the plough; and these were likewise called crofting lands; in contradistinction to which, were outfield grounds, ploughed at distant intervals of time. The object of the statute was only to exeem the crofting lands; and such is the interpretation the Court has put upon it; Steel *contra* Dalrymple, No 39. p. 5161.; Hodges *contra* Bryce, No 41. p. 5162. As the lands designed are not crofting, or arable lands, in this sense of the word, they do not fall within the exception of the statute. No 42.

These lands were entirely outfield 20 years ago, and at that time confessedly liable to have been designed. Though, by late improvements, they are brought into better cultivation, the minister ought not to be deprived of the right he then had to a designation of grass out of them.

THE COURT were of opinion, That, by arable lands, are to be understood lands in a continued state of cultivation, though bearing crops of grass, and not constantly under the plough. That the question, Whether lands fall within the exception of arable in the statute, is to be determined by their condition at the time when the designation is applied for, however recently such lands may have been improved.

THE COURT "sustained the reasons of reduction of the grass-grounds."

Act. *Rae.* Alt. *Crosbie,*

Fol. Dic. v. 3. *p.* 252. *Fac. Col. No* 24. *p.* 39.

1784. *June* 23.

The HERITORS of the Kirk-lands in the Parish of PEEBLES, *against* WILLIAM DALGLEISH.

No 43.
A presbytery having allotted to a minister, for his grass, a piece of land, which tho' not in tillage, was frequently covered with water, and so unfit for pasturage, and which had previously been feued to the inhabitants of a burgh in the vicinity of which it lay; the Lords sustained the designation.

THE ministers of Peebles having never obtained a designation of pasturage, in terms of the statute 1663, c. 21. the presbytery allocated to Mr Dalgleish, the present incumbent, a piece of land called the Kirkmyre, formerly part of the vicar's glebe, which, on the eve of the Reformation, had been feued out in small divisions to the inhabitants of the burgh.

As the spot thus chosen by the presbytery was marshy, and often covered with water for a great part of the winter season, it had never been in tillage; nor was it frequently used in pasture, the grass which grew upon it having been either cut green or made into hay.

In a reduction of the decreet of the presbytery,

The Heritors *pleaded*; The design of the statute 1663 was not so much to add to the income of the person serving the cure, as to accommodate him with a spot of ground, on which a horse for his own use, and two cows for that of his family, might feed. For this reason, the allocation is to be made of pasturage-grounds; and in case of there being within the parish no kirk-lands of that kind, the heritors are to make payment annually to the minister of L. 20

No 40.

Scots, which, at the time of the enactment, would have procured the requisite quantity of pasture. It never could be the mind of the Legislature, therefore, to authorise the designation of lands like those in dispute, which are in a great measure unfit for that use, and have been hitherto converted to other purposes.

2*dly*, The statute itself prohibits the allocation 'of incorporate acres in villages and towns,' under which description the lands in question may with great propriety be comprehended. The exception cannot be confined to lands contained in the charter of erection of a royal burgh, though these alone, in accurate language, be styled incorporated; the statute having expressly extended it to villages, which are distinguished by no corporate privileges. The reason, too, of this humane exemption, which was to preserve the grounds in the vicinity of towns, employed by the inhabitants in feeding their cows, and for other necessary uses, can no where be urged with greater justice than in the circumstances of this case.

Answered; The distinction intended by the statute under consideration, was not between one kind of pasture-grounds and another, but between arable lands, or what were in a state of constant cultivation, though sometimes yielding green crops, and lands which either had never been ploughed, or were cultivated at stated times only, and after having been in pasture for several years; Sir William Dalrymple *contra* Steele, No 39. p. 5161.; Hodges against Bryce, No 41. p. 5162.; Grierson *contra* Ewart, No 42. p. 5162. Thus the lands in question, never having been in tillage, were the proper subject of allocation, though, from the natural humidity of the soil, they may be somewhat less commodious than if they had been more dry; a circumstance of which the minister alone is entitled to complain.

2*dly*, The exception in the statute does not regard all incorporated lands, but only such as are possessed as gardens, or covered with houses. Even in these it does not altogether exclude the incumbent from the benefit of an allocation, but gives to the heritors an alternative, of furnishing him 'with other lands 'nearest the kirk.' In truth, the lands in question, never having been incorporated, belonging to no corporation, and being held, not in burgage, but by feu tenure, cannot be thought to fall within the exception.

"THE LORDS assoilzied from the reduction."

Lord Ordinary, *Kennet*. Act. *Lord Advocate*, (*Campbell*), *J. W. Murray*.
Alt. *H. Erskine*. Clerk, *Menzies*.

C. *Fol. Dic. v. 3. p. 252. Fac. Col. No 159. p. 247.*

See KIRK PATRIMONY.

See MANSE.

See APPENDIX.