Wednesday, December 4.

FIRST DIVISION.

[Sheriff Court at Hamilton.

PATERSON *v.* BROWN.

Church—Heritor—Seats—Family Pew.

Circumstances in which *held* that a certain pew in a church had been allocated as a family pew.

Opinion by the Lord President—"A right to a family pew created by allocation remains with the lands as the family pew until another legal allocation, and is not lost because the family do not sit there. . . . So long as the major part of the estate remains with the original proprietor and his successors the family pew remains with it until a new allocation. . . . When there has been legal allocation the heritor's right to his family pew is . . . exclusive as to the right to sittings in it and the right to furnish it and to exclude all others, at least until the bell for service has ceased to toll."

Proof — Writ or Oath — Church — Family Pew.

Opinion by the Lord President that an assignment of sittings in a family pew can only be proved by writ.

John Paterson, who was feudally vest in the lands of Birkenshaw and others, under a writ of *clare constat* from the superior, duly recorded, *pursuer*, raised an action of declarator and interdict in the Sheriff Court at Hamilton against Robert Brown, residing at Craighead, in the parish of Blantyre, and Albert Edward Brown, Beechcroft, Bothwell, *defenders*.

The pursuer craved the Court to "find and declare that the primary right to use the pew or seat No. 94 in the area of the parish church of Bothwell belongs to the pursuer and his tenants in the said lands of Birkenshaw and others, and that exclusive of any right thereto, other than that of ordinary parishioners, on the part of the defenders, or either of them; and that the pursuer has primarily the right of administration of the sittings in the said pew or seat; to interdict the defenders from using the said pew or seat without permission from the pursuer, except to the extent to which ordinary parishioners are entitled to do so, and from interfering with the pursuer in any way in his exercise of his said primary rights to use and administer the sittings in said pew or seat."

The parties averred, *inter alia*—"(Cond. 2) At the last allocation of the seats in the parish church of the parish of Bothwell, which was made in accordance with the valued rent of the lands in the parish, there were allocated to the said lands of Birkenshaw the following sittings:—five sittings in pew No. 63, six sittings in pew No. 94 (being the whole pew), and nine sittings in pew No. 132 (being the whole pew). There have been attached to said pews for many years brass plates bearing the name 'Birkenshaw,' and the initials of the proprietor of the lands when the allocation was made. The lands to which the said sittings are allocated exceed 200 acres in extent. (Ans. 2) Denied. The heritors' minute of the allocation of the seats in the Bothwell parish church is referred to. (Cond. 3) Pew No. 94 has all along been the family pew of the proprietors of Birkenshaw, and as such was occupied by them, and those to whom they gave liberty of occupancy. The upholstery in it was their property. (Ans. 3) Denied, and averred the late Mr James Paterson and his family never occupied the pew No. 94, as James Paterson resided in Arran and Greenock until his death, and the pursuers have resided in Greenock since—a period covering at least more than the last forty years. (Cond. 4) Some years ago, as the late Mr James Paterson, father of the pursuer, then the proprietor of Birkenshaw, was not permanently resident in the parish, the late Rev. Dr Pagan, who was then the minister of the parish, applied to him for liberty to grant sittings in pew No. 94. This liberty Mr Paterson granted, but only to Dr Pagan personally and during his own pleasure. He was not informed by Dr Pagan of the use made of the permission thus given. Denied that the first defender acquired any right in pew No. 94 in consequence of his having purchased or feued lands from the late James Paterson. . . . Denied that the late James Paterson made an allocation in favour of the first defender of sittings in pew No. 94. The latter is called upon to produce the alleged allocation. . . . (Ans. 4) Denied, and averred a right to a portion of pew No. 94 was acquired by the senior defender years ago. For long the pew was unoccupied by any heritor, and was occupied by parishioners without specific title until about twelve years ago, when it was occupied by the defenders, and has since been occupied by them under the following circumstances:—The senior defender had feued from the late James Paterson [in 1872 and 1884 small lots of land amounting to about $1\frac{3}{4}$ acres], all parts of said lands in Uddingston in the parish of Bothwell. In 1884 the senior defender bought from the said James Paterson 2 acres 2 roods, being other parts of the said James Paterson's lands in Uddingston in the parish of Bothwell. These lands so feued and purchased by the senior defender were and are parts of the lands in the parish of Bothwell which belonged to the said James Paterson in respect of which he was entitled to pew No. 94 in the parish church of Bothwell (if the same was allocated to him in or about 1834, when Bothwell parish church was rebuilt, which is not admitted). . . . In virtue of said lands acquired by the senior defender he is entitled to some part of the pew No. 94 in the parish church of Bothwell as an heritor of the parish in trust for himself and his tenants. The senior defender built on said ground self-contained and other houses occupied by twenty tenants, whose rents are £787. . . . About twenty-two years ago the senior defender applied to the late James Paterson for an allocation to him

of seats in the parish church in respect of said lands feued and purchased by the senior defender, and the said James Paterson allocated two sittings in pew No. 94 as a right or pertinent of the lands acquired by the said defender, with the further permission to use the rest of the pew No. 94 so long as the said James Paterson could not occupy it."

On 2d July 1909 the pursuer's agents had written to the first defender stating, *inter alia*, that he was willing that the defenders should have right to sittings in either of the other two seats allocated to Birkenshaw, but this offer was not accepted.

The pursuer pleaded, *inter alia*—"(1) The primary rights to use and administer the sittings in the said pew No. 94 being attached to the lands in which the pursuer is heritably vest, and the pursuer being thus entitled to exercise the said rights on behalf of himself and his tenants, to the exclusion of any right on the part of the defenders other than that of ordinary parishioners, decree of declarator and interdict should be granted as craved. (3) Said pew No. 94 being the family pew of the pursuer, duly allocated to the lands in which he is heritably vest, he is entitled to the peaceable possession thereof to the exclusion of the defenders. (4) The church of the parish of Bothwell having been built prior to the year 1868, and the first defender not being on the roll of valued rent heritors of the said parish or a valued rent heritor thereof, he is not entitled to an allocation of sittings in said church in respect of his ownership of the subjects mentioned in the defences. (5) *Separatim*—The defenders having been offered by the pursuer accommodation in either of the seats allocated to the lands of Birkenshaw other than pew No. 94, are bound to rest satisfied with such accommodation while it is available for them."

The defenders pleaded, *inter alia*—"(1) No title to sue. (4) The senior defender having right and title as an heritor to two sittings in the pew in question, the action is incompetent, and should be dismissed with expenses. *Separatim*—The senior defender having right and title as an heritor to an unallocated portion of the pew in question, the action is incompetent, and should be dismissed with expenses. (5) The defenders as parishioners being entitled to occupy any vacant seat in the parish church, the action is incompetent."

On 28th March 1910 the Sheriff-Substitute (A. S. D. THOMSON) repelled the defences, and found, declared, and interdicted as craved.

On 30th July 1910 the Sheriff (MILLAR) recalled this interlocutor, repelled the first plea-in-law for the defenders, found that the pursuer John Paterson had not set forth facts and circumstances to justify the prayer of the petition, therefore dismissed the petition and decerned.

The pursuer appealed to the Court of Session.

The case was heard on 19th and 20th June 1911, and the following authorities were cited:—*Peebles* v. *Jardine*, June 10, 1903, 5 F. 932, 40 S.L.R. 707; *Macdonell and Another* v. *Duke of Gordon*, February 26, 1828, 6 S. 600; *St Clair* v. *Alexander*, November 21, 1776, F.C., M. App. Kirk, No. 1, 2 Hailes 719; *Duke of Roxburghe*, June 1, 1876, 3 R. 728, 13 S.L.R. 498; *Duke of Abercorn* v. *Presbytery of Edinburgh*, March 17, 1870, 8 Macph. 733, 7 S.L.R. 419; Duncan's Ecclesiastical Law, p. 151.

On 13th July 1911 the Court *hoc statu* recalled the interlocutors of the Sheriff and Sheriff-Substitute, dated 30th July 1910 and 28th March 1910 respectively, and allowed parties a proof of the averments in condescendences 2 and 3 and the relative answers thereto, to proceed before Lord Mackenzie.

Proof was led, the import of which is summarised in the opinion of the Lord President *infra*.

On 20th November counsel for the defenders were heard, and argued—Where following the feuing off of certain portions of an estate a certain *status quo* had emerged as to the use of seats originally allocated to the estate as a whole, that *status quo* could only be upset by setting in motion the machinery for a new allocation—*Earl of Marchmont* v. *Earl of Home*, 1776, M. App. Kirk No. 2; *St Clair* v. *Alexander* (*cit. sup.*). (2) Even if the pursuer was entitled to any remedy, the crave of his initial writ was not in order. "Primary right" was not a *nomen juris*, and was not self explanatory. It would not be possible to apply such an interdict as asked.

The Court intimated to counsel for the pursuer that they would communicate with him should they desire to hear argument for him. No argument was, however, asked for.

At advising—

LORD PRESIDENT—The present action is raised by the pursuer as proprietor of the lands of Birkenshaw, and as such a heritor in the parish of Bothwell, and his object is to vindicate his right to pew No. 94 in Bothwell parish church. It is resisted by the defenders, who assert a right to two sittings in said pew. The senior defender is not resident in the parish, but he is a feuar holding a title from the pursuer's predecessor to four acres of land occupied by tenement houses which he lets out. The junior defender is resident in the parish of Bothwell, but not upon the lands of Birkenshaw.

The pursuer avers that pew No. 94 was allocated to the lands of Birkenshaw as the family pew. He states that he wishes to occupy the said pew, and had requested the defenders (who had occupied it under temporary permission given by the pursuer's father to the then minister, and by him communicated to the defenders) to remove some cushions, etc., therefrom. This the defenders refused to do, and the action became necessary. The defenders assert their right to sittings in the pew—(1) upon the ground of a so-called allocation by the pursuer's father; (2) upon the right *quoad* the senior defender as a feuar; and (3) upon the right *quoad* the junior defender as a parishioner.

The learned Sheriff-Substitute, upon the fact of the allocation to the pursuer's author being (although not admitted on record) conceded at debate, and no writing being produced to evidence an "allocation" by the pursuer's father to the defenders, granted decree of declarator and interdict as craved. An appeal was taken to the Sheriff, who recalled that interlocutor and dismissed the petition. The learned Sheriff held that though the pursuer averred that pew No. 94 had been allocated to Birkenshaw, and that it "had all along been" (*i.e.* from the time of the allocation) the family pew, that was not an averment that the pew had been allocated as a family pew; and he went on to say, though no proof had been allowed, that there was no evidence that this was a family pew. Treating it as a non-family pew, he therefore held that the senior defender had a right in it as a feuar, and that therefore no declarator or interdict in the terms asked could be granted.

When the case, being appealed, came before your Lordships, at the first hearing you were satisfied that the Sheriff's reading of the averments in Conds. 2 and 8 was much too narrow and could not be supported; and that it was also out of the question to decide the case upon the footing that no evidence of No. 94 being a family pew had been produced, when no opportunity of producing such evidence had been afforded. Your Lordships therefore recalled *hoc statu* the interlocutor before mentioned and allowed the parties a proof of the averments as to No. 94 being a family pew. That proof was taken before Lord Mackenzie and is now before your Lordships, and counsel have been heard upon the import thereof.

The proof in my opinion establishes with absolute certainty that the seats in Bothwell parish church were allocated in 1834, and that pew No. 94 was allocated to the proprietor of the lands of Birkenshaw as a family pew. The evidence of Mr Sewell, the clerk to the heritors, with the relative document No. 39 of process — a document entitled "Sittings in Bothwell Parish Church" — would in my opinion be enough. The original heritor's minute-book is lost. But No. 39 comes from an almost equally good source. It is produced by the session clerk. Once the allocation is finished, the session has more to do with the actual occupation of the church than the heritors. So that I cannot doubt that No. 39 was a correct copy of the original minute. Now it bears on the face of it that No. 94 is a family pew. The method of an allocation has been settled for all time since the decision of 1776 of *Earl of Marchmont* v. *Earl of Home* (2 Hailes 734, M. 7924) and it is not too much to say that almost every parish church in Scotland has been so allocated. Now that method was that each heritor, according to his valuation, had first a choice of a family pew, and then a second choice of so many more pews or seats as made up his share of the total area proportional to his valuation. This allocation bears on the face of it that things were gone about in this manner — Look at the list. 1. His Grace the Duke of Hamilton, by Robert Brown, Esq., and Robert Rutherford, Esq., W.S., the whole centre seat of gallery, No. 119; also in Nos. 120, 121, 122, 126, 127, 128, 18. 2. Walter Frederick Campbell, Esq., of Woodhall, by Mr Webster, his factor, No. 98; also in Nos. 95, 96, 97, and so on. Then, 16. Andrew Jack, Esq., of Uddingston, No. 94; also in Nos. 132, 63. So that in every case we have first of all a pew allocated and then the expression "also in," which shows to my mind as clearly as anything can be that this allocation was according to the rule laid down in *Marchmont*, namely, that you first got the family pew and then made up the total allotted seats in other pews.

Now Andrew Jack was the predecessor in title of the pursuer, and it is under his settlement that the pursuer takes his estate of Birkenshaw, Uddingston. I may say in passing that a sort of attempt in cross-examination to confuse the matter by suggesting that the estate of Birkenshaw proper does not correspond to the old possessions of Andrew Jack, who is not designed as of "Birkenshaw," but as of "Uddingston," is really quite beside the mark to anyone who is at all acquainted with the practice of Scotch nomenclature. At the time of an allocation each heritor has his portion of the area allocated to him in proportion to his total share of the valued or real rent as the case may be (all the older allocations were on valued rent *de facto*), quite irrespective of the names of his lands in title-deeds, and of the fact whether they consisted of one old estate or a congeries of various estates. As to his name, that would be as he was called at the time, and anyone who knows anything of Scotland can recal instances where at different times of a family history the territorial name of the family would be different. For instance, the Stewarts of Grandtully came to be commonly designated as the Stewarts of Murthly after Murthly became the chief family seat, though Grandtully was their oldest possession and was still in the family.

But the evidence does not end there. In the seats allocated to Andrew Jack there is a plate "A. J., Birkenshaw," which is there to this day. Then in the evidence of Mrs Paterson, who is eighty years old, having been born in 1831, we have a history of the occupation of the pew 94 during the days of Mrs Jack, the widow of Andrew Jack, and under his settlement liferentrix of his estates, and then through the time of Walter Paterson, Mrs Jack's brother, and finally of James Paterson, the husband of the witness and father of the pursuer. There is, besides her testimony, ample testimony of other old people that No 94 was occupied during all her time by Mrs Jack. Indeed, there is no testimony the other way. It is true that there is evidence to the effect that Walter Paterson for many years sat in pew 63, being in disagreement with his brother. But Walter Paterson was only proprietor of the estate

for a year, for Mrs Jack did not die until 1867, and Walter died in 1868. By the time he succeeded he had probably become accustomed to 63, and his early death scarcely left him time to change. Anyway, until the year 1882 the pew No. 94 seems not to have been occupied by any but Patersons. In that year they went away from the parish, and permission was given to Dr Pagan, the minister, to put other people in the seat, of which permission he availed himself. This is also borne out by the testimony of Mrs Pagan, widow of the minister, and by the lists of the actual condition of the occupation of the seats produced by her, and written in her deceased husband's handwriting. These show Patersons in exclusive possession up till 1875, and in occupation after 1878, the date of the heading of the list, for obviously the deletions would be made subsequently, probably in 1882. This book is, of course, no testimony as to legal right, but is good evidence as to actual occupation. It also bears out historically the occupation by Walter Paterson of No. 63.

Now if one comes to the conclusion that No. 94 is the family pew allotted to the proprietor of the lands of Birkenshaw, it seems to me that the case is virtually ended. The mere fact that since 1882 the family has not used it can make no difference. A right to a family pew created by allocation remains with the lands as the family pew until another legal allocation, and is not lost because the family do not sit there. There are many family pews in parish churches which are not used by the family, but that does not affect the legal right or prevent the proprietor of the lands vindicating his right if he wishes to sit there.

Now what is the defence proposed? It is, first, that a so-called "allocation" of two sittings in No. 94 was made by the father of the pursuer to the senior defender when he feued four acres of the estate. I say "so-called," for allocation is quite an improper word for such an arrangement. Allocation means allocation to a heritor by the heritors as a body by agreement, or by the Sheriff on a petition. But, treating the grant as an assignment by the pursuer's father to the senior defender of two sittings in No. 94, I agree with the Sheriff-Substitute that such an arrangement could only be established by writing, and no writing is produced. Further, from the evidence I am satisfied that no such arrangement was ever contemplated. *Per se* it would be most unlikely that the proprietor of Birkenshaw should assign to a feuar of four acres two seats in his family pew of seven sittings in all. But on the evidence I have no doubt that the pursuer's account is correct, viz., that after the family had for the time left the parish they allowed the minister to have the disposal of the seats, and that it was he who permitted the defender to use them—a use which he has long ago given up, and which he does not really practically wish to continue.

Failing that argument the next defence is based upon the senior defender's position as a feuar. Now it is quite true that the family seat is not a piece of independent property; it cannot be separately conveyed away from the estate; and if the estate is parted with as a whole it will pass as part and pertinent without mention in the conveyance. But to feu four acres out of an estate of 200 is not to part with the whole, and so long as the major part of the estate remains with the original proprietor and his successors the family pew remains with it until a new allocation. All this is distinctly stated by Mr Duncan in his work on Parochial Ecclesiastical Law, and is amply borne out by the authorities there cited. Counsel for the defender sought to rely upon the case of *St Clair* v. *Alexander* (1776, 2 Hailes 719, M. App. Kirk, No. 1). But in the *St Clair* case a large portion of the estate had been feued out and practical possession of certain seats allowed to the feuar. In this state of affairs no exclusive possession was adjudged to any of the parties involved—St Clair of Roslin, Miss Alexander of Rosebank, and David Wilson of the Roslin Inn. But the whole point of the case, as clearly brought out in the opinion of the Lord President as given in Hailes' report and in the interlocutor as given in Morison, was that there never had been a legal allocation of the church; that consequently nothing but occupation could be looked at, and that that occupation had been common to all the parties concerned.

That when there has been legal allocation the heritor's right to his family pew is exclusive is absolutely certain. When I say exclusive I mean exclusive as to the right to sittings in it, and the right to furnish it and to exclude all others, at least until the bell for service has ceased to toll. Whether after that a person without a seat is entitled to seek admittance to an unoccupied seat has never been decided and need not be decided now, for I entirely agree with Mr Duncan, who says that a person who has a sitting of his own which he is entitled to occupy cannot insist upon entering some one else's pew which is partially occupied, and the pursuer has all along been willing that the defender should have a sitting in any of the pews allotted to Birkenshaw except No. 94. The whole meaning of a family seat is that it is to be for the exclusive use of the family. The whole practice of churches—and some of your Lordships as well as myself are entitled to appeal to an experience of over fifty years in such a matter—is all the same way. The passage of Lord President Inglis' judgment in the *Jedburgh* case (3 R. 728, at p. 734) which denies exclusive use to a heritor and his family is relative, not to a family pew at all, but to the total area given to a heritor in the allocation of the total space in the church.

The other defender, who is a parishioner, *i.e.*, lives in the parish but never enters the church, has really no defence at all, for if he could assert a right allocation would be an empty ceremony.

It only remains to consider what should be the form of the decree to be granted. The procedure here, which has been started in the form now imperative in the Sheriff Court by initial writ, is not so calculated as to suggest exact words as the conclusions of a declarator. I am of opinion that there should be declarator of the pursuer's right to pew No. 94 as his family pew, and a negation of any right on the part of the defenders to sittings therein. By a sitting is merely meant a right to go there and exclude others before service begins, and it does not touch the question of the rights of anyone to ask for a vacant seat in order to occupy it during worship; and in view of the attitude and actings of the defenders, I think there should be interdict against their putting furnishings or books into the pew or entering themselves therein at any time previous to the commencement of public worship. In view of the perfectly reasonable offer which was made by the pursuer before litigation in the letter of 2nd July 1909, and which the defenders refused, I think the litigation was necessary and justified, that the defenders have been wrong all through, and that consequently they must be held liable in expenses in all the Courts.

LORD MACKENZIE—I concur.

The LORD PRESIDENT intimated that LORD KINNEAR, who was present at the hearing but absent from the advising, also concurred.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

". . . Find and declare that the pursuer John Paterson has right to the pew No. 94 in the area of the Parish Church of Bothwell as his family pew, and that the defenders have no right to any sittings therein: Therefore interdict the defenders from putting furnishings or books into said pew, or entering thereinto at any time previous to the commencement of public worship. . . ."

Counsel for the Pursuer and Appellant—Blackburn, K.C.—J. R. Christie. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Defenders and Respondents—Dean of Faculty (Dickson, K.C.)—Macmillan, K.C.—J. Stevenson. Agents—Davidson & Syme, W.S.

Tuesday, December 10.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

HEGARTY & KELLY *v.* THE COSMOPOLITAN INSURANCE CORPORATION, LIMITED.

Contract — Arbitration — Termination — Clause Referring to Arbitration Disputes as to Construction of Contract—Repudiation by Party Founding on Clause—Bar.

A contract between an insurance corporation and a firm of live stock agents provided—Art. VI (*a*)—"The sellers shall warrant all fat cattle and pigs sold by them to pass the authorised meat inspectors subject to the conditions hereinafter stated"; and Art. VII—"Any dispute or difference between the insurers and the sellers as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator, to be mutually chosen, or failing agreement to be appointed by the Court on the application of either party; and the award of such arbitrator shall be final, and no action shall be maintainable against the insurers except upon such award." Disputes having arisen as to the meaning of clause VI (*a*), the insurance company declined to transact further business until they had been determined by arbitration. The stock agents thereupon raised an action of damages, to which the company pleaded the arbitration clause. The stock agents then pleaded that as the company had repudiated the contract they were barred from pleading the arbitration clause.

Held (*rev.* judgment of Lord Skerrington, who had allowed a proof before answer) that as the contract had not been rescinded, and as the decision of the arbiter upon the construction of clause VI (*a*) was a condition-precedent of liability, the defenders were entitled to plead (as they had done) the arbitration clause, and action *sisted* to await the determination of the arbiter.

Municipal Council of Johannesburg v. *D. Stewart & Company (*1902*) Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, *distinguished.*

On 28th June 1910 Hegarty & Kelly, live stock agents, Glasgow, and the individual partners thereof, *pursuers*, brought an action against the Cosmopolitan Insurance Corporation, Limited, *defenders*, for £6000 (afterwards restricted to £4500) as damages for alleged breach of contract—the breach alleged being that they (the defenders) had since 9th October 1909 refused to insure any of the pursuers' live stock although bound to do so by the agreement, dated in March 1909, and to endure for three years from 1st March 1909, the material clauses of which are quoted *supra in rubric.*