is admitted that, on an application to the Inner-house, matters would have been set to right. That was as well done by enrolling again. The second decreet was valid though the first was erroneous: *utile per inutile non vitiatur.*

KAIMES. The decreet, taken before the days of compearance, was null and void. It is said that a man is not bound to attend in Court after decreet. This is a mistake, for a pursuer is not bound to call his summons on the first day. The defender must either wait the pursuer's time or put up protestation.

MONBODDO. As the cause was called when not in Court, an application to the Court would have been improper.

JUSTICE-CLERK. It is no impeachment of form what has been done *here.* The interlocutor, signed before the parties were in Court, is to be considered merely as a useless, unmeaning piece of paper.

On the 25th June 1778, "The Lords repelled the reasons of reduction;" altering Lord Alva's interlocutor.

Act. R. Cullen. *Alt.* Ilay Campbell.

1778. *June* 26. ROBERT, &c. GRIERSONS *against* Mr JOHN EWART.

GLEBE.

Import of arable lands in the statute 1663, c. 21.

[*Faculty Collection, VIII.* 39; *Dictionary,* 5162.]

WESTHALL. Manse, &c. and glebe, are distinct rights: formerly ministers had only right to a manse if there was a vicar's or parson's manse in the parish: if there was a glebe in the parish, they had right to it: if there was none, none could be designed. The Act 1663, copying a rescinded statute, 1649, made a general provision for ministers. The practice has been, to set aside half an acre for manse, garden, &c. I have never seen such designation disputed.

BRAXFIELD. When split, new designations of manse and glebe are made. The practice has been to set apart four and a half acres in all. But when a minister has been in long possession of a manse, &c. the presumption is, that his predecessor was in possession before the Act 1663. If he was in possession of less than half an acre for manse, and had four acres of glebe, I do not think that he could claim any more. Supposing the manse to be more than half an acre, and the glebe only three acres, the minister would still be entitled to have his glebe made up to four acres: the want here is in the glebe, not in the manse ground. As to the fisher's road there is a servitude, and a deduction must be allowed on that account: As to the other road parties are not agreed, and the thing is a trifle.

KENNET. If the minister has four acres of glebe, he can ask no addition: he

can ask no addition because the manse-ground is less than half an acre; and if he has more than half an acre for manse-ground, *that* will not hinder him from getting four acres for glebe.

HAILES. The heritors are too strict in their calculations: they even compute the church-yard, which certainly cannot be designed either for glebe or grass. If they allow the minister to pasture his cattle *there*, they allow what they have no right to do; for, although the church-yard may be the property of the heritors, as every subject must have a proprietor, yet it is a property *sub modo*, and cannot be either ploughed or pastured: the fisher's road must be deduced; for it is plain that the minister could not effectually plough it up: were he to attempt this, his corn would be trod down. The case is much the same as to the other road; for, if the parishioners have been in the practice of going that way every Sunday, it will not be in the minister's power to exclude them. A glebe of four acres, with two roads or paths through it, would not amount to what the law meant to give: it is four acres, minus the roads.

GARDENSTON. We ought to give a liberal interpretation to the judicious ordinance of our ancestors: a road is no more arable ground than a rock is.

COVINGTON. Were a designation to be now made, I would not scruple at four and a half acres for manse and glebe. But if the minister has possessed less than half an acre for manse, I would not give him more: my only doubt is as to the private road.

On the 26th June 1778, "The Lords repelled the reasons of reduction, as to the glebe."

WESTHALL. As to the grass, I am for repelling the reasons of reduction: ever since the decision in 1712, a distinction has been made between outfield and croft land. Formerly, the ground in question was a wilderness, and now it is good land by the industry of the minister: shall his industry have the effect of cutting him out?

HAILES. I view the case in a very different light. Were a glebe to be designed at this moment, it would be designed out of that very ground which has been designed for grass: now, it seems inconsistent with the words and spirit of the statute, that the same ground should be designable both for glebe and grass. The former state of the ground is out of the question: we must consider what the ground is when grass comes to be designed. I will illustrate this by a familiar example: the ground to the west of Tranent has been long under culture: to the east has been newly brought into culture. Suppose that at this time the minister of Tranent should have occasion to pursue for a designation of glebe and grass, would you give him his glebe on the west, and his grass out of the cultivated fields on the east, because you have always seen the one under culture, and have remembered the other a wilderness. That this minister's industry has improved the ground allotted for grass, is a circumstance of no moment: he improved it as any other tenant would have done; and the ground must be considered as if it had been in the possession of any other tenant. The grass is not designed to a particular minister, but to the minister serving the cure. If the defender's successor had been pursuing for a designation of grass, he could not have pleaded that this ground ought not to be denied to him, as having been improved by the industry of his predecessor; and so rendered dif-

ferent from what it had formerly been: I therefore think that this designation of grass must be reduced.

BRAXFIELD. Of the opinion last delivered: I have frequently had occasion to consider the words of the statute 1663, and I confess that I never saw much sense in the distinction *there* laid down. But, as the act is conceived, I must give it a suitable interpretation, and one agreeable to its words. If this ground is designed for grass, we take away the exception in the Act of Parliament altogether. If former times were to be looked into, no lands whatever would be excluded. That the present incumbent has improved the grounds is nothing to the purpose: the heritor must have the benefit of the improvements made by his tenant. A distinction was made, in the practice of the Court, between outfield and infield, whereof the one was constantly cropt, and the other only occasionally; but there is no room for any such distinction here.

COVINGTON. If the principles adopted by the minister were to be received, there would not be an hundred acres in Scotland exempted by the statute 1663. The very next lands to those in question were designed as glebe: if they were such, as the minister contends, no glebe at all ought to have been designed. There was no subject for a glebe; and sixteen soums of grass ought to have been designed.

KAIMES. The state of the country, when the statute 1663 was made, ought to be considered: the difference, at that time, between *outfield* and *infield* was universal: The *infield* was dunged; the rest was merely for feeding cattle. Some crops of oats were occasionally taken, and then the land was rested or left ley: the minister could not be allowed his grass out of the infield or croft land. Alterations in husbandry were introduced; and men discovered that outfield was not naturally bad, but that it might be improved by proper cultivation. Thus, circumstances are changed. What rule is it that we must follow?—for the land is no longer outfield.

GARDENSTON. I repeat my former observation,—that the statute 1663 ought to receive a liberal interpretation: it gives a competency of ground to ministers, and no more than a competency. I would consider what the state of the ground has been within the memory of man, or for many years. We ought not to interpret the word *arable* in the very strictest sense. Now, all lands are arable, and the tops of mountains are ploughed: take the statute in that light, and you exclude ministers altogether.

JUSTICE-CLERK. I am not a legislator. I must interpret the law that lies before me: the law says, that the designation of grass must not be made out of arable land; and, by giving a succedaneum of L.20 Scots, points out what it apprehended the general value of the grass to amount to. In estimating the nature of the ground, we cannot go back to a remote period; we must consider what is the *abiding* state of the land. It is of no consequence that the improvement was, in a great measure, made by the present incumbent. I would not hold every parcel of ground to be arable, because it happened to be ploughed in the year of the designation. According to the common course of outfield labouring this would be an interpretation of the statute too literal; but, on the other hand, I cannot, in a fair construction of the statute, give away from the heritor so valuable a property, for the accommodation of the minister.

On the 26th June 1778, "The Lords sustained the reasons of reduction as to the grass."

Act. D. Rae. *Alt.* A. Crosbie.

Reporter, Covington.

Diss. Westhall, Kennet, Gardenston.

1778. *July* 2. SIR LAURENCE DUNDAS *against* ARTHUR NICOLSON and ROBERT HUNTER.

MANSE.

The Superior not liable to be assessed for the expense of building the manse.

[*Faculty Collection, VIII.* 42; *Dict.* 8511.]

MONBODDO. The superior is not liable in the burden in question, but only landholders who have the *dominium utile*. There is a valuation here by mark and penny lands, older, perhaps, than the valuation by old extent. Cess and parochial burdens are to be viewed differently: a proprietor has a family in the parish,—a superior has not. It does not appear that there has been any constant practice; and we know nothing of any practice before 1731. As to the practice through Scotland, it is so various that no rule can be discovered. The feuars here ought to have insisted only for deduction of the feu-duties, payable to Sir Laurence Dundas; but that would have laid no additional burden on Sir Laurence Dundas.

BRAXFIELD. I can discover nothing from the inquiries made, as to practice, which may have influence on this cause. A *superior*, in the sound construction of the statute, is not to be held as a *proprietor* or *heritor*. All parochial burdens fall to be laid on the *dominium utile*, such as poors' rates and schoolmasters' salaries, statute-work for the repairing of highways, on this principle, that *cujus est commodum ejus et incommodum*. The case of repairing the manse is the same with the case of building a church: they who have only a right of superiority have no share in the division of a church. The superior is not entitled to set his foot within the church, or even within the parish. The valued rent is the general rule for parochial burdens; and, upon the whole, it is a good rule; but when it chances not to be equitable, it is departed from; as in the case of a royal burgh, where there is a landward parish.

KAIMES. The practice is so various that it determines nothing. I am convinced by Lord Braxfield's argument, so far as it relates to the case, where the superior has only right to blanch duties. But, in feu-holdings, the superior has a material interest; for his feuars are, in reality, tenants, although, by the fall in the value of money, the feu-duty ceases to have the effect *now* which it *originally* had; and the interest of the vassal becomes greater. But what if the superior, instead of feuing out the whole, should only feu out a part of the estate?