

## PEW RIGHTS IN THE AMERICAN LAW

There is perhaps no separate subject of litigation in the United States where the financial consideration directly involved is smaller and the amount of bitter litigation is larger than that relating to pews. This is due to the fact that the owners of pews have frequently relied on their pew rights to prevent some change in the church edifice of which their pew was a part. A great number of pew cases have in consequence come before the various courts. Almost every possible angle of the matter has been investigated and adjudicated. There is hardly a contention that can be raised that has not at one time or another received judicial consideration.

It would seem on first thought that the English cases on this subject would be of substantial assistance to the American courts in reaching their conclusions. This, however, is an entirely erroneous conception. "Not much light is to be got from decisions as to the rights of pew holders in England and elsewhere, where different laws, usages and systems of religious administration have been established."<sup>1</sup> Such difference affects the pew rights in the two countries to such an extent that cases decided in one are of little if any help in deciding cases in the other.

It follows that the law on this subject in the United States is a distinctly American product. It represents the application of the ordinary rules of the common law to a distinctly American situation. In the investigation of this matter the English law can be of benefit only by way of contrast. The law as slowly worked out by the decisions of the courts is an integral and even typical part of the exclusively American legal system, which defines the civil status of the American churches. As such, it will be treated in the following pages.

The word pew is said to be derived from the Dutch word "puye" and to signify an enclosed seat in a church.<sup>2</sup> A pew right therefore is an exclusive right to occupy a certain part of a meeting house, for the purpose of attending upon public worship, and for no other purpose.<sup>3</sup> To constitute a church in which

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<sup>1</sup> *Aylward v. O'Brian*, 160 Mass. 118, 125, 35 N. E. 313, 22 L. R. A. 206.

<sup>2</sup> *Brumfitt v. Roberts*, L. R. 5 C. P. 225.

<sup>3</sup> *Daniel v. Wood*, 18 Mass. 102, 104.

the pews are rented as distinguished from a "free church" it is not necessary that rights in all the seats be owned by individuals. The majority of the pews may be free without changing the character of the church to that of a free church.<sup>4</sup> It is necessary, however, that seats, to constitute pews, be attached to the building in such a way as to become part of it. A loose seat or bench belonging to an individual in which he has been permitted to worship for many years and which on special occasions has been removed by the trustees of the church will therefore not be recognized as a pew in any sense.<sup>5</sup>

The acquisition of pew rights in the British Isles is closely related to and interwoven with the system of church establishment which is in vogue in that country. "In England before the Reformation, the body of the church was common to all parishioners. After the Reformation a practice arose to assign particular seats to individuals. This assignment of seats was made by the ordinary, by a faculty which was a mere license, and was personal to the licensee; and all disputes concerning it were settled by the spiritual courts."<sup>6</sup> In addition to this faculty, pews in England may be acquired by allotment on the part of the ministers or churchwardens and by prescription. "In the last case the right is appurtenant to a dwelling house and in the others it is merely personal and not transferable or descendible."<sup>7</sup> In any case every parishioner has a right to a seat in the church. It is "the duty of the churchwardens to distribute them in the most convenient way so as to give each parishioner a seat."<sup>8</sup> Since all residents in a certain district are presumptively members of the English church, they are thus by mere residence entitled to pew rights in the building maintained in that district by the established church.

It is evident that this system of parcelling out pew rights can have no place in America where there is no established church and where church membership with its privileges and burdens is voluntary in every sense of the word. It follows that pew rights are not thrust on a person by virtue of his forced membership in a church, but are a matter of contractual arrangement between the owners of the church building and the occupants

<sup>4</sup> *Torbert v. Bennett*, 24 Wash. Law Rep. 149.

<sup>5</sup> *Niebuler v. Piersdorf*, 24 Wis. 316.

<sup>6</sup> *Livingston v. Trinity Church*, 45 N. J. L. 230, 232, 28 Abb. L. J. 111.

<sup>7</sup> *Church v. Well's Executors*, 24 Pa. St. 249.

<sup>8</sup> *In the matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155, 158.

of its seating privileges. A contract of some kind is therefore the basis of American pew rights just like mere membership in the established church is the basis for analogous rights in England. Pew rights in America are therefore all "a matter of bargain, and entirely conventional between the trustees and those individuals who wish to become hearers or members of the society and to have seats in the church."<sup>9</sup>

The form which this contract usually assumes is that of a deed or certificate issued by the owners of the building to the applicant for pew privileges, though the same result may also be achieved by an allotment, by vote or otherwise, of the pews among the various subscribers to the funds of the church.<sup>10</sup> In granting deeds of pews it is proper to insert such conditions against alienation as to prevent an indiscriminate sale and retain some right to elect and determine whom the owners will associate with and who may associate with them. Otherwise a number of people of another denomination finding pews to be low in price might purchase them, become a majority and turn the proper congregation out of its own house.<sup>11</sup> The doctrine that conditions against alienation in a conveyance in fee simple are void, will therefore not be applied to conveyances of pews since such conditions are necessary to preserve the integrity of the society.<sup>12</sup> While a New York court has held an absence of two years on the part of a pew owner not to be a leaving within the meaning of a condition which provided that the pew was to be tendered back in such a case to the society,<sup>13</sup> the Massachusetts court in a case where the owner had left four years before but had kept up his payments for some time, has held that he had forfeited his pew and that the society by receiving the payment had waived its right to declare a forfeiture only *pro tanto*.<sup>14</sup>

Next in importance to the right to declare a pew forfeited on the breach of certain conditions is the right, usually reserved in pew deeds, to tax the same so as to raise the necessary funds to carry on the work of the church. Where a pew owner, by

<sup>9</sup> *In the matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155, 159.

<sup>10</sup> *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653.

<sup>11</sup> *Attorney General v. Federal Street Meeting House*, 69 Mass. 1, 47, 48.

<sup>12</sup> *French v. Old South Society in Boston*, 106 Mass. 479. See *Heeney v. St. Peter's Church*, 2 Edw. Ch. 608, 612.

<sup>13</sup> *Abernethy v. Church of the Puritans*, 3 Daly 1, 7.

<sup>14</sup> *Crocker v. Old South Society*, 106 Mass. 489.

accepting the deed, has consented to such a clause, he cannot dispute the power of the society to levy such a tax.<sup>15</sup> Where he has obligated himself to "pay the annual sum of 10% on the original appraisement of the pew and whatever else shall be further assessed thereon" he cannot avoid an assessment of 15%.<sup>16</sup> Nor will such an assessment be regarded as an incumbrance within the meaning of a deed of a one-half interest in a pew granted by the pew holder to another.<sup>17</sup> He can, however, insist that the resolution to tax be in accordance with the constitution of the society;<sup>18</sup> that the tax be imposed by such a vote as is prescribed by such constitution;<sup>19</sup> that it be raised for the purpose defined in the deed and for none others,<sup>20</sup> and that the church services as originally contemplated be continued.<sup>21</sup> He may refuse payment where a tax is illegally assessed,<sup>22</sup> and may when such payment has been made, recover it back.<sup>23</sup> He does not, however, come under any personal liability for a refusal to pay a tax legally assessed. "A pew owner is not liable in *personam* unless there be some special ground from which to infer a contract or promise to pay."<sup>24</sup> The only remedy of the owner of the building in such case will be to declare a forfeiture of the pew and sell it.<sup>25</sup>

The conditions so far considered are express conditions. They have their foundation in some clause of the instrument by which the pew right is granted away. It must not, however, be supposed that they are the only terms to be found in such instruments. On the contrary, the law unless controlled by clear and explicit clauses to the contrary will import certain implied terms and conditions into such instruments. Certain changes in church property are certain to occur both in the course of human events

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<sup>15</sup> *Mussey v. Bulfinch Street Society*, 55 Mass. 148; *Curtis v. Quincy First Congregational Society*, 108 Mass. 147.

<sup>16</sup> *Abernethy v. Puritan Society of Christians*, 3 Daly 1.

<sup>17</sup> *Spring v. Tongue*, 9 Mass. 28.

<sup>18</sup> *Perrin v. Granger*, 33 Vt. 101.

<sup>19</sup> *Perrin v. Granger*, 30 Vt. 595.

<sup>20</sup> *First Methodist Episcopal Society v. Brayton*, 91 Mass. 248; *Mayberry v. Mead*, 80 Me. 27, 12 Atl. 635.

<sup>21</sup> *Ebaugh v. Hendel*, 5 Watts, 43, 30 Am. Dec. 291.

<sup>22</sup> *First Parish v. Dowe*, 85 Mass. 369.

<sup>23</sup> *Second Universalist Society v. Cooke*, 7 R. I. 69.

<sup>24</sup> *St. Paul's Church v. Ford*, 34 Barb. 16.

<sup>25</sup> *Manro v. St. John's Parish*, 4 Cr. C. C. 116, Fed. Cas. No. 9,313; *Hebron First Presbyterian Church v. Quackenbush*, 10 Johns. 217.

and through the action of the elements. The congregation may outgrow the church edifice or may disintegrate completely. The building may be suddenly destroyed by fire, wind or water or may gradually succumb to the relentless wear and tear of time. Express provisions for such a change will be found in only very few pew deeds. Yet the corporeal property upon which the pew rights depend has in such cases been practically destroyed. If "the house becomes wholly ruinous, unfit for a place of worship, and cannot be repaired, so as to be useful and convenient for that purpose, it is evident there is no beneficial interest left in the pew holder, for which he can claim a compensation. His right to sit in a house without doors and windows, and when he cannot be protected from the inclemencies of the weather must be wholly valueless."<sup>26</sup> So also is his right to sit in a house in which no services are conducted because the congregation has disappeared or has been forced by its own growth to repair to more adequate quarters of no practical value. Under such circumstances the law therefore implies a condition subsequent according to which the pew holder's rights are terminated without more, so far at least as the owner of the house is concerned. Where, therefore, the edifice has so far decayed as to become unfit for the purposes for which it was erected<sup>27</sup> or in addition to being ruinous has been outgrown by the congregation<sup>28</sup> and its unfitness for public services is permanent and not merely temporary,<sup>29</sup> it may be sold outright to some third person<sup>30</sup> or may be pulled down by its owner, but not by anyone else,<sup>31</sup> and the materials or money realized used for the construction of a new building without making any compensation to the pew holders.<sup>32</sup> The same rule applies where the building

<sup>26</sup> *Kellogg v. Dickenson*, 18 Vt. 266, 274.

<sup>27</sup> *Wentworth v. Canton First Parish*, 20 Mass. 344; *Kellogg v. Dickenson*, 18 Vt. 266.

<sup>28</sup> *Heeney v. St. Peter's Church*, 2 Edw. Ch. 608.

<sup>29</sup> *Gorton v. Hadsell*, 63 Mass. 508.

<sup>30</sup> *Wheaton v. Gates*, 18 N. Y. 395; *Sohier v. Trinity Church*, 109 Mass. 1. In *Van Houton v. First Reformed Dutch Church*, 17 N. J. Eq. 126, the pew deed provided that the pew holders should be entitled to the proceeds of the lot in case the church was destroyed by fire. It was held that they were entitled to nothing since the church was not destroyed but was sold outright.

<sup>31</sup> *Howe v. Stevens*, 47 Vt. 262.

<sup>32</sup> *Kellogg v. Dickinson*, 18 Vt. 266.

has been destroyed by fire,<sup>33</sup> or on account of the disintegration of the congregation has stood vacant for a long time. "There seems little difference in principle between the decay of the building rendering the further holding of services impracticable, and the decadence of the society, rendering payment for conducting the services impossible of performance."<sup>34</sup> The congregation may even abandon the old church entirely and build a new one,<sup>35</sup> or remove it to a new location<sup>36</sup> without laying itself open to an action for damages by the pew holders. It may, where internal changes in the edifice become necessary, make them,<sup>37</sup> even as against pew holders who have taken their pews as a compensation for building the edifice,<sup>38</sup> and though thereby certain pews are removed farther from the pulpit and decreased in value,<sup>39</sup> without giving the pew holder a right to complain.

Whether the rights of a pew holder are real or personal property depends upon the instrument under which he holds and the law under which such instrument is executed. Where he holds under a mere lease for a term of years his rights on ordinary principles cannot be anything else but personal property.<sup>40</sup> Where the statutes of the state in which the contract is made declare such interest to be personal property, as was the case in Massachusetts in regard to Boston before 1855 and is such in regard to the entire state since that time, the same result will follow.<sup>41</sup> Even without such a statute the Pennsylvania court while admitting that pew rights are "a sort of interest in real estate" has classified them as personal property on the ground that they cannot well be transferred or transmitted generally,

<sup>33</sup> *Witthaus v. St. Thomas Church*, 146 N. Y. Supp. 279.

<sup>34</sup> *Huntington v. Ramsden*, 92 Atl. (N. H.) 336, 338.

<sup>35</sup> *Fassett v. Boylston First Parish*, 36 Mass. 361; *In re Reformed Church of Saugerties*, 16 Barb. 237.

<sup>36</sup> *Fisher v. Glover*, 4 N. H. 180.

<sup>37</sup> *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159; *Voorhees v. Amsterdam Presbyterian Church*, 8 Barb. 135, 5 How. Pr. 58, affirmed 17 Barb. 103.

<sup>38</sup> *White v. Trustees*, 3 Lans. 477.

<sup>39</sup> *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs. 361.

<sup>40</sup> *Livingston v. Trinity Church*, 45 N. J. L. 230, 237, 28 Abb. L. J. 111; *Johnson v. Corbett*, 11 Paige 265, 276. It has been doubted whether pew rights can be termed tenancies. *Huntington v. Ramsden*, 92 Atl. (N. H.) 336. For an example of such a lease, see *Gifford v. Syracuse First Presbyterian Society*, 56 Barb. 114.

<sup>41</sup> *Aylward v. O'Brian*, 160 Mass. 118, 35 N. E. 313, 22 L. R. A. 206. Similar statutory provisions exist in some other states. See the statutes of the various states.

are scarcely divisible among heirs and can hardly be said to be the subject of an action of partition or ejectment or of a decree of sale by the probate court for the payment of debts.<sup>42</sup>

It is obvious that the underlying reason for these statutes and the decision of the Pennsylvania court is the small value of these rights on the one hand and the greater ease with which they can be transferred if they are classed as personal property. Since the stringent rules which formerly hampered real estate transfers have been generally released, it is not surprising that the great majority of states still treat such rights as real estate, though it is not overlooked that a pew does not "partake of all the properties of real estate, or entitle its owner to all the rights of a freeholder, or subject him to all the liabilities of such citizen."<sup>43</sup> It has therefore been said that the interest in a pew created by a lease in perpetuity is an interest "in realty and the lessees or pew owners take title to their pews as real property."<sup>44</sup> No convention of the parties to the pew deed can change this result. An instrument in which the pew rights are described as "chattels and effects" will therefore fail to convert them into personal property.<sup>45</sup> Pew rights have therefore been declared to be real estate within the meaning of the New York Religious Corporation Act,<sup>46</sup> the Statute of Limitations,<sup>47</sup> and the Statute of Frauds,<sup>48</sup> and will, on the death of the owner, pass to his heirs,<sup>49</sup> subject to his widow's dower rights.<sup>50</sup> It follows that

<sup>42</sup> *Church v. Well's Executors*, 24 Pa. St. 249; *Curry v. First Presbyterian Church*, 2 Pitts. 40. See also, *Livingston v. Trinity Church*, 45 N. J. L. 230, 237, 28 Abb. L. J. 111.

<sup>43</sup> Randolph, J., in *Presbyterian Church v. Andrews*, 21 N. J. L. 325, 331.

<sup>44</sup> *St. Paul's Church v. Ford*, 34 Barb. 16, 18.

<sup>45</sup> *Deutch v. Stone*, 27 Wkly. L. Bul. (Ohio) 20.

<sup>46</sup> *Vilie v. Osgood*, 8 Barb. 130; *Vorhees v. Presbyterian Church of Amsterdam*, 8 Barb. 135, 5 How. Pr. 58, affirmed 17 Barb. 103; *In re Reformed Church at Saugerties*, 16 Barb. 237; *Montgomery v. Johnson*, 9 How. Pr. 232. But see, *Freligh v. Platt*, 5 Cow. 494; *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs. 361.

<sup>47</sup> *Price v. Lyon*, 14 Conn. 279; *Brattle Square Church v. Bullard*, 43 Mass. 363; *Aylward v. O'Brian*, 160 Mass. 118, 35 N. E. 313, 22 L. R. A. 206.

<sup>48</sup> *Price v. Lyons*, 14 Conn. 279; *Vilie v. Osgood*, 8 Barb. 130; *Hodges v. Green*, 28 Vt. 358; *Barnard v. Whipple*, 29 Vt. 401, 70 Am. Dec. 422; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28, 30.

<sup>49</sup> *Bates v. Sparrell*, 10 Mass. 323; *Johnson v. Corbett*, 11 Paige 265; *McNabb v. Pond*, 4 Brad. Surr. 7.

<sup>50</sup> *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs. 361; *Howe v. School District*, 43 Vt. 282, 291.

trespass is a proper remedy for disturbing a pew;<sup>51</sup> that specific performance of a contract to convey it may be had;<sup>52</sup> that an action involving it cannot be brought in a justice court;<sup>53</sup> that an execution issued out of a justice court will not affect it,<sup>54</sup> and that no act of notoriety, such as is required in regard to personal property, is necessary in attaching it.<sup>55</sup>

But while the status of pew rights as real estate is thus generally firmly established it must not be forgotten that a pew is "property of a peculiar nature derivative and dependant,"<sup>56</sup> which is separate and distinct from the fee,<sup>57</sup> is not subject to the same rules and principles as the pew owner's property in his farm would be,<sup>58</sup> and amounts to only a limited usufructory interest<sup>59</sup> or an incorporeal hereditament "in the nature of an easement."<sup>60</sup> The pew holder has "a right issuing out of a thing corporate or concerning or annexed to or exercisable with the same." His estate eludes our corporal senses and like the cardinal virtues exists but cannot be seen or handled.<sup>61</sup> He does not own the material of which his pew is composed,<sup>62</sup> has no interest in the space above or below it,<sup>63</sup> and no title to the church edifice or to the land upon which it stands.<sup>64</sup> He cannot put labels on

<sup>51</sup> *Jackson v. Rounseville*, 46 Mass. 127; *Day v. Baker*, 17 Mass. 435; *Union Meeting House v. Rowell*, 66 Me. 400. See *Presbyterian Church v. Andrews*, 21 N. J. L. 325; *White v. Marshall*, Harp. (S. C.) 122.

<sup>52</sup> *Frelich v. Platt*, 5 Cow. 494.

<sup>53</sup> *Presbyterian Church v. Andrews*, 21 N. J. L. 325.

<sup>54</sup> *Deutch v. Stone*, 27 Wkly. Law. Bul. (Ohio) 20.

<sup>55</sup> *Perrin v. Leverett*, 13 Mass. 128.

<sup>56</sup> *Attorney General v. Federal Street Meeting House*, 3 Gray 1, 45, 47.

<sup>57</sup> *City Bank v. McIntyre*, 8 Rob. 467, 470; *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298, affirming 5 Hun. 551; *Kellogg v. Dickinson*, 18 Vt. 266; *In re Reformed Church of Saugerties*, 16 Barb. 237.

<sup>58</sup> *Gay v. Baker*, 17 Mass. 435, 438.

<sup>59</sup> *Heeney v. St. Peter's Church*, 2 Edw. Ch. 608, 612; *Frelich v. Platt*, 5 Cow. 494; *Voorhees v. Amsterdam Presbyterian Church*, 17 Barb. 103, 109.

<sup>60</sup> *Presbyterian Church v. Andrews*, 21 N. J. L. 325, 328. See *Hartland Union Meeting House v. Rowell*, 66 Me. 400; *Solomon v. Congregation B'nai Jeshurun*, 49 How. Prac. 263.

<sup>61</sup> *Marshall v. White*, 16 S. C. 122.

<sup>62</sup> *Cooper v. Sandy Hill First Presbyterian Church*, 32 Barb. 222, 230; *Kellogg v. Dickinson*, 18 Vt. 266; *Wentworth v. Canton First Parish*, 20 Mass. 344; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159.

<sup>63</sup> *Presbyterian Church v. Andrews*, 21 N. J. L. 325, 330; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159.

<sup>64</sup> *Abernethy v. Church of the Puritans*, 3 Daly 1, 7; *First Baptist Church v. Witherell*, 3 Paige 296, 24 Am. Dec. 223.

his pew,<sup>65</sup> box it up with boards,<sup>66</sup> remove it,<sup>67</sup> change or decorate it,<sup>68</sup> or use it for purposes incompatible with its nature,<sup>69</sup> such as interrogating the clergyman or interrupting the services.<sup>70</sup> He cannot "set up a grocery, or a grog shop or apply it even to any other useful purpose, or shut it up and pervert the use of it to anybody."<sup>71</sup> He cannot prevent the leasing of the church to a convention,<sup>72</sup> prevent it from changing its preaching,<sup>73</sup> or affect its policy in the seating of the sexes.<sup>74</sup> Where the church property is held subject to a condition subsequent he cannot even enjoin the owner from performing acts which will make such condition effective.<sup>75</sup> His right to use the pew is so strictly limited to the time when services are conducted that he subjects himself to an action of trespass if he enters it at any other time.<sup>76</sup> His rights thus are not absolute or unlimited but subordinate to and qualified by the superior rights of the owner of the building,<sup>77</sup> and may even be affected by by-laws passed after he has acquired his right.<sup>78</sup>

Whether or not a congregation can abolish pew rights altogether and transform itself into a "free church" without making compensation to the pew owners is a question which, curiously enough, has not been directly decided. Considering pew rights as resting on contract it would seem that the conclusion must be that no such action can legally be taken. The New Jersey court, however, has reached a different conclusion in a case in which the right of a congregation to declare the pew of

<sup>65</sup> *Howard v. Hayward*, 51 Mass. 408.

<sup>66</sup> *Jackson v. Rounseville*, 46 Mass. 127.

<sup>67</sup> *Antrim First Presbyterian Society v. Bass*, 68 N. H. 333, 337, 44 Atl. 485.

<sup>68</sup> *Church v. Well's Executors*, 12 Harris 249.

<sup>69</sup> *Freligh v. Platt*, 5 Cow. 494; *Daniel v. Wood*, 18 Mass. 102, 104.

<sup>70</sup> *Wall v. Lee*, 34 N. Y. 141, 149.

<sup>71</sup> *Curry v. First Presbyterian Church*, 2 Pitts. 40, 42.

<sup>72</sup> *Warner v. Bowdoin Square Baptist Society*, 148 Mass. 400, 19 N. E. 403.

<sup>73</sup> *Trinitarian Church v. Union Congregational Society*, 61 N. H. 384.

<sup>74</sup> *Solomon v. Congregation B'nai Jeshurun*, 49 How. Pr. 263.

<sup>75</sup> *Erwin v. Hurd*, 13 Abb. N. C. 91.

<sup>76</sup> *Leeds First Baptist Society v. Grant*, 59 Me. 245.

<sup>77</sup> *Perrin v. Granger*, 33 Vt. 101; *Kellogg v. Dickinson*, 18 Vt. 266; *In re Reformed Church of Saugerties*, 16 Barb. 237; *Abernethy v. Church of Puritans*, 3 Daly 1; *Antrim First Presbyterian Society v. Bass*, 68 N. H. 333, 44 Atl. 485.

<sup>78</sup> *Curry v. First Presbyterian Congregation*, 2 Pitts. 40.

an expelled member forfeited without any clause of the pew deed to that effect was in question. In order to justify its decision, however, it has in this solitary instance harked back to the English law and based its decision on the British and not on the American doctrine in regard to pews.<sup>79</sup> However much this decision may be in accord with the English law and however much such a result may be desired and desirable, the conclusion that the case is out of line with the other American cases and is not the law except possibly in New Jersey is unavoidable and is apparent from the reasoning which the court adopts to support its decision.

It has been seen that a pew holder's rights are qualified, subsidiary and dependent. It must not, however, be supposed that they are shadowy or insubstantial. They are on the contrary "substantial and material rights,"<sup>80</sup> of which he cannot be despoiled. In some respects they are even superior to those of the congregation. The congregation must exercise its general ownership in subordination to them and be restricted to the general purposes for which churches are erected.<sup>81</sup> While therefore in a proper case a church edifice may be abandoned, removed, sold, taken down or altered without giving the pew owner any right to complain or any claim for damages, there is a wide difference between cases of necessity and cases where the congregation acts from motives of mere expediency or convenience. "If for convenience or from expediency, and not from necessity, the pew is destroyed, the owner has a right to indemnity. Neither the corporation, nor a majority of the congregation, can, for mere purposes of improvement or embellishment, deprive the pew owner of his property; certainly not without compensation."<sup>82</sup> In a case where a congregation acts from motives of expediency or convenience its rights over the pews are analogous to the power of eminent domain exercised by the state over the property of its citizens. The pew may be taken down but only on condition that the pew holder be compensated for his loss.<sup>83</sup> "Though the parish have a right to take down a meeting house which may be in good condition in order to build one in better

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<sup>79</sup> *Livingston v. Trinity Church*, 45 N. J. L. 230, 28 Abb. L. J. 111.

<sup>80</sup> *Howe v. School District*, 43 Vt. 282, 291.

<sup>81</sup> *Kimball v. Second Parish of Rowley*, 41 Mass. 247, 249.

<sup>82</sup> *Voorhees v. Amsterdam Presbyterian Church*, 17 Barb. 103, 109.

<sup>83</sup> *Cooper v. Sandy Hill First Presbyterian Church*, 32 Barb. 222, 229, and cases cited.

taste or of larger dimensions, yet in such case they must make compensation."<sup>84</sup> This compensation may be in the form of money<sup>85</sup> or in the form of a new pew. In the latter case the new pew should correspond in location and value to the old one,<sup>86</sup> but need not be of the identical number<sup>87</sup> unless the old pew deed expressly so provides.<sup>88</sup>

But the most striking illustration of the superior rights of pew holders is afforded by cases where execution is levied against a church building or a mortgage is sought to be foreclosed against it. While pews granted after the execution and delivery of a mortgage on the building are of course subject to the mortgage,<sup>89</sup> a different rule applies where they are granted before such time. In such case the pew holders have "an individual interest in the meeting house"<sup>90</sup> which is distinct from that represented by the owners and is not embraced in the mortgage. "Each pew holder has an undivided right in the use and enjoyment of the church, and a distinct and separate right to the use of his pew."<sup>91</sup> When therefore such a mortgage is foreclosed the rights of the pew holders must be respected. The creditor cannot convert the house into a place of traffic, as by doing so he would trample on the rights of the pew holders. He must preserve it in its present condition and can at most satisfy his debt by taking over its rents and profits.<sup>92</sup> In regard to general creditors of the owners of the house the pew owner is in every case entitled to a preference,<sup>93</sup> while a judgment creditor, whose judgment is subsequent to the granting of the pews, is in no better position. Such creditor cannot levy execution against the building,<sup>94</sup> nor any part of it such as the pulpit since the pew holders take with the pews that which renders them valuable. "The sellers can have no right to take away the windows of

<sup>84</sup> *Howard v. North Bridgewater First Parish*, 24 Mass. 138, 139.

<sup>85</sup> *Kimball v. Rowley*, 41 Mass. 247.

<sup>86</sup> *Mayer v. Temple Beth El*, 23 N. Y. Supp. 1013, 52 St. Rep. 638.

<sup>87</sup> *Colby v. Northfield and Tilton Congregational Society*, 63 N. H. 63.

<sup>88</sup> *Samuelson v. Congregation Kol Israel Aushi Poland*, 65 N. Y. Supp. 192, 52 App. Div. 287, 99 St. Rep. 192.

<sup>89</sup> *Severance v. Whittier*, 24 Me. 120.

<sup>90</sup> *Bigelow v. Middleton Congregational Society*, 11 Vt. 283, 287. This was said by the court in regard to an execution.

<sup>91</sup> *New Orleans City Bank v. McIntyre*, 8 Rob. 467, 472.

<sup>92</sup> *New Orleans City Bank v. McIntyre*, 8 Rob. 467, 472.

<sup>93</sup> *Montgomery's Appeal*, 1 Pitts. 348.

<sup>94</sup> *Bigelow v. Middleton Congregational Society*, 11 Vt. 283.

the meeting house, or the walls, or the pulpit or the singers loft. The proprietors of pews are entitled to various privileges, such as passing through the aisles, being addressed from the pulpit, etc. There is no property in the pulpit distinct from the right of enjoying the house for public worship.<sup>95</sup> It follows that the rights of those in whose name a church is held are legal in their nature while the pew holders are the equitable owners<sup>96</sup> and as such entitled to enjoin an attempted conversion of a church building into a schoolhouse.<sup>97</sup>

The relation of the pew holders toward each other deserves a passing notice. While several persons who are tenants in common of a church edifice may also be the owners of the pews of the church,<sup>98</sup> and while a single pew may be owned by several persons as tenants in common of that pew,<sup>99</sup> it is well established that the ownership by individuals of separate pews does not make them tenants in common of the church edifice<sup>100</sup> so as to enable them to join in an equitable action.<sup>101</sup> The owners of pews "hold and possess their particular seats in severalty, in subordination to the more general right of the trustees in the soil and freehold."<sup>102</sup> Each pew owner therefore is the absolute owner of his particular pew right and hence may freely sue the owner of another pew in any form of action applicable to the circumstances.<sup>103</sup>

In regard to the proper remedy for disturbing a pew, the courts have declined to allow the use of such extraordinary remedies as mandamus<sup>104</sup> and injunction,<sup>105</sup> and have left the com-

<sup>95</sup> *Revere v. Gannett*, 18 Mass. 169.

<sup>96</sup> *Craig v. Franklin County*, 58 Me. 479, 496; *Attorney General v. Federal Street Meeting House*, 3 Gray 1, 45, 47; *Massachusetts Baptist Missionary Society v. Bowdoin Square Baptist Society*, 212 Mass. 198, 203; *Sohier v. Trinity Church*, 109 Mass. 1, 20; *Small v. Cahoon*, 93 N. E. (Mass.) 588.

<sup>97</sup> *Howe v. School District*, 43 Vt. 283.

<sup>98</sup> *North Bridgewater Second Congregational Society v. Waring*, 41 Mass. 304.

<sup>99</sup> *Murray v. Cargill*, 32 Me. 517.

<sup>100</sup> *Craig v. Franklin County*, 58 Me. 479; *St. Paul's Church v. Ford*, 34 Barb. 16.

<sup>101</sup> *Cooper v. Sandy Hill Presbyterian Church*, 32 Barb. 222.

<sup>102</sup> *Shaw v. Beveridge*, 3 Hill 26, 27.

<sup>103</sup> *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653.

<sup>104</sup> *Commonwealth v. Rosseter*, 2 Binney 360, 4 Am. Dec. 451; *Crocker v. Old South Society in Boston*, 106 Mass. 489.

<sup>105</sup> *Cooper v. First Presbyterian Church*, 32 Barb. 222; *Sohier v. Trinity Church*, 109 Mass. 1.

plainant to the ordinary remedies provided by the common law. In considering these remedies, however, they have reasoned differently and have in consequence arrived at different results. Perhaps the majority of the courts have adopted the view that trespass is the proper remedy on the ground that so long as pews are considered in point of law as real estate there is no reason why the form of action given by the common law to redress a wrong done to the right of possession of real estate is not the legal and proper remedy.<sup>106</sup> Other courts, however, have refined a little more deeply, pointing out that a pew right, though it is real estate, has no actual substantial existence, is incapable of manual possession and cannot be invaded by physical force and that for this reason an action on the case is the proper remedy.<sup>107</sup> These considerations make it clear that this question is not merely close to the line that separates trespass from case but actually occupies the zone formed by the overlapping of these boundary lines at certain points. It has therefore been said that "the owner of the pew may maintain case, trespass, or ejectionment, according to the circumstances, if he is improperly disturbed in the legitimate exercise of his legal right to use his pew."<sup>108</sup> On the whole it will be well to avoid all difficulty by having a count both in trespass and in case where such practice is permissible.

To sum up: While pews in both England and America are enclosed seats attached to a church building, the right of their holders rests on an entirely different foundation in the two countries. In England such right inheres in all the members of the established church of the parish in which the particular church edifice is situated while in America it rests entirely on agreement and hence is limited to such persons as have contracted for it. This contract usually assumes the form of a deed. Since it is necessary to protect the church society from undesirable pew holders, conditions in such deed against alienation and for a forfeiture of the pew in certain contingencies will be upheld by the courts. Since pews in many cases are the principal source

<sup>106</sup> *Jackson v. Rounseville*, 46 Mass. 132; *Shaw v. Beveridge*, 3 Hill 26, 38 Am. Dec. 616; *Kellogg v. Dickinson*, 18 Vt. 266; *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653; *Howe v. Stevens*, 47 Vt. 262; *Jones v. Town*, 58 N. H. 462, 42 Am. Rep. 602; *Union Meeting House v. Rowell*, 66 Me. 400.

<sup>107</sup> *Marshall v. White*, Harp. 122; *Perrin v. Granger*, 33 Vt. 101; *Presbyterian Church v. Andrus*, 21 N. J. L. 325; *Daniel v. Wood*, 18 Mass. 102.

<sup>108</sup> *Hartford Baptist Church v. Witherell*, 3 Paige 296, 24 Am. Dec. 223.

of revenue of the church, conditions by which the right to tax them are reserved will also be upheld, though they will be construed not to impose a personal obligation. Since church buildings will become dilapidated or will be destroyed, sold, altered or abandoned, a condition will be read into the deed according to which the pew holders will be entitled to compensation in case changes are made as a matter of convenience but will be entitled to nothing in case they occur otherwise. Their rights in every case, whether they be viewed as personal property as is done in Pennsylvania and some other states which have passed statutes on the subject, or whether they be viewed as real estate as is generally the case, are of an incorporeal nature subordinate to and qualified by the superior rights of the owners of the building, and will entitle their holder to nothing more than the right to occupy his pew during the time set aside for public worship. While his rights are thus generally quite subordinate, they are superior to those of subsequent mortgagees or subsequent judgment creditors. Such creditors must respect not only the pews but also all the accessories which give them value, such as the pulpit, the singers loft, the windows and the altar. They will therefore be unable to sell the building on foreclosure but will have to be satisfied with taking over its rents and profits. As between themselves, pew owners are owners in severalty, and in case of a disturbance may vindicate their rights by actions of trespass or by actions on the case.

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