means of obtaining the review of the Supreme Court.

This was a reduction of a judgment of the Sheriff of Morayshire, decerning the pursuer to pay the defender certain sums of money pursued for in an action by her. The judgment having been extracted, and appeal being no longer competent, the pursuer brought a reduction of the decree. A charge had been given on the extracted decree, but it had not been implemented, and no further steps of diligence were taken by the defender. The defender now pleaded against satisfying the production that the action was incompetent in respect suspension was the proper remedy to stay the execution of diligence, and that reduction was not competent until every other competent remedy had been exhausted. After hearing parties, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument, repels the preliminary defences, and, under reservation in the meantime of all questions of expenses, appoints the case to be enrolled with a view to further procedure.

"*Note.*—It was maintained in support of this defence that reduction, even of an extracted decree, is incompetent wherever suspension would be competent. On the other hand, it was maintained by the pursuer that the decree complained of in the case being extracted, reduction was competent as well as suspension. Both parties cited and relied on the case of *Scoular* v. *M'Lachlan*, 20th March 1864, 2 Macph. 995.

"In the case there referred to all that was actually decided was that reduction was an incompetent mode of reviewing an Inferior Court process, the decree in which has not been extracted. But in the opinion of the Court a great deal of valuable matter is to be found bearing on the present question.

"According to the Lord Ordinary's reading of the Lord President's opinion in *Scoular's* case, his Lordship would appear, although he had no occasion to state so in so many words, and is careful to avoid laying down any general rule on the subject, to have held and assumed that reduction would have been a competent mode of review if the decree complained of had been extracted. Lord Deas is quite distinct in the expression of his opinion to this effect, while Lord Ardmillan would seem, on the strength of a dictum of Lord Moncreiff in the case of *Martin* v. *Barclay*, 12th June 1844, 6 D. 1136, to have entertained a different opinion. But with great deference, the case of *Martin* v. *Barclay* is very special, and so very different from the present as to render it impossible to hold that the solitary and somewhat vague observations, as reported, which appear to have fallen from Lord Moncreiff, can have any weight in the present discussion, even supposing it was of the nature which Lord Ardmillan thought it was, although that is far from being clear.

"The Lord Ordinary thinks, therefore, that the authority of the case of *Scoular* was in favour of the interlocutor pronounced by him in the present case, and that being so, and having regard to the precedents cited in 'Shand's Practice' pp. 613–14, and particularly to the cases of *Jack* v. *Umpherston*, 15 S. 1833, and *Brown* v. *Anderson and Stair*, 15 S. 977, in which the Court appears to have assumed that reduction of an extracted decree is clearly competent, the Lord Ordinary has not had much difficulty in repelling the preliminary defences in this case. In doing so he has not only acted on the precedents, but also on what he himself has always understood to be the practice of the Clerks of Court in the Outer House. Nor is there much in the observation that reduction has been resorted to in order to avoid the necessity of finding caution, for as reduction does not stop the execution of diligence, the defender may proceed against the pursuer so as to compel him to suspend and find caution."

This interlocutor has become final.

Counsel for the Pursuer—Mr Asher. Agents—Murdoch, Boyd, & Co., S.S.C.

Counsel for the Defender—Mr W. A. Brown. Agent—David Cook, S.S.C.

Tuesday, November 9.

SECOND DIVISION.

PRESBYTERY OF SELKIRK *v.* DUKE OF BUCCLEUCH AND OTHERS.

Teind—Parochial Glebe—Designation—Prescription. Circumstances in which *held* to be proved (1) that there had been at a certain period a valid and effectual designation of a parochial glebe; (2) that the benefit of it had not been lost to the minister by the operation of prescription.

This was an action brought by the Presbytery of Selkirk and the Rev. James Russell, minister of the parish of Yarrow, against the Duke of Buccleuch and others, heritors of the latter parish, concluding for declarator—(1) that a certain portion of the lands of Kirkstead, lying adjacent to St Mary's Loch, and bounded as described in the summons, formed the *parochial* glebe of the parish of Yarrow; and (2) that a certain other portion of land, in the neighbourhood of that first mentioned, formed the *grass* glebe of the said parish. The Duke of Buccleuch having put in defences, and having produced a decree of the Court of Session, dated 1728, negativing the claim of the minister of Yarrow to a *grass* glebe, that part of the pursuer's demand was given up, and the question came to be confined to the parochial glebe claimed as above. Besides disputing that there had ever been any designation, the Duke of Buccleuch maintained the following plea:—"Even assuming that a proper parochial glebe and minister's grass were designed by the Presbytery of the dates alleged in the condescendence, the decrees cannot now be enforced or given effect to, and the action is excluded by the operation both of the positive and of the negative prescription, in respect—(1) That the whole lands alleged to have been so designed have ever since the dates of said alleged decrees, or at least for upwards of forty years before the date of this action, been possessed exclusively, and without interruption, by the defender and his predecessors, as proprietors thereof, under their titles to Kirkstead; and (2) That neither of said alleged decrees has been acted upon at any time, at least for upwards of forty years before the date of this action."

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor and note:—

"*Edinburgh, 14th April* 1869.—The Lord Ordinary having heard counsel for the parties, and considered the closed record and proof—Finds that the pursuers do not now insist in the conclusions of the

action in regard to the grass glebe, or minister's grass, in respect that it was decided by decreet of this Court in 1728, of which an extract has been produced, No 40 of process, pronounced in a process to which the then minister of Yarrow was a party, that the minister of Yarrow 'could not have four soumes of grass for his horse and kyne in the pr'nt case where there appeared no kirk lands in the parish,' but that in lieu thereof the minister must have twenty pounds Scots yearly from the heritors proportionally, which sum has since been received by the minister of the parish: Finds that it is not proved that there ever was a legal and effectual designation of ground as the parochial glebe of the parish of Yarrow: Sustains the second plea-in-law stated for the defender the Duke of Buccleuch, and assoilzies him from the whole conclusions of the libel, and decerns: Finds the pursuers liable in expenses; allows an account thereof to be given in, and when lodged remits the same to the auditor to tax and report.

"*Note.*—In consequence of the recent discovery and production of the decree of 1728, the pursuers do not now insist in the conclusions as to the grass glebe. The question is therefore confined to that part of the case which relates to the alleged designation of a proper parochial glebe out of the lands of Kirkstead.

"It does not seem to be material in the present case whether these were church lands or not. No certain information on that point has been recovered, and it is not thought that the name of the lands can be taken as conclusive. The judgment of the Court in 1728, as to the demand for a grass glebe, proceeded on the ground that there appeared to be no church lands in the parish.

"If the minister of Yarrow had been in the ordinary possession of a definite piece of ground as a glebe, the want of the decree of designation, or of evidence of its once having existed, would have been of no importance. In the present case, however, the possession has been of a peculiar and ambiguous kind, and it does not seem ever to have had relation to a subject with defined boundaries. It rather appears that at times the minister has pastured sixteeen soumes or eight score of sheep on the lands of Kirkstead, though that does not appear to have been the way in which he has commonly possessed, and more generally he has received rent as for the pasturage by the tenant of that number of sheep. It is possible that this may have been adopted as a convenient mode of exercising the minister's right of property over a portion of the farm which had been specifically designated as a glebe; but it is a mode of possession quite as consistent with a right of pasturage over the farm generally, and not of property in a portion of it which had been designated as a glebe. Such being the case, the Lord Ordinary thinks it lies upon the pursuers to show that there was a designation, and to what specific subject it applied.

"The only evidence directly tending to instruct the alleged designation is in the Presbytery Records. It there appears (Pursuer's Print, p. 10) that at a meeting of Presbytery in 1723, held for the designation of a grass glebe to the minister of Yarrow, Mr Walter Laing, factor for the Duchess of Buccleuch, 'produced ane original designation of a glebe for Mr William Elliot, then minister of St Mary's Kirk of the Lochs, now Yarrow, dated at St Mary's Kirk of the Lochs, 7th October 1641.' There are no records of the Presbytery extant between 1619 and 1690. The minute bears that a copy of this document was taken, and ordered to be kept *inter retenta*, bearing that the lands of Kirkstead were then found to be kirk lands of old pertaining to the vicars and curates of the said kirk, and that the minister of Maxton did, 'by virtue of a special commission from the Presbytery for that effect, design out of the said lands sixteen soumes grass in lieu of a glebe.' In the absence of all further evidence on the subject, and looking to the state of possession which has all along subsisted, the Lord Ordinary does not think that this is such proof of a legal designation as it is incumbent on the pursuers to produce when they seek to invert that state of possession.

"Inferential but strong evidence to support the allegation that there was a designation of some kind, arises from the fact that a portion of the farm of Kirkstead has been known as 'the glebe,' or 'the minister's glebe.' But it does not appear that there has been any distinct understanding as to the boundaries of what has been known by this name. The name seems to attach more particularly to the ground extending upwards from St Mary's Loch, between the Gaitcleuch and Kirkcleuch burns—or at the lower portion of the ground, between the Gaitcleuch and Kirkslack. But it also appears to extend to the watershed on the top of the hill, and it would rather seem to include in the upper part more than the breadth of ground between the two burns, which rise about halfway up the hill. Some of the witnesses speak as if it only included the ground bounded on each side by the cleuchs. But it is clear that without taking in an extensive track of hitherto undefined ground there would not be pasturage for eight score of sheep. However it may have happened that the minister's right was understood to be specially connected with the ground between the two burns, the evidence upon that matter is not such as to show the existence of a subject with defined boundaries, designated and possessed as the glebe.

"In the absence of the alleged decree of designation itself, and of information in regard to its terms, and also of possession of any subject with definite and recognised boundaries, it would appear that any claim which the minister may have in regard to a glebe must be of a different kind from that which is made in this action. If he could produce the alleged decree, or evidence of its contents, he would be in a position to demand actual possession of the ground designated, subject to any plea of prescription arising to the defender from the past state of possession. Or if, without any evidence as to the decree of designation, he had actually possessed the ground by definite and known marches, he would have been in a position to defend that possession. But in the actual state of matters, in which neither he nor the heritors can show an existing designation, the Lord Ordinary is of opinion that his claim must be to have a glebe designed out of the lands of Kirkstead or elsewhere. It is unnecessary to consider here whether, in the circumstances, the heritors might have any defence against such a claim, but the Lord Ordinary thinks there can be no doubt as to its competency; *Minister of Falkland* v. *Johnston*, M. 5155; *Lawrie* v. *Halket*, M. Glebe, Ap., 4.

"The Lord Ordinary has not thought it necessary to pronounce a decision on the defender's plea of prescription. As the debate was on a proof he was precluded by the recent statutory regulation on that subject from hearing a reply to the argu-

ment of the defender' scounsel in support of the plea. There can be no doubt that prescription may support the title of an heritor to land which has been formerly designed as a glebe; *Minister of Stoneykirk* v. *Maxwell*, M. 10,819; *Lister* v. *Smith*, Hume, 475; *Scott* v. *Ramsay*, 5 S. 340. The difficulty in the present case arises from the ambiguous nature of the possession. The Lord Ordinary is inclined to think that, if it should be held to be sufficiently proved that there was a legal and effectual designation of a definite portion of ground as the glebe, it would follow that the possession which the minister has all along enjoyed was possession by himself or his tenants of that ground as held by him in property as the parochial glebe. But in the view which he takes of the evidence, he does not think that construction can be put on the possession."

The pursuers reclaimed.

D. F. GORDON and BALFOUR for them.

MILLAR, Q.C., and JOHN MARSHALL, in answer.

At advising—

LORD JUSTICE-CLERK—This case raises three questions for decision.

1. Whether it has been proved that there has been a legal designation of a glebe to the minister of Yarrow?

2. Whether if such a designation has been proved to have been made, the benefit of it has been lost by the operation of prescription?

3. If these two questions are resolved in favour of the minister, what is the specific subject so designed?

The Lord Ordinary has answered the first of these questions in the negative, and has found that it has not been proved that there ever was a legal and effectual designation of ground as the parochial glebe for the parish of Yarrow. But I am unable to concur in this conclusion. The original designation which is said to have been made in 1641 has not been produced. It seems that none of the Presbytery records are extant prior to 1660. But the pursuers rely on certain minutes of the Presbytery of Selkirk in 1723, which state that an original designation of a glebe for the parish of Yarrow, dated 7th of October 1741, was produced to the Presbytery, and that a copy of it was directed to be taken and kept *inter retenta*. This copy also seems to have perished in a fire about 1760. They also found on the terms of a decree pronounced in certain suspensions of the proceedings of the Presbytery brought in this Court a few years afterwards by several of the heritors of the parish, in which all the parties refer to and plead on this designation as at that time valid and effectual. They found also on parole evidence proving a long traditional repute that the ground claimed was known as the glebe of the parish of Yarrow.

It is certainly not fatal to the claim of the pursuers that the designation has not been produced, and the Lord Ordinary does not seem to doubt that collateral evidence is competent to establish the point in question. The right acquired by the incumbent, or rather by the benefice, from the designation of a glebe is of an exceptional kind. There is no disposition and no sasine required in such rights, there is neither superior nor feu-duty—no form is required to transmit these rights, and there is no public register appointed where they may be published and preserved. Lord Stair says, b. 2, 8, 29, "Ministers being thus entered have right to their benefices or stipends during their incumbency which they need not instruct by writ, but it is sufficient to prove by witnesses that the minister or his predecessors have been in possession of that which is controverted, as a part of the benefice or stipend of the kirk, and that it is commonly holden and reputed to be a part thereof for their being no competent way to preserve the rights and evidents of the kirk amongst successors in office, as there are of other rights amongst other successors, the canon law attributeth much more to possession than the civil for thereby possessor *decemalis et triennalis non tenetur docere de titulo.*" It seems, therefore, never to have been held that to maintain such a right production of the original designation is essential, but that its original existence may be presumed or inferred from facts and circumstances, especially when the minister has been for a long period in the substantial enjoyment of the right.

In the present case it is not contested by the defenders that it is sufficiently established that a proceeding professing to be a designation took place in 1641; but it is suggested that looking to the subsequent possession it is quite consistent with the evidence before us that the real nature of the right given by the Presbytery was a servitude of pasturage over the whole farm of Kirkstead, and not a glebe consisting of a defined portion of ground.

On careful consideration I have come to the conclusion that there is no room for this contention.

I think, in the first place, that the presumption is that the Presbytery proceeded according to law, and I am clearly of opinion that if they had attempted to give the minister a right of servitude over the farm of Kirkstead, they would have acted illegally and without any colour of authority. This designation proceeded under the authority of the Act 1606. By the previous statutes 1572 and 1593, it had been provided that the minister serving the cure should have four acres of land for his glebe. These statutes say nothing of arable land. They speak simply of four acres of land. By the subsequent statute of 1603, c. 7, on the narrative that "there are sundry kirks within the same whilk has no arable land adjacent thereto, but only pasturage, so that be the foresaid Act of Parliament made anent the designation of four acres only for the glebe of ilk minister and na farther, the minister serving the cure at sic kirks as have na arable land adjacent thereto, but only pasturage are greatly hurt and defrauded, it is enacted that such minister shall have four soums grass for ilk acre of the foresaid acres of land extending in the haill to 16 soumes." I think it very clear from the words of this statute—*First*, that these soumes of grass are a measure of quantity; and, *secondly*, that the quantity of pasture land to be provided under it was to be designed previously in the same way and to the same effect as in the case of arable land. The extent of a soum of grass is as much pasture as will maintain ten sheep. The evil which the statute was intended to remedy was the limited extent to which Presbyters were restricted in cases in which there is no arable land. No other form of procedure is directed besides that contained in the former statutes.

But under those former statutes the powers of the Bishops and Superintendents under the first, and of the Presbyters under the second, are very clearly defined, and they have been strictly construed; so much so, that designations have in more

than one instance been set aside for want of conformity to the procedure prescribed; *Hamilton*, M. 5134. Now it seems certain that no power of constituting a servitude is given by these statutes, and that the heritor might at once have prevented any such attempt. I say nothing of what may be the effect of possession in a question of prescription, or even of local custom, as in the case of *Barvas*, 4 Shaw. But certainly no such power is conferred by these statutes. If therefore the evidence by which the existence of the designation is established be consistent with its having been legally carried out, I think that the assumption that the Presbytery created, or tried to create, a servitude is entirely excluded.

But I think the same conclusion follows from the evidence to which I have referred, when carefully considered, and to it I shall shortly advert.

Some light is thrown on this question by the decree of valuation of the teinds of the lands of Kirkstead in 1636. In the narrative of decree it appears that the value was referred to the oath of the heritor, Sir John Murray of Philiphaugh; and that he deponed that his lands of Kirkstead extended to ninety-six soumes, of which the minister possessed sixteen, and he proceeds to state in the deposition that these sixteen soumes possessed by the minister were the best part of the ground, and the only part of it where the milk was good, that is to say, the productive cattle and sheep could go. This he urges to reduce the teindable value of his own lands.

This is a fact of some importance, for it seems to indicate that prior to 1641 the minister serving the cure was already in possession of the statutory glebe, probably designed by episcopal authority. This renders it probable that the proceeding in 1641 was mainly intended to give the authority of the Presbytery to the prior designation, and excludes the supposition that they would have gone out of their way to attempt the creation of a servitude.

The proceedings of the Presbytery in 1723 seem to lead to the same result, and indeed are not intelligible on the supposition that there had been the constitution of a mere servitude in 1641.

These proceedings commence by a petition from the then minister of Yarrow, on the 5th of March 1723, that sets out, that having for his glebe only sixteen soumes grass, distant from kirk and manse about five miles, he still wanted four soumes grass (under the subsequent statutes) for a horse and two cows. He also wanted turf and moss.

The Presbytery at their next meeting was attended by a number of honest men of the parish, and they proceed to inform themselves of the real extent of the minister's grass soumes, and they find both from the unanimous report of these honest men, and from two letters, one from the then tenant, and the other from the son of a former tenant, that the minister has only sixteen soumes in the Kirkstead, and that therefore he still requires four soumes more. They resolve to communicate with the Duke of Buccleuch's commissioners before proceeding further.

It is true, as was pointed out by the counsel for the defender, that the letter of the son of the former tenant clearly indicates promiscuous grazings by the minister's sheep, along with those of the heritor, over the whole farm of Kirkstead. But I cannot read the minutes as referring to anything but a specific portion of ground, the question which the Presbytery were endeavouring to clear up being whether it was or was not more than sixteen soumes. At a subsequent meeting, held three months afterwards, to which the heritors were cited, the Presbytery obtain further light on this matter, for Walter Laing, factor for the Duke of Buccleuch, appears, and produced "ane original designation of a glebe for Mr William Elliot, then minister of St Mary's Kirk of the Louchs, now Yarra, dated at St Mary's Kirk of the Louchs, 7th October 1641, a true copy whereof was taken and ordered to be kept *inter retenta*, bearing that the said lands of Kirkstead, now belonging to the Earl of Traquair, and presently possessed by the above-designed William Lindsay, as tenant in his name, were then found to be Kirk Lands, of old pertaining to the vicars and curats of the said kirk, and that Mr Andrew Duncanson, then minister of the gospel at Maxton, did therefore, by virtue of a special commission from the Presbytery for that effect, design out of the said lands sixteen soumes grass in lieu of a glebe for the said Mr William Elliot and his successors, ministers of the said St Mary's Kirk, now Yarra, in all time coming, as the said designation in itself more fully bears."

The decree thus produced appeared to the Presbytery conclusive of two points—*First*, that no more than sixteen soumes had been designed; and, *secondly*, that the lands of Kirkstead were church lands, out of which alone, under the statute of 1663, could the minister's grass for a horse and two cows be designed. These two points being cleared up, they proceed very systematically to take steps for designing four soumes in the Kirkstead for the minister.

It seems to me that this is conclusive as regards this part of the contention. The terms of the designation, as abridged in the Presbytery minutes, have no legal signification, excepting that a special piece of ground was marked out and designed. Designed signifies demarcation by specific boundaries. It has no other meaning in law as applied to this subject.

The heritors, however, were not satisfied with these proceedings, and five years afterwards, in 1728, three suspensions of them were brought in this Court, to which Lord Traquair, the then proprietor of Kirkstead, the Duchess of Buccleuch, whose factor held the principal designation, and the minister, were parties. Two positions were maintained for the heritors—*First*, that there having been a sufficient designation of sixteen soumes already, no farther designation was competent; and, *secondly*, that the former designation did not establish that the lands of Kirkstead were church lands. The Court repelled the first plea, but sustained the second. But all parties concurred in assuming that the old designation was effectual.

On this review of the evidence, coupled with the immemorial tradition of the neigbourhood in 1763, I am unable to give any weight to the plea that in 1641 the designation was not the designation of a special portion of pasture land in terms of the statute. I think we must hold that it was.

I have only further to add on this head, that looking to the nature of the right which the designation of a glebe confers, and to the expressions quoted from Lord Stair, I do not think that the pursuers need be put to the formality of a proving of the tenor, if the Court are satisfied on the evidence before them of the constitution and subsistence of the right.

The second question, whether the benefit of

this old designation has been lost by prescription, I have found to be attended with difficulty.

The Duke of Buccleuch pleads that he has held these lands of Kirkstead as a proprietor under a title which includes the property of the glebe, and that he has had exclusive possession of them for more than the prescriptive period.

There can be no doubt that a right to land which has been designed as a glebe may be so acquired as is established by the cases referred to in the note of the Lord Ordinary.

I am also of opinion that the disposition from Lord Traquair to the Duke of Buccleuch in 1764 does convey the whole lands of Kirkstead, including the glebe. It dispones these lands as possessed, the glebe also; and the exception from the warrandice necessarily implies that the glebe formed part of the property conveyed. If the possession had continued on the footing of this title, I think the plea would have been one very difficult to resist.

But although it is undoubtedly true that at no period that can be now traced has the minister's possession been confined to the special subject conveyed by separate pasturing of his glebe, I still think that he has throughout been in the substantial enjoyment of his full right, and that any possession held by the Duke and his tenant must be held to have been in the minister's right, and under him; for the Duke of Buccleuch, instead of paying the sum of £8, 6s. 8d. only, in terms of his title, has paid, by himself or his tenant, what may be held to be the full grass rent to the minister, increasing the amount until it has reached £42, or five times the amount stated in his title.

Indeed, the Duke of Buccleuch's contention on this head seems to be destructive of the plea of prescription, for he maintains that the possession by the minister has been of a servitude of pasturage. But the lands were not conveyed under any such burden, but under the burden of a fixed money payment. The fact being that the minister has drawn the full value of his glebe year by year, seems to me sufficient for the disposal of this plea.

The minister's case, however, is stronger than this, for it seems clearly enough proved that from the date of the purchase from Lord Traquair downwards in all the negotiations between the minister and the Duke of Buccleuch, the former has always asserted his right to stand on a special claim to the glebe itself, and I do not find in any of the writings founded on that this claim was ever directly repudiated. Three successive incumbents, Mr Bannatyne, Mr Lorimer, and Dr Cramond, had raised questions as to their right, and seem to have been always settled with on the footing of an increased rent. Mr Bannatyne seems to have contemplated legal proceedings. Mr Lorimer founds directly on the designation in 1641, and Dr Cramond having asked the Presbytery for a visitation of his glebe in 1788, is arranged with by the Duke of Buccleuch by an additional rent and a payment for byegones. The terms of the lease of 1840 shew very clearly that even then the glebe was dealt with as a separate subject from the rest of the farm, and the tenant was taken bound to pay the rent of that subject to the minister, and that the Duke has throughout let the land. But as the possession has been consistent with the relation I have mentioned, I do not think the minister has acquired a right of servitude over Kirkstead, nor do I think that the Duke has acquired right to the glebe by prescription.

The case of *Liston*, reported by Hume, has some analogy to the present, but in that case the money payment had continued uniform, which was the main ground of the judgment.

On the whole, therefore, I am disposed to repel the plea of prescription.

This leaves the only question remaining, to what extent we are in a position to give effect to the conclusions of the Summons.

Without going through the evidence, I think it has been sufficiently proved that from time immemorial there has been a portion of ground on the Kirkstead, bounded by St Mary's Loch on the south, by a ravine or cleuch called the kirk cleuch on the east, and by a cleuch called the gait cleuch on the west. The northern boundary is more doubtful; that claimed by the Summons is the watershed, but that spoken to by the witnesses seems rather to indicate a line drawn from the top of one cleuch to the top of the other.

It is very possible that the tradition spoken to by the witnesses had its origin in the possession prior to 1641. But if it were so, the fact would tend to corroborate the internal evidence afforded by the documents, and to demonstrate the true nature of the proceedings in 1641. It is also worthy of remark that these very boundaries are the same as those mentioned by Walter Laing, the Duke of Buccleuch's factor, in a memorandum drawn up with a view to the purchase in 1763. The terms are very material. "Yarrow glebe, I looked at the ministers of Yarrow's glebe which lies near the middle of Kirkstead ground. It seems to be naturally marked by the Loch of Lows at the foot and by two cleuchs *on each side*, and runs up to the top of the hill where it ends."

On the whole case I am of opinion that the defences, so far as founded on the want of designation and of prescription, should be repelled; and, holding that we have the power to adjust the boundaries of the glebe anew as may seem to be most in accordance with the ancient limits, I think we should remit before answer to a person of skill to report in regard to the northern boundary, holding the others to be proved.

LORD COWAN said he concurred in every respect in the opinion his Lordship had stated.

LORD BENHOLME—This is a case in which our differing from the opinion of the Lord Ordinary, and also the anxiety with which it was pled, render it necessary that we should direct our attention to every part of it; and while I cannot say your Lordship has omitted anything essential to the decision of the case, you will permit me to confirm and fill up the views you have expressed. It is a singular thing that the designation of this glebe in 1641 was not the first designation in favour of the minister. Of that there can be no doubt; and the reason, as was suggested by your Lordship, is that the designation had been made by the archbishop, bishop, or superintendents. The Act of 1606 was the first Act that authorised the substitution of sixteen soumes of grass to form a glebe, and between that date of 1606 and 1636, when there was a valuation of the Teinds of Kirkstead by Sir James or Sir John Murray, the first designation by the bishop or archbishop must have taken place, because we know that in 1636 the minister was then in actual possession of the sixteen soumes of grass,

and that they are characterised as being the best pasture on that part of the estate. Now, in 1640 the Episcopal Establishment was overthrown, and Presbytery established. In the very next year the minister makes this application, which, his Lordship has observed, was a sort of repetition or sanction of what had previously been done under prelatic authority, and I think that is the reason why it is a designation substantially under the provisions of that Act. Now, we have evidence a century afterwards that the minister who got this designation had been for many years in possession of this grass. He was in possession in 1636, and in 1723, when an attempt was made to give the minister grass for a horse and cattle, it appears from the Presbytery records that he had been for a long time in possession of these soumes, and thus we bring down the actual possession of the soumes till 1723. During some part of that century the old church and the manse were removed—and removed to a very considerable distance—the result of which must have been that the possession of the soumes actually by the sheep of the minister could not very well be maintained. There was no establishment for a servant to herd the sheep. It was therefore necessary that some arrangement should be made between the minister, the heritor, and his tenant, by which this piece of ground was let either to one or both by the minister. The exact footing upon which this took place, and which was continued by the payment of a sum of money, increasing from time to time, enters very deeply into the question of prescription. I may say, indeed, it is the element upon which we must determine that plea, because the question arises—Has the Duke of Buccleuch's possession not been of such a kind as to prevent him prescribing this piece of ground? Now if this ground was let—if it is the true fact that he paid rent—there was an end of his right to prescribe, because the man who takes a piece of ground on lease, and pays rent for it, acknowledges the proprietory right of the party from whom he takes it. The only question—and that seems to be settled satisfactorily—was whether this money paid must be considered as actual rent for land? It appears to me that the long possession the ministers had for two centuries, at least until the manse and church were removed, ascertains beyond doubt that it began as rent, and I can see nothing in course of the management by the landlord on the one hand, and the tenant and minister on the other, to change the character of that possession. In fact the prescriber cannot change the quality of the possession, and if that quality can be clearly traced back to an early period, it must be held to be maintained throughout the whole period. Now it is a very singular thing that, although there has been a promiscuous possession by the sheep of the tenant over Kirkstead for such a long time, there remains such a strong and permanent tradition as to the locality of this teind. The nature of the subject, the character of the locality, have aided this in great measure, because it appears there are natural boundaries. St Mary's Loch on the south, and these two cleuchs on the east and west, which define in some degree the boundaries of this glebe, and without which it would be impossible to trace it; but the tradition is very strong and unanimous as regards these three boundaries, and the only difficulty is with respect to the north. One observation I would make as to that is this—It was strongly urged on the part of the defender that the piece of ground inclosed by these three boundaries, completing the circuit by drawing a line from the top of one to the top of the other, does not inclose enough pasture ground to satisfy the sixteen soumes. That was strongly urged as interfering with the identity of the subject; but the consideration that weighs with me on that point is this. It does not by any means follow that the northern boundary was so to be traced. One of the cleuchs does go to the summit of the hill—the wind and water shed—and by continuing the other, and thus making the height of the hill the boundary on the north, you include somewhat more of the pasture; and it rather appears to me that would just make up the difference, and make the whole sufficient to give the sixteen soumes. That, however, is a matter for consideration under the remit your Lordship proposes to make. The only other thing that suggests itself to me is the argument that there must be proof of the tenor, and that was a plea which occasioned considerable anxiety, until I discovered from Lord Stair what seems *a fortiori* to be relief from proof of tenor. In the case of churchmen who are depositaries of the minister's right, there is considerable danger of their right being lost. The original designation may be lost, and then there may be no means of recovering it, or of proving its tenor. Now, Lord Stair seems to me to adopt the doctrine that, even without title at all, a sufficient length of possession of a benefice is sufficient to maintain the possession of a churchman, and prevent him being ousted by any competitor on the ground that he has not a written title. I may refer your Lordship to another passage similar to that already quoted, namely, Stair, 6, 2, t. 1, § 25, entitled "Possession of Churchmen,"—well, if it be the law that without a written title at all a churchman may be maintained in his possession, it follows that when we have written documents such as we have here, that is a more satisfactory state of things, and *a fortiori* we are not required to demand proof of tenor. In short, we may safely, and without infringing any rule such as that required in the case of title to property, where an essential leaf must be supplied by proving tenor, we may safely repel the plea on that ground; and, upon the whole, I agree with your Lordship. Considering all that has been urged, the evidence of witnesses, the nature of the ground, and the quantity of pasture required to fulfil the measure of the proper designation, I think the party ought to satisfy us where this northern boundary should be.

Lord Neaves—I concur in the opinions which have been delivered.

One great principle that must help to regulate this case is, the peculiar favours shown to churchmen in reference to the loss of their titles; but that favour is truly not more than common justice. No proprietor with us is bound, as a general rule, to produce his original grant. Recent renewals of the right are admissible instead, if supported by possession. But churchmen cannot be expected to produce renewals of any right; they have no call or power to renew those rights. Then glebes and manses are allodial subjects with no superior, and each incumbent succeeds another without service or any other form of an *aditio hæreditatis*. If therefore some title must always be produced by churchmen, the original grant could alone satisfy the condition; and this would place them in a worse position than other proprietors. An ancient deed may easily be lost, particularly when there may be no

continuous custody. The true question then is—If there is here sufficient evidence that an original grant or designation of a glebe took place, and whether that right subsists? On this matter, which is one of evidence, I am satisfied of these points—

1. That there was a designation.

2. That this designation not only must be presumed to have been a special designation of so much ground, but is actually proved to have been so. There would have been no need of a commissioner to designate unless there was a special designation.

3. That possession has taken place consistently with this view. Even before the designation I think the incumbent was in possession of a special extent of land to which the formal designation was made applicable. Subsequently the possession was modified that so far there was a promiscuous grazing of the minister's sheep and those of the tenant or heritor; and latterly the arrangement was of the nature of a lease by the minister to the heritor or tenant—a commodious and natural mode of possession.

4. I think the existence of a definite designation is strongly proved by the repute of definite boundaries which continued to within the memory of man, and even to the present time, and by which the glebe was known as a special subject, with no uncertainty as to its limits, except as to the watershed on the north.

5. An idea seems to have been entertained by Lord Traquair that he had succeeded in turning the minister's right to a glebe into a mere money payment. But this view did not prevail; and ever since the commencement of the present defender's right it has been held and assumed that the money paid was a variable sum according to compact, and was, as it bore to be, of the nature of rent due by the heritor of Kirkstead to the minister.

6. The same grounds, particularly in the immediately preceding article, preclude the plea of prescription as not supported by appropriate possession as proprietor.

I concur in the course proposed.

There being a difficulty in determining the northern boundary of the glebe as held to be designed, the Court remitted to a man of skill to report thereanent; and with reference to the expenses, they allowed the defender any expenses which had been caused by the pursuer's demand for a grass glebe, and *quoad ultra* they found the pursuers entitled to expenses.

Agent for the Pursuers—John Shand, W.S.
Agent for the Defenders—John Gibson, W.S.

Friday, November 12.

SANDS *v.* AULD.

Parent and Child—Filiation and Aliment—Proof of Paternity. Circumstances which *held* sufficient (*diss.* LORD BENHOLME) to corroborate the evidence of the mother of an illegitimate child as to its paternity.

This was an appeal from the Sheriff-Court of Stirlingshire in an action of filiation and aliment. The defender was an apprentice and the pursuer a domestic servant with a Mr M'Callum, a wright, near Gargunnock. The child was born on February 6, 1867, so that the conception must have taken place shortly before the May term 1866. At that term the pursuer quitted Mr M'Callum's service and went home to her parents. She swore that the defender had had connection with her on only two occasions, both within two or three weeks of her leaving. The defender swore that he never had had connection with her at all. The only corroboration of the pursuer's oath was proof of "tousling" on one occasion in spring or summer 1865, the witness being Mr M'Callum himself; and the conduct of the defender after he was charged with the paternity of the child shortly before its birth. The Sheriff-Substitute (SCONCE) decerned in favour of the pursuer; but the Sheriff (BLACKBURN) reversed and assoilzied.

The pursuer appealed.

GUTHRIE for appellant.

BURNET for respondent.

The Court returned to the Sheriff-Substitute's judgment; Lord Benholme dissenting. The majority founded strongly on the fact that when the defender was charged orally by the pursuer's mother, and in writing by herself, with being the father of the child, he had merely denied being the father, and had not also alleged, as was said to be the proper course in such circumstances, that he never had had any connection with the mother. It appeared farther that after denying paternity the defender had written a letter to the pursuer agreeing at her request to meet her. It was thought that if the women's charge against him were not true he must have known it to be concocted, and that it was not a proper answer to such a charge to travel some miles to see the pursuer; that an innocent man in such a case would have at once repudiated the charge as concocted, and would not have dallied and fenced with the question.

The Court observed that in the Sheriff-Court it was an infringement of the statute to adjourn diets of proof, as had been done here, without stating in the interlocutor the special reason of such adjournment; and Lord Cowan said there had been too many instances of such delays having been taken advantage of for the purpose of procuring fresh evidence. Further, it was a reprehensible practice to take down the evidence of the pursuer, the leading witness, merely as concurring with a previous witness (as had been done here in regard to the incident in spring 1865). In such a case as this the precise statement sworn to ought to have been taken down.

Agent for Pursuer and Appellant—N. M. Campbell, S.S.C.

Agent for Defender—A. J. Dickson, S.S.C.

Saturday, November 13.

FIRST DIVISION.

PETITION—ALLAN, FOR AUTHORITY TO INCREASE ANNUITY.

Trust—Power to Trustees to Increase Annuity—Judicial Factor—Thellusson Act. A truster having conferred on his trustees power to increase an annuity provided to his daughter, if his funds would admit and they should think proper. Circumstances in which *held* (1) that although the judicial factor could not exercise this discretion, it was competent to the Court to do so; (2) that a case had been made out warranting an exercise of it by the Court.