step of process other than the initial writ or defences shall give written intimation of such lodging to the agent of the other party, and the clerks shall not mark any such step as received until a certificate of intimation has been endorsed thereon."

Tuesday, January 27.

OUTER HOUSE.

[Lord Ormidale, Ordinary on Teinds.

MACPHAIL *v.* KILBRANDON AND KILCHATTAN HERITORS.

Church — Manse — Glebe — Access — Obligation of Heritors.

The heritors of a parish are bound to provide and maintain a reasonable access from the public road to the manse, suitable for foot-passengers, and also sufficient for use by a horse and trap.

Observations as to the liability of the heritors to provide and maintain an access to the glebe.

The Rev. William Macphail, minister of the United Parish of Kilbrandon and Kilchattan, *defender*, presented a petition to the Presbytery of Lorn seeking repair, &c., to the church and manse of his parish, and, *inter alia*, asking a finding "that the entrance to the glebe from the public road and the part of the road within the glebe leading to the manse must be repaired and appointed to be not less than fifteen feet broad, and that the glebe must be sufficiently enclosed." The Marquis of Breadalbane, K.G., and others, heritors of the said parish, *pursuers*, being dissatisfied with the findings of the Presbytery, appealed to the Sheriff. On 23rd May 1912 the Sheriff-Substitute (WALLACE) remitted for report to a man of skill, with the exception of the repair of the glebe fences and of the entrance to the glebe and manse.

Note.— . . . "Pursuers however aver, and have submitted an argument to prove, that the repair of the access to the glebe and manse and of the glebe fences are matters which do not fall within the purview of the legal liability of the heritors, and that therefore the defender's petition, so far as it relates to these matters, is incompetent and should be dismissed. I have, after a careful consideration of such authorities as are available, come to the conclusion that their view is sound. I shall deal first with the repair of the glebe fences.

"Professor Rankine, in his treatise on Landownership, says at page 670 that 'where a glebe has once been provided, it is difficult to conceive of any further burden resting on the heritors by way of maintenance, *unless it be to keep up the fences and access*' (the italics are mine), and he goes on to indicate an opinion that in the absence of decisions on these matters no such obligation rests upon the heritors. Mr Black, in his work on Parochial Ecclesiastical Law, at page 160, quotes Professor Rankine's observations with approval, and remarks that 'as the minister enjoys the whole benefit of the glebe, it does not appear that he is entitled to ask the heritors to build a wall round it, and that if a fence be already round the glebe when he enters upon the benefice, it is his duty to maintain it, such maintenance being an incident to the minister's right to the glebe, *just as his payment of road and school assessment qua proprietor of manse and glebe*' (again the italics are mine). It will be noticed, however, that Professor Rankine, to whose opinion on such matters very great weight is deservedly attached, expresses himself in very guarded terms. It is, he thinks, 'difficult' (not, it will be observed, impossible) 'to conceive of any further burden resting on the heritors by way of maintenance,' but he is careful to qualify even this guarded statement by adding 'unless it be to keep up the fences and access.' So that apparently in his view it is not even difficult, much less impossible, to conceive the burden resting on the heritors of maintaining the glebe fences and access. Mr Black's statement is, however, much more sweeping than Professor Rankine's, for while the latter deals with the maintenance and repair of the glebe fences, he leaves one rather to conjecture by a process of exclusion that there does rest upon the heritors an initial obligation adequately to fence the glebe when first it is designed as such. Mr Black, on the other hand, expressly bases his opinion that the maintenance and repair of the fence does not form a burden on the heritors, on the twofold ground (*firstly*) that as the minister is not entitled to ask the heritors in the first instance to enclose his glebe, he cannot afterwards ask them to maintain a fence which *ex hypothesi* they were not responsible for erecting; and (*secondly*) that the maintenance of the glebe fences is an incident of the minister's proprietorship, just as payment of his assessments are.

"In Sheriff Johnston's erudite edition of Mr Duncan's work on Ecclesiastical Law, there occurs the following passage on page 428:—'None of the statutes anent glebes contain any requirement to the effect that the ground designed as glebe should be fenced and enclosed by the heritors, and no decision imports that walls or fences constitute an integral part of the glebe. In the case of the manse garden, a wall or enclosure of some kind has been repeatedly recognised as a necessary or proper adjunct thereof. On a somewhat similar principle it might possibly be inferred that where a dyke or fence is essential to the beneficial use of the ground *qua* glebe, the burden of erecting such enclosure would, on the designation of the ground, devolve on the heritors.' As a result it may I think be taken to be the opinion of these three eminent writers that while there may possibly (not certainly) be a liability on the part of the heritors to enclose the glebe at its designation, no liability whatever attaches to them in respect of its maintenance once it has been erected.

"I think, however, the true test of the matter is to discover to whom the ownership of the glebe belongs. Does the glebe

belong to the minister or to the heritors? Now on that point there cannot I venture to think be any dubiety. The question rests not upon opinion, however eminent, but upon authority. It has been held more than once that the minister is the owner of the glebe, in the sense at any rate that he enjoys all the privileges of ownership (see *Heritors of Aberdour* v. *Roddick*, December 14, 1871, 10 Macph. 221, 9 S.L.R. 159, *per* Lord Moncreiff; *Cowan* v. *Gordon*, July 9, 1868, 6 Macph. 1018, 5 S.L.R. 645). It certainly cannot be said that the heritors are the owners of the glebe, even in the sense that they enjoy any of the privileges attaching to that status. Why, then, it may be asked, should they have thrust upon them any of the liabilities attaching to a position the benefits of which they do not enjoy? Of course, if there were statutory authority for this liability, as in the case of the repair or rebuilding of the manse itself, that would be another matter. There is, however, no statutory authority for such a liability, and as the obligations of the heritors must primarily rest upon legislation, that consideration is perhaps alone enough to decide the question. But if, then, the minister be the owner of the glebe, in the enjoyment of all the privileges of ownership, he must, I think, in the absence of authority to the contrary, be equally saddled with the responsibilities incident to ownership and co-relative to the privileges which he enjoys. And one of the responsibilities devolving upon ownership of the glebe is, I think, the duty of maintaining the fences in a suitable state of repair. I think, therefore, it is incompetent and irrelevant for the defender to ask the heritors to repair the glebe fences.

"The same observations apply, I think, to the questions of the repair of the entrance to the glebe and manse. They are, I think, equally incidents of the ownership or proprietorship of the glebe and manse by the defender, and that for their upkeep the heritors cannot legally be made responsible."

The defender the minister appealed to the Lord Ordinary in Teind Causes (ORMIDALE).

Counsel for the appellant did not maintain the appeal on the question of the fencing of the glebe, as an appeal under the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 and 32 Vict. cap. 96) on that matter was of doubtful competence. The following authorities were quoted:—*Maxwell* v. *Langholm Presbytery*, 1867, 5 S.L.R. 16; *Elliot* v. *Hunter*, July 12, 1867, 5 Macph. 1028, 4 S.L.R. 180.

The *facts* are given in the following *opinion* of the Lord Ordinary—"On 5th January 1912 the minister of the United Parishes of Kilbrandon and Kilchattan, in the county of Argyll, presented a petition to the Presbytery of Lorn, within whose jurisdiction the parishes are situated, praying it, *inter alia*, to find that the church of the said parishes needed to be repaired and that the manse and offices must be rebuilt and enlarged; that the entrance to the glebe from the public road and the part of the road within the glebe leading to the manse must be repaired and appointed to be not less than fifteen feet broad, and that the glebe must be sufficiently enclosed and the garden wall repaired. Objection was taken by the heritors before the Presbytery to the competency of the petition in respect that the findings dealing with the access to the glebe and manse and with the glebe fences were outwith the jurisdiction of the Presbytery. On 24th January 1912 the Presbytery resolved to visit and inspect the whole subjects. The proceedings were then taken by way of appeal at the instance of the heritors to the Sheriff of Argyll. In the appeal the heritors repeated their objection to the jurisdiction of the Presbytery to deal with the matter of the access to the glebe and manse and of the glebe fences, and also objected on the merits to the extent of the operations alleged by the minister to be necessary to put the church and manse into a sufficient state of repair. Objections stated in seven pleas-in-law to the competency of this appeal were taken by the minister. The pleas were repelled by the Sheriff-Substitute on 29th March 1912. Thereafter the minister having been allowed to amend his record by adding thereto additional pleas-in-law, the Sheriff-Substitute on 23rd May 1912 pronounced the following interlocutor:—'*Oban, 23rd May* 1912.—The Sheriff-Substitute having further heard parties' agents on the additional pleas-in-law stated for defender, sustains the fourth plea-in-law stated for pursuers, and repels the third additional plea-in-law stated for defender so far as it affirms the liability of the pursuers to repair the access to the glebe and manse and the glebe fences; remits to Mr George Woulfe Brenan, architect and civil engineer in Oban, to report *quam primum* on the various matters referred to in the defender's petition to the Presbytery, with the exception of the repair of the glebe fences and of the entrance to the glebe and manse, and meantime continues the cause.' The fourth plea-in-law for the pursuers (the heritors) is as follows:—'4. *Separatim*—The defender's petition in so far as it relates to repairing the access to the glebe and manse and to the repair of the glebe fences is incompetent, and should be dismissed.' The third additional plea-in-law for the defender is as follows:—'3. *Separatim*—The repair of the glebe fences and the maintenance in good repair and space sufficient for the minister's use of the entrance to the glebe from the public road and the part of the road within the glebe leading to the manse being included in the legal liability of the pursuers and other heritor or heritors of the parish, the defender is entitled to pronouncement of the finding thereanent craved by him in his petition to the Presbytery.' The present appeal to the Lord Ordinary on Teind Causes is at the instance of the defender, the minister. At the hearing the minister did not insist in his contention that the heritors were bound to repair the glebe fences. He limited his argument to the question of their liability to repair the entrance to the glebe and manse.

"It appeared to me desirable that the exact condition of the access or entrance should be ascertained before dealing with this question, and accordingly on 18th July 1913 I made a remit to Mr Peddie to inquire into and to report upon the condition of the road.

"From this report it appears that the road to the manse leaves the main or public road nearly opposite to and on the other side of the road from the Parish Church, being shut off from the public road by an iron gate, that the road is at present fitted for only the roughest of wheeled traffic, and that it is dangerous in places for foot-passengers at night owing to the absence of fencing, and that in wet weather the low lying parts of it, which form a considerable section of the road, are nearly impassable. The total length of the road is 840 yards, the distance between the main road and the glebe being about 512 yards. The cost of making the existing road into a good serviceable road 10 feet wide would be, on the section of the road from the public road to the glebe £105, and on the section from the glebe to the manse £70, in all £175. The average money value of the minister's stipend it may be noted is about £140.

"That the access road has really ceased to be a road in the ordinary sense of the term, and has come to be nothing more than a rough and ill-defined and somewhat dangerous cross country track, and is in urgent need of repair, is to my mind clear. To make it a decent serviceable road it requires to be repaired, and the question which I have to decide is whether the cost of so repairing it falls to be borne by the heritors?

"The question is an entirely novel as well as an extremely difficult one. There is no case in which the matter appears to have been referred to even indirectly, and the writers on ecclesiastical parochial law do not offer any opinion.

"When the case was before the Sheriff-Substitute the minister still asserted his right to call upon the heritors to repair the fences of the glebe, and the Sheriff-Substitute has dealt almost exclusively with this topic in his most admirable note. If I were able to agree with him in what he says in the concluding paragraph of his note, 'that the same observations apply to the questions of the repair of the entrance to the glebe and manse,' I would have derived much assistance from these observations in coming to a conclusion on the subject.

"It seems to me, however, that the entrance to the manse is in a quite different position to the fences of the glebe. Once a glebe has been designed, it is difficult, as Professor Rankine puts it, to conceive of any further burden resting on the heritors by way of maintenance. If it should become unprofitable by inundation, sanding, or any other extraordinary accident, then there is an express duty imposed by statute upon the heritors to provide a new one. But short of annihilation the glebe is at the disposal of the minister for the time, to make what profit he may from it.

"In the case of a manse the heritors have not only to provide a competent manse. There is a continuing obligation on them to keep it sufficient in point of repair and accommodation. If, then, the requirements of a competent manse include at the outset a reasonable access to it from a public road, it seems to me that there is not the same difficulty as in the case of glebe fences in inferring that there is a continuing obligation upon the heritors to keep that access in sufficient repair. In the present case, as it happens, it is not necessary to treat as raising separate questions the entrance to the glebe and the entrance to the manse, for the road or access to the manse from the public road passes through the glebe *en route* to the manse, and so forms an access to it. But it may be noted that there is authority for the proposition that the heritors are bound to provide an access to the glebe. In *Potter* v. *Ure*, 1710, M. 5129, the Laird of Shargarton advocated the designation of a glebe out of his lands upon grounds of iniquity, as the marginal note to the report shortly puts it. The second of these grounds was that the presbytery 'had appointed the entry to his glebe to be 20 feet broad, whereas the 38th Act 1661 prescribed that breadth only to highways leading to and from market towns and seaports.' It was answered to this that the law required 'that ministers have free ish and entry to their glebes, to give an easy passage to his carts and wains, that one may pass by another.' That, no doubt, has reference to a provision contained in the Act 1593, c. 165, but as Sheriff Johnston says (Parochial Ecclesiastical Law of Scotland, p. 429), in commenting on the case, the obligation may be derived apart from statute law from principles of common law. The important point to note is that Shargarton did not disclaim liability to make an access to the glebe. Unfortunately the only point before the Lords was whether they should remit the trial or advocate it to themselves, and no further light can be derived from the report on the question of access.

"Now it seems to me that the claim for an access to a manse is *a fortiori* of that for an access to a glebe. There is certainly no statutory enactment imposing the burden. No reference is made to 'ish or entry' in any of the Acts concerned with the heritors' duty of providing a manse. But then I think that the obligation to provide one may be derived from principles of common law. 'Nothing is better settled than that the conveyance of a piece of property implies a right of access to it. No one can possess a piece of ground without having a right of ish and entry, and the way that is to be obtained if the conveyance is silent is just the existing way.'—*Walton Brothers* 3 R. 1130, at 1133. As it is put by Professor Rankine, Land Ownership, p. 431—'If the tenement bequeathed, conveyed, or reserved does not abut on a public access, but is landlocked on all sides either by the rest of the estate held along with it, or by that and the estates of third parties, there is implied a right to a way of necessity through the disjoined property.' Now while admitting that the position of a minister in relation to his house is not that of a feudal pro-

prietor, still his right to a manse as part of the temporality of the benefice is in its nature indefeasible, and he can compel the heritors to provide him with one. If that be so, then it seems to me that the law I have referred to imposes on the heritors when they design the half acre which is to form the site of the manse offices and garden of the minister, and that half acre does not abut on a public access, a duty to furnish a way to the minister of getting to the public access.

"It is not, however, necessary to examine this topic at length, for counsel for the heritors admitted that there was an initial obligation on the heritors to furnish the minister with an access, and they say that it must be assumed that they duly implemented this obligation. I am prepared to make this assumption, although what precisely was the kind of access that was supplied cannot now be determined.

"What the heritors say is that they are under no further obligation to the incumbent with reference to the access so provided by them.

"In my opinion they are. It appears to me that the manse of a minister ceases to be a sufficient manse if it ceases to be accessible. The incumbent is no longer able to occupy it. He cannot serve the cure from it. Obviously the proper performance of his duties necessitates his having at all times ish and entry from the dwelling-house with which the heritors, in fulfilment of a duty laid upon them by the law, have furnished him. It is not merely that his personal enjoyment of his residence is affected. His ministerial duties are directly and seriously interfered with. In the present case the access in question is the only way by which the minister can get to church. In such circumstances it seems to me that it would be most unreasonable and highly inexpedient to lay the burden of maintaining the access upon the incumbent for the time. I doubt very much whether he would have any right or title to interfere with the access to his manse where it passes through ground that is outside the glebe, and yet he might be, as apparently he is in the present case, to all intents and purposes, the sole user of it, so that no one else might have any interest in its proper maintenance. It is certainly not a public road falling to be upkept at the public expense. The absence of a statutory enactment relative to the providing or maintaining of an access is not perhaps remarkable, for if, following the directions thereanent, the heritors select as the stance for the manse a site as close to the church as is possible, it may be assumed that such a site will in nearly every instance abut upon a public road, and the public road will be the access to the manse. In such a case the burden of maintaining the road will fall neither on the heritors *qua* such nor on the minister. Moreover, many obligations are laid upon heritors which are not the creatures of statute, *e.g.*, a garden wall is not provided for by any statute, and yet the law has held that a minister may require the heritors to furnish one on the ground that without one he cannot have the beneficial use of the garden to which he is entitled, and I take it, as at present advised, that if a wall becomes ruinous through no fault of the minister the heritors are bound to rebuild it. In the same way, an access being indispensable for the beneficial use and enjoyment of his manse *qua* incumbent, it seems to me that the heritors are bound to provide and to maintain one. On the other hand, something more than a mere footpath is necessary. A minister is entitled to have among the offices attached to his manse a stable, which assumes the possible use of a horse and trap. What precisely the nature or quality of the access ought to be must be a question of circumstances. Here the minister claims to have a 15 feet wide road. In the circumstances I am not disposed to sustain that claim. The access to his manse has never, so far as I can judge, been so wide as 15 feet. On the report of Mr Peddie a 10 feet wide road will form a reasonably sufficient access once it is put into a thorough state of repair.

"As regards the competency of the appeal to the Sheriff from the Presbytery, I think that the Sheriff-Substitute was right in the conclusion at which he arrived.

"I am prepared to recall the interlocutor of the Sheriff-Substitute so far as it negatives the liability of the heritors to repair the access to the manse and glebe.

"That disposes of the only questions debated before me, and it seems desirable before pronouncing any other order to hear parties as to further procedure."

The Lord Ordinary pronounced the following interlocutor—". . . . In respect that the appellant has not insisted in his appeal so far as regards the finding of the Sheriff-Substitute, to the effect that the respondents are not liable for the repair of the glebe fences, and that it is therefore unnecessary to dispose of that question in this appeal, Recalls the interlocutor of the Sheriff-Substitute of date 23rd May 1912, except in so far as it negatives the liability of the respondents to repair the glebe fences: *Quoad ultra* sustains the third additional plea-in-law for the appellant, to the effect that the respondents are bound to repair the access road to the manse and glebe, and provide a suitable road of not less than 10 feet in width. . . ."

Counsel for the Minister—Johnston, K.C. —W. Wilson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Heritors—Wilson, K.C.—J. Macdonald. Agents—Davidson & Syme, W.S.