employment averred was germane to the pursuer's proper duties as clerk to the defenders. But he dissented so far as regarded the sum of £250 claimed for the work done at Bergen. He said this was a service which was not intended in his engagement, and was for the benefit of another firm than that from which he received a salary, although composed of the same partners. His proper masters consented to his undertaking these duties, and he certainly had a right to demand payment for them, although he had stipulated for none at the time.

Agent for pursuer—J. M. MACQUEEN, S.S.C.

Agent for defenders—D. J. MACBRAIR, S.S.C.

Tuesday, November 19.

MACMILLAN *v.* PRESBYTERY OF KINTYRE, ETC.

Presbytery—Glebe—Minister's Grass—Act 1663, *cap.* 21—*Designation—Arable Land—Pasture Land—Reduction.* Circumstances in which *held* that a designation of a grass glebe for the minister was made from arable and not from pasture lands, and minute of designation accordingly reduced.

This was an action of reduction at the instance of John Gordon Macmillan, Esquire of Ballinakill, directed against the Presbytery of Kintyre and the Rev. James Campbell, minister of the parish of Kilcalmonell and Kilberry, and the object of the action was to reduce a resolution or minute of the said Presbytery of Kintyre, dated the 25th February 1865, whereby they designed a certain portion of the pursuer's lands as a grass glebe for the defender, the Rev. James Campbell.

The pursuer made the following averments:—"The glebe and minister's grass thus designed were, from the date of designation as aforesaid, bruiked by the successive ministers of the parish of Kilcalmonell as the glebe and minister's grass of the parish until about the year 1828, and soon after the Reverend John M'Arthur, now minister of the parish of North Bute, was inducted as minister of the parish of Kilcalmonell. Instead of sending his horse and cows to pasture on the outfield or hill of Ballinakill, as his predecessors had done from the period of designation, Mr M'Arthur made an arrangement with the proprietor of Ballinakill whereby he accepted an annual payment of £6, 6s. in lieu of pasturage. This arrangement was acted upon by the minister and the two proprietors who successively possessed Ballinakill before the purchase of that estate by the pursuer; and it was on the assurance and in the belief that such was the state of matters that he made the purchase. But soon after the pursuer entered into possession he was called on by the defender, the Reverend James Robert Campbell, then and now minister of the parish, to make payment of £10, 10s. as an equivalent for the grass which had been designated. This sum the pursuer declined to pay, but offered to pay £6, 6s. a-year, as his predecessors had done, or even to increase the payment to £8, with the alternative that the minister, if dissatisfied with the offer, should revert to the use of the pasturage designed by the Presbytery in 1699. The counter statement is denied."

After stating that Mr Campbell applied to the presbytery for the designation of a glebe, and that the presbytery did designate a glebe to him, the pursuer set forth—"This designation is not made out of the pasturage on the estate of Ballinakill before referred to, but, contrary to all reason, custom, and propriety, is made out of the very lawn or park lying immediately in front of the mansion-house of Ballinakill. The ground designated, in short, forms a main part of the pursuer's policy, used and inclosed as an adjunct to the mansion-house, and only accessible by the approach to the mansion-house, which has a handsome lodge and gate at the point of entrance from the highway. The use of the ground designated for the purposes of a grass glebe would destroy the privacy and amenity of the mansion-house, and greatly depreciate the value of the estate. There is abundance of grass land upon the estate from which a designation, if competent, could have been made without interfering with the pursuer's lawn; and the defenders, in making the designation complained of, have done so with a reckless disregard of the pursuer's rights and interests, and an undue favour for those of the defender, the said Reverend James Robert Campbell. The ground out of which the designation of 1865 has been made is in every sense arable, and has been so beyond the memory of man. It had been continually under cultivation as croft land for more than forty years, indeed for a period long beyond the memory of man. When the pursuer took possession of the estate in 1861 it was then under green crop, and was only put under grass in 1863. The counter statement is denied."

The defenders made the following statements:—"It appears from the presbytery minutes that, in February 1754, Mr Archibald M'Neill, then minister of Kirkcalmonell, 'petitioned the presbytery for a visitation in his parish, as he hath no church to preach in, and no manse or legal glebe;' and that accordingly there was a visitation of the presbytery at Kilcalmonell on 27th march 1754, when the presbytery, *inter alia*, annexed certain pieces of ground to the arable glebe formerly designed, so as to bring it up to the statutory extent, and, in reference to the pasturage, the minute bears, 'and the presbytery, considering the inconveniency of the grass presently possessed by the minister, they did, and hereby do, appoint and decern the four soums grass to be in the most commodious pasturage in the foresaid farm of Ballinakill; upon all which Mr Archibald M'Neill took instruments in the clerk's hands, and craved extracts.' The pasturage thus pointed out by the presbytery included the lands now designed, which were outfield pasture lands. The counter-statement is denied; and it is averred that, after the date of the minute, the minister enjoyed better and more convenient grass than he had previously done. Reference is made to the next article. Prior to the year 1828, or thereby, and for time immemorial, and indeed ever since 1754, the minister of the parish exercised a right of pasturage to the extent of four soums over the lands of Ballinakill and adjacent to the manse and offices, and most convenient to the minister. In particular, the minister exercised the right of pasturage on the slopes of the ridge lying towards the junction of the Loch Kiaran river with the Glen-Maodall river, and stretching down to the clachan, and bounded on the west and south by the road to Loch Kiaran, from the slope of which ridge the present designation has been taken. These were all outfield pasture lands, and included the lands now designed. Since 1828, or thereby, until a few years ago, the ministers have received, year by year, a pecuniary compensation in lieu of the pasturage, under temporary arrangements not

reported to nor sanctioned by the presbytery. Some time after Mr A. Morrison became proprietor of Ballinakill, or in or about 1842 or 1843, he formed the present avenue referred to in the pursuer's statement, and inclosed and planted a considerable extent of that portion of the ridge nearest the manse over which the minister had been in use to exercise his right of pasturage. This ground is still inclosed and under plantation, and it is impossible now for the minister's right of pasturage to be exercised as it was exercised prior to 1828. The pasture lands and the minister's right of pasturage were liable to be still further encroached upon in a similar manner, and it thus became necessary for the preservation of the cure that a specific portion of ground should be designed and set apart for the minister to serve as grass for a horse and two cows, in terms of the Statute 1663, caput 21. The designation complained of has accordingly been made on the application of the defender. The designation was made from what appeared to the presbytery to be, and really are, kirk lands, not arable, and most suitable for designation. No one appeared on behalf of the pursuer to point out to the presbytery other suitable lands from which a designation less objectionable to the pursuer might have been made, or for any other purpose. The defender, however, is still willing, on being relieved of expense, to accept, under the sanction of the presbytery or the Court, any other suitable designation in lieu of the designation complained of."

The pursuer pleaded:—"The said designation is invalid, and ought to be reduced, in respect that it was *ultra vires* of the presbytery, their powers having been exhausted by a prior designation, which had been acquiesced in and acted upon from this date. The designation of 1865 is invalid, and ought to be reduced, in respect that arable lands are by law exempted from designation, and that the lands designated are arable in the sense of the statute. The said designation ought to be reduced and set aside in respect that, while there are other church lands suitable for minister's grass upon the pursuer's property, the presbytery have arbitrarily, contrary to all custom and propriety, as well as contrary to law, designated a part of the pursuer's lawn and policy, the effect of which, if carried into execution, would be to destroy the pursuer's policy, the privacy and amenity of his mansion-house, and the value of his estate."

The defender pleaded:—"The minister of Kilcalmonell and Kilberry being in the circumstances entitled to have a specific portion of ground designed to him, to serve as grass for a horse and two cows, in terms of the statute 1663, caput 21, and the designation complained of being in all respects legal and valid, the defender should be assoilzied, with expenses. The proceedings of the presbytery in 1699 do not constitute a valid completed designation of grass for a horse and two cows, in virtue of the statute, in respect (1) grass was not designed for a horse and two cows, and (2) no specific portion of ground was set apart for such grass. Assuming it to have been the intention of the presbytery, by their proceedings in 1699 and 1754 to design grass for a horse and two cows, the present designation should be sustained, in respect the operations and encroachments of the proprietor upon the pasture lands of Ballinakill have rendered it impossible for the minister now to enjoy the pasturage formerly enjoyed in virtue of these proceedings, and the prior designations have become so far nugatory and are in danger of being still further encroached upon and lost to the cure. The lands now designed, being part of the lands upon which it was provided by the presbytery in 1754 that the minister should exercise his right of pasturage, and the minister having in point of fact exercised said right thereon for a long period of time thereafter, and the lands having during all that time been outfield pasture lands, neither the pursuer nor his predecessors were entitled, by any acts of enclosure, tillage, or otherwise, to alter the character of said lands so as to affect the rights of the minister, and the pursuer is not now entitled to plead that the said lands are arable in the sense of the statute. The pursuer is barred from insisting in his fourth plea in law, at least to the effect of having the designation complained of set aside, unless provision first be made for another suitable designation, and for payment to the defender of his expenses, and of compensation for having been kept out of the enjoyment of his rights from the date of the said designation, in respect the defender has all along been and still is willing to accept a designation from any suitable lands the pursuer might point out, and of the pursuer refusing any offer to that effect, or to attend the meeting of presbytery to see that the designation should not be made from lands considered by him to be unsuitable.

The Lord Ordinary (Barcaple) pronounced the following interlocutor:—

"The Lord Ordinary having heard counsel for the pursuer, and the Reverend James Robert Campbell, defender, and considered the closed record, proof, productions, and whole process—Finds that the ground designated to the defender for grass by the designation sought to be reduced is arable land: Sustains the third plea in law stated for the pursuer: Repels the defences: Finds, reduces, decerns, and declares in terms of the conclusions of the libel, reserving to the defender, if so advised, to apply of new to the presbytery for a competent designation, and to the pursuer all competent defences against such application: Finds the defender liable in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report. "E. F. Maitland.

"*Note.*—The pursuer's second plea in law, grounded upon the allegation that there has been a prior designation, raises a question which appears to be entirely new, and not free from difficulty. The proceedings of 1699 and 1754 may be looked upon as connected, the latter not being intended to supersede the former, but to give proper effect to it. If both or either of these proceedings was a proper statutory designation, it could hardly be held that the ministers of the parish could, by long neglecting to use their right, or taking a sum of money for it, acquire a right now to demand a new designation in a different place, where the presbytery, when originally applied to, did not think proper to give it. But it is doubtful whether the proceedings, on either of these occasions, can be looked upon as a designation under the statute, as it would rather appear that no particular portion of ground was allocated to the minister, and that all that the presbytery intended to assign to him was the right of pasturage on uninclosed pasture land. The Lord Ordinary inclines to think that this is a sufficient answer to the pursuer's plea, but in the view he takes of the case he has not thought it necessary to decide the point.

"He thinks that the evidence establishes that the ground in question is arable. It was actually

under crop when the pursuer bought the estate in 1860. It continued to be so in 1861 and 1862, a tillage crop of hay being taken of it in that year. It was laid down in grass in 1863. The designation was in February 1865, when in ordinary course it was not time for the land to be broken up. The evidence shows that the cropping of this portion of the estate was not a new or an occasional thing, but that the land had always been treated as arable. It was in that state when the property was bought by Mr Morrison, the late proprietor, in 1842. He seems to have wished to lay it down as part of his lawn and policy, but from the condition of the land he was obliged to break it up and put it through a course of crops repeatedly during the time he possessed the estate. In 1863 the new proprietor, the pursuer, renewed the experiment of laying it down as a lawn or policy. It appears from the evidence and the plan produced that it is within the ornamental grounds laid out by Mr Morrison in connection with the residence, and that it is within sight of the house.

"If, in 1865, when the designation took place, the pursuer had not wished to keep the ground as a lawn, but had intended to break it up at the usual and proper time, the Lord Ordinary does not think it could have been held that it was not arable. It appears to him that the evidence shows that up to that time it had always been used as arable land, according to the ordinary course of cultivation in the district, suitable to the soil and climate. Neither does he think that the circumstance that the pursuer intends to keep it in grass for the purposes of a lawn, deprives it of the character of arable land with reference to this question. It would be a very hard construction of the statute to hold that land which has always been used as arable until it is required for an exceptional purpose of this kind—more valuable to the proprietor than its agricultural use—should by that change become liable to designation, to the entire defeating of the object for which the change was made. The Lord Ordinary thinks that the principle of the decision in *Bruce* v. *Carstairs*, 30th May 1826, 1 S, 688, fairly applies to such a case. It would be an entirely different case if the land were thrown out of cultivation merely for the purpose of putting it in permanent pasture, as a better and more lucrative system of management.

"The defender brought much evidence for the purpose of showing that, in the opinion of skilled witnesses, the land in question, and apparently all the land in the district, would be more remunerative if permanently used for pasture. These witnesses admit that if cattle are to be kept, there must be cultivation to provide fodder for them, so that it would require a change in the system of husbandry of the district to carry out their views. The Lord Ordinary assumes that these may be correct, but he does not think that they can receive effect in determining whether the land in question is arable or not. He is of opinion that that question must be determined by the existing state of the fact, not by any agricultural theory, which, however sound it may be, is prospective, and founded on improvements and facilities of recent introduction.

"E. F. M."

The defenders reclaimed.

Shand and Asher for them.

Dean of Faculty (Moncreiff), and N. C. Campbell in answer.

At advising.

The Lord Justice-Clerk held that at the time when the statute anent the designation of glebes was passed, there was probably little difficulty in distinguishing what land was arable and what was pasture. What the statute meant by arable land was "infield" land, and what it meant by pasture was "outfield" land, and these terms were well understood, and the two kinds of land easily distinguished. Now, however, the whole face of the country had been changed by the progress of agricultural improvement and other causes, and the only principle which could now be followed, was, that land should be considered arable which had been for a long course of years dedicated to the raising of cereal crops. The Court could not adopt the view pressed upon them for the defenders, that the thing to be looked to was whether the land was naturally more suitable for pasture or for cereal crops. The actual history of the ground was the test, and not any speculative considerations as to what was most beneficial. He agreed with the Lord Ordinary in the result at which he had arrived on a consideration of the evidence.

The other Judges concurred.

Agent for pursuer—John Martin, W.S.

Agents for defenders—Adamson & Gulland, W.S.

Tuesday, November 19.

CATTO, THOMSON & CO. *v.* GEORGE THOMSON & OTHERS.

Bills of Exchange—Accommodation Bills—Onerosity—Writ or Oath. Circumstances in which *held* that although the drawer of certain bills of exchange admitted these to be accommodation bills, the acceptors were not entitled to prove *pro ut de jure* that they were for the benefit of the drawer only and without value.

In this action the pursuers conclude for various sums which they allege are due to them by the defenders on seven different bills of exchange. The defenders called are George Thomson & Son, merchants in Aberdeen; James Chalmers and John Gray Chalmers, both printers in Aberdeen, executors of the deceased William Leslie Thomson, wine merchant and shipowner in Aberdeen, and the said James Chalmers and John Gray Chalmers as individuals. George Milne, agent of the Commercial Bank, trustee on the sequestrated estate of George Thomson, lately merchant in Aberdeen, and now furth of Scotland, is also called for any interest that he may have in the premises. The pursuers made the following statements in support of the action:—The pursuers, Messrs Catto, Thomson, & Company have for many years carried on business as rope and sail-makers in Aberdeen, and the pursuers, James Hall, William Hall, John Catto, and John Duthie junior, are now the sole partners of that firm. George Thomson, merchant in Aberdeen, was also a partner of the firm up to the date of the sequestration of his estates on 30th October 1863. The firm of George Thomson & Son had also for many years carried on business in Aberdeen as wine merchants and commission agents, and were a firm of good standing and repute. This firm had at various times consisted of different partners. Latterly, prior to 1862, the late William Leslie Thomson, wine merchant and shipowner in Aberdeen, brother of the said George Thomson, was the sole partner. He died on 29th January 1862, leaving a will dated 7th January