

(3) warrant of registration on behalf of the defender, endorsed upon the said feu-contract, and subscribed by James Service junior, writer, Glasgow, to have been from the beginning, to be now, and in all time coming null and void, and of no avail, force, strength, or effect in judgment, or outwith the same in time coming, and reponed and restore the pursuer thereagainst *in integrum*; and grant warrant to the Keepers of the General Register of Sasines to mark upon the registers that decree of reduction of the deeds libelled; reserving to the pursuer all claims of count and reckoning against the defender for his intrusions with the rents, profits, and annual produce of the lands libelled from 1st October 1877 to the date hereof, or until his intrusions therewith shall cease: Finds the defender liable in expenses to the pursuer, and remit to the auditor to tax the same and to report, and decern."

Counsel for Pursuer (Reclaimer)—Guthrie Smith—Moncreiff. Agents—Macgregor & Ross, S.S.C.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser.)—Rhind. Agent—George Begg, S.S.C.

Wednesday, November 13.

## FIRST DIVISION.

[Sheriff of Forfarshire.

STIVEN v. THE HERITORS OF THE PARISH OF KIRRIEMUIR.

*Church—Reseating of Area—Competency of Petition for Allocation of Seats.*

The seats of a parish church had been allocated in 1795 by decret-arbitral after a submission to the Sheriff, and, *inter alia*, thirty-nine seats had been apportioned to the feuars. The church having been repaired and reseated, but without altering the extent of the accommodation, a petition was brought in the Sheriff Court by a single feuair praying the Court to divide the area of new. *Held* that a petition for such a purpose was incompetent.

In 1795 the area of the parish church of Kirriemuir was divided amongst the heritors of the parish under decret-arbitral issued by Peter Ranken, Sheriff-Substitute of Forfarshire, the arbiter chosen in a submission amongst the whole heritors of the parish. This decret-arbitral was implemented and carried into effect, and the arrangement and division so made was uniformly adhered to, until some years before the date of this petition, when certain alterations and repairs were executed on the church, including its reseating. An organ was also introduced, which, however, did not, it was conceded, diminish the accommodation, as the gallery in which it was placed was enlarged.

This was a petition by John Stiven, a proprietor of certain lands in the parish, praying the Court "to divide the area of the parish church of Kirriemuir, and allocate the sittings therein amongst the parties entitled thereto in terms of law, after

intimation being given to the heritors and minister of said parish, and other parties interested, in such manner as the Court may direct," &c. The averment in the pursuer's condensation was that the "heritors, though called upon, have refused or delayed to obtain a judicial division of the area of said church, or a division by agreement or otherwise."

Process was sisted in the Sheriff Court to enable the defenders to lodge a scheme of allocation of the seats. This was done "in accordance with the decret-arbitral of 1795." Under the scheme lodged in process, the feuars, of whom the petitioner was one, were still found entitled to the same number of sittings as before—thirty-nine in number. The petitioner afterwards lodged objections to the scheme to the effect that the seats had not been distributed amongst the feuars.

The Sheriff-Substitute (ROBERTSON), who had pronounced his interlocutor before the sist was granted or the scheme of allocation had been lodged, had allowed a proof; and on appeal, the Sheriff (MAITLAND HERIOT), after the procedure referred to above, had dismissed the petition.

The pursuer appealed to the Court of Session.

Authorities—*Magistrates of Hamilton v. Duke of Hamilton*, June 23, 1846, 8 D. 844, 22 Jurist 266; *Duke of Roxburghe and Others v. Millar*, June 1, 1876, 3 R. 728, 4 R. (H. of L.) 76; *Duke of Abercorn v. Presbytery of Edinburgh*, March 17, 1870, 8 Macph. 733.

At advising—

LORD PRESIDENT—I do not think that in this case there are any material facts in dispute. It is not denied that in 1795, under a submission by all the heritors, the area of this church was divided by decret-arbitral—a perfectly competent mode—nor that this decret-arbitral was acted upon, and that possession was held under it until a recent date, when certain alterations were carried out. One of the pursuer's allegations upon record is, that there was a great diminution in the accommodation in the church by the introduction of an organ at that time. That was, however, not insisted in, as the diminution was met by an increase in the gallery itself, and there are now as many seats as formerly. But then it is further alleged, that when the area of the church was reseated the seats were made wider and more comfortable, and that in that way the number was diminished. I do not find anything else in the condensation in support of the averment that the extent of the accommodation was decreased.

The prayer of the petition is that the area should be divided. In short, the application made to the Sheriff is to divide the area of this church on the same footing as if it had been a church newly erected. Now, I always understood that it was settled both in law and by practice, that the division of a church, when once settled in a competent way, cannot be disturbed so long as the structure remains; but that when a new church is erected there is an application to the Sheriff to divide it simply according to the heritors' legal rights, without regard to their respective shares in the area of the old church. These are very different things, and the distinction is noted in the case of *The Duke of Roxburghe and Others v. Millar* both here and in the House of Lords.

In the present case the church is not a new one. So long as the extent of accommodation in a church is the same, and the original division was competently made, there is no need to distinguish the cases. But if the heritors voluntarily or otherwise erect a new church they must have regard to the increased population, and it must be made so large as to hold two-thirds of the whole population over twelve years of age. Therefore the area may be divided on different principles to what it was formerly, for there is both a larger church and a larger population. But so long as the old church stands the heritors need not increase the accommodation. Now this is an old church. A difference may then arise, as in this case, when the form of the sittings is altered, and when it does arise all I can say is that I think it ought to be amicably adjusted. That is often done, and I am not aware that such a difference has ever been judicially settled. But the petitioner says, that in respect of the alteration in the form of the sittings there should be a totally new division of the area in terms of law.

Now we must see what the petitioner's interest is, as compared to his demands. It is conceded that this body of feuars have the same number of sittings under the new arrangement as they had under the old, namely thirty-nine, and that therefore the pursuer and the class to whom he belongs not only do not suffer any prejudice by the new arrangement, but they receive advantage, as the new pews are more comfortable than the old. The pursuer's interest therefore is merely to secure his own share of these pews, but did anyone ever hear of making a division of this kind by means of a petition? The powers of this Court are very large, but I do not think that even this Court could seat two hundred feuars in thirty-nine seats. I am therefore of opinion that this application is without foundation, and instead of doing what the Sheriff-Substitute and the Sheriff have done, I should have dismissed the petition even before the preparation of the scheme of allocation.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court therefore recalled all the interlocutors of the Sheriff, and dismissed the petition.

Counsel for Pursuer (Appellant)—Kinnear—Pearson. Agents—Irons & Roberts, S.S.C.

Counsel for Defenders (Respondents)—Balfour—Darling. Agent—J. Stormonth Darling, W.S.

Friday, November 15.

## FIRST DIVISION.

[Lord Young, Ordinary.]

### THE MAGISTRATES OF LEITH *v.* FIELD.

*Police—Compensation for Sewer Passing Through a Street—Act 25 and 26 Vict. c. 101 (General Police and Improvement (Scotland) Act 1862), sec. 186—Act 8 Vict. cap. 19 (Lands Clauses Consolidation (Scotland) Act 1845), sec. 36.*

Claims against Police Commissioners under the 186th section of the General Police and Improvement (Scotland) Act 1862, and the 36th section of the Lands Clauses Consolidation (Scotland) Act 1845, by the proprietor of the *solum* for ground taken to be permanently occupied by sewer and other drainage works underneath a street where it was not alleged that any cellars or vaults were interfered with, and for permanent way-leave and surface and other damage caused by the execution of the works in question—held to be irrelevant.

Observed (*per* Lord President) that it was doubtful whether a claim for compensation under the above Acts could competently be amended, and that in that case it would be necessary to lodge a new claim.

The complainers in this case were the Magistrates and Council of Leith, as Commissioners for the purposes of the General Police and Improvement (Scotland) Act within that burgh. The respondent was proprietor of the lands of Bowling Green and Redhall, Leith, through which two streets, named Bangor Road and Burlington Street, were being constructed.

By section 186 of the General Police and Improvement (Scotland) Act 1862, it is provided that the Police Commissioners of a burgh shall "from time to time, subject to the restrictions herein contained as to the notice to be given, and the plans and estimates to be prepared, cause to be made under the streets, public or private, or elsewhere, such main and other sewers as shall be necessary for the effectual draining of the burgh, and also if necessary for such drainage to deepen, divert, or cover over any burn or any ditch made use of as a common sewer or any ditch into which sewage flows, and shall also cause to be made all such reservoirs, sluices, engines, and other works as shall be necessary for cleansing such sewers; and if needful they may carry such sewers through and across all underground cellars and vaults under any such streets, doing as little damage as may be, and making full compensation for any damage done; and if for completing any of the foresaid works it be found necessary to carry them into or through any inclosed or other lands the Commissioners may carry the same into or through such lands accordingly, making full compensation to the owners or occupiers thereof, and they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agricultural or other purposes as may be deemed most expedient, but so that the same shall in no case become a nuisance: Provided always that if in making any such main and other sewers, or in repairing, constructing, or enlarging the same or existing drains or sewers, the contents at present carried into any existing