vicar-lands were twenty-six acres, and the minister had only four thereof designed; and so he ought to have pasturage, seeing the kirk-land had the pasturage of twelve soums grass. THE LORDS found, that albeit the minister bruicked four complete acres for his glebe, yet he ought also to have a part of the privilege of pasturage, which was due to the vicar's land, and wherein the vicar's feuar was infeft; and therefore they found due to the minister the privilege of one horse grass for his travelling to presbyteries, and others his lawful business, and of two cows grass for his house and family; and that the pursuer had right to the rest, and that the minister should have no more.

No 28.
of glebe, to a horse and two cows grass out of the vicar's land next adjacent.

*Fol. Dic. v.* 1. *p.* 353. *Durie, p.* 489.

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1769. *February* 28.

ARCHIBALD DUFF of Drummuir *against* MR ALEXANDER CHALMERS Minister of Cairney.

No 29.
Presbyteries cannot design moss for the use of a minister.

THE ministers of the parish of Cairney had, from time immemorial, enjoyed a servitude of casting peats in certain mosses, the property of the Duke of Gordon.

But, in 1767, the presbytery, upon a petition from Mr Chalmers the incumbent, setting forth that these mosses were exhausted, designed part of a moss belonging to Mr Duff of Drummuir, for the use of the petitioner and his successors, in all time coming.

This decree being brought under challenge by Mr Duff, it was *pleaded* for the minister, That the 165th act of Parliament 1593, which directs the extent of glebes, provides, 'That the saids glebes be designed with freedom of fog-'gage, pastourage, fewall, faill, diffat, loning, free ischue and entry, and all 'other privileges and richtes, according to use and wont of auld.' And the act 1663, c. 21. enacts, 'That every minister have fewel, foggage, feal, and 'divots, according to the act of Parliament made in *anno* 1593.'

These statutes are express. The first ordains, that glebes be designed with freedom of fuel, &c. and the other, that every minister have that right. The power of designation is conferred upon presbyteries, in words as clear as those under which they are in the uninterrupted use of designing manses and glebes. Nor can that designation be limited to those parishes where the minister had already acquired a right of servitude by prescription; for, why make a law to vest in ministers what they already enjoyed? or, why oblige presbyteries to decree privileges already acquired? But, in whatever way the general point may be determined, the present decree of the presbytery must be good, since it is confessed, that the ministers of the parish of Cairney have been in the immemorial possession of a servitude of fuel.

No 29.

*Answered* for Mr Duff; The powers now asserted to belong to presbyteries cannot be supported upon the statute 1593. That statute plainly refers to those parishes where any, or all of the privileges therein mentioned had been acquired by prescription; for if, independent of use and wont of auld, that is, of immemorial possession, every minister could have demanded a designation of fuel, he must, upon the same principles, have been equally entitled to insist for a designation of pasturage; but that this was not the case, is obvious from the subsequent statute in 1663, passed many years after, and empowering presbyteries to design grass glebes, or pasturage for a horse and two cows.

Upon the construction of the statute 1593, contended for by the minister, this last provision would have been superfluous; and indeed the same plea has been already over-ruled by the Court in the case of the miniser of St Martin's, *anno* 1763.

'THE LORDS found, that the presbytery were incompetent judges, and that their decree is *funditus* null and void.'

For the Minister, *M'Queen.* Alt. *Lockhart.* Clerk, *Ross.*

*G. F.* *Fol. Dic. v.* 3. *p.* 253. *Fac. Col. No* 89. *p.* 162.

*** This case is referred to in No 3. p. 5123.; but there is another case of the same date, viz. Heritors of the parish of Elgin against Troop, *voce* MANSE, which appears to be the one alluded to; only the date, not the names are mentioned in the Faculty Collection.

No 30.
Ministers are not entitled to pasture their cattle in church-yards.

1778. *December* 2. HUGH HAY *against* ANDREW WILLIAMSON.

HAY and Low, two heritors in the parish of Arngask, brought an action before the Sheriff of Fife, against Andrew Williamson, minister of the parish, concluding, *inter alia*, that he should be decerned to desist from pasturing his cattle in the church-yard in all time coming. The Sheriff found, 'That he was 'only entitled to cut the grass in the church-yard, but not to pasture his bes-'tial thereon;' and discharged him from doing so thereafter. The defender, in a bill of advocation, *alleged*, that it was the general practice over Scotland for ministers to feed their cattle in the church-yard.

*Answered* for the heritors; The law does not allow parish church-yards to be put to any use but that of the interment of the dead. In every other respect they are *extra commercium*; and the minister has no more right to feed his cattle in them than he has to plow them up, and raise a crop out of them. THE LORD ORDINARY refused the bill so far as it respected this article.

THE COURT, upon advising a reclaiming petition and answers, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Braxfield.* Act. *D. Græme.* Alt. *Robertson.* Clerk, *Orme.*

*Fol. Dic. v.* 3. *p* 253. *Fac. Col. No* 47. *p.* 81.