with the prayer of this petition. We have not the same powers of amendment in appeals from the Sheriff Court as we have in actions originating in the Court of Session. Yet even if this were a Court of Session action I should hesitate to say that an action directed only against a circumstantial infringement of a right could be granted in an application which was based on a perfectly absolute and unqualified assertion of right on the part of the complainer.

While accordingly I agree with Lord Adam that we must dismiss this application, I have come to this conclusion with some difficulty. My inclination would be to hold that the person to whom sittings have been allocated has primarily the right of the administration of these sittings, and that, failing tenants of his own, he would have the right to grant the use of these sittings, subject of course to the preferable claims of the parishioners. It is a somewhat narrow right, and not one of a nature to be used for profit, but it would be a right which the law would recognise. At the same time I agree that our only course in the present case is to dismiss the application.

The **LORD PRESIDENT** and **LORD KINNEAR** concurred.

The Court sustained the appeal and dismissed the petition, with expenses.

Counsel for the Appellant and Defender—Crabb Watt, K.C.—P. Balfour. Agent—Alex. Wylie, S.S.C.

Counsel for the Respondent and Pursuer—C. N. Johnston, K.C.—Welsh. Agents—Somerville & Watson, S.S.C.