

1779. February 25. JAMES DYMÖCK *against* WILLIAM DUKE of MONTROSE.

MR DYMÖCK minister at Aberfoil brought an action before the Court, against the Duke of Montrose, proprietor of the greater part of the parish, setting forth, that the mosses out of which the former ministers cast their peats were all exhausted; but that there still remained extensive mosses within the parish; and, therefore, that it should be declared, that the pursuer, and his successors serving the cure in that parish, have right of casting, winning, and away-taking fuel, fail, and divot from the mosses still unexhausted, for the use of their families.

*Pleaded* for the pursuer; By the act 1593, c. 165. ratified by act 1663, c. 21. it is enacted, 'That the said glebes be designed with freedom of foggage, pasturage, fuel, fail, and divot, loaning, free ish and entry, and all other privileges and rights, according to use and wont of old.'

The expression in the statute, 'according to use and wont of old,' applies to the usage of supplying ministers with fuel and other articles mentioned in it, as well as the glebe. The meaning of the clause is, that, as ministers were, according to ancient custom, entitled not only to a glebe, but to fuel, &c. these other articles should be designed along with all glebes to ministers not already in possession of them.

It is not, therefore, necessary, that the pursuer should be able to shew, that he, or his predecessors, have been in use of taking their fuel from the moss in question. He is equally entitled to have fuel designed to him out of the mosses of the parish, as a glebe out of the land of it. If a minister could not, under the statute, lay claim to any thing more than what he has been in immemorial possession of, this clause would be perfectly superfluous; for immemorial use is sufficient title to continue in possession without the aid of any statute.

*Answered* for the defender; The plain import of act 1593 is, that notwithstanding the special right given in the first part of this statute to insist for designation of a glebe, such clergy as were in possession of any of the servitudes mentioned in the act should not, by getting the glebe, be deprived of the servitude. This was necessary to prevent all misapprehension as to the meaning of the act.

If the statute were to be interpreted in the manner the pursuer contends for, it would pave the way for many claims on the part of the clergy, which they have not as yet pretended to.—The minister's claim to fuel would not be limited to peats. The statute makes no exception; and, therefore, where there are coal-pits, but not mosses, the minister would be entitled to a designation out of a coal-pit. The clergy would have the same right to the other privileges mentioned in the statute as they have to fuel.

No 31.  
A minister is not entitled to fuel, unless by immemorial usage.

No 31.

Every minister in Scotland, therefore, would be entitled to insist, that the heritors shall provide him, not only with fuel, but also with foggage, fail, divot, &c. No such claims as these were ever heard of, which is satisfactory evidence of what has been always understood to be the intention of the statute.

The pursuer having likewise *alleged*, That he and his predecessors had, at different times, taken their peats from different mosses in the parish, besides the mosses now exhausted, the COURT ordained the pursuer to give in a special condescendence of these alleged acts of possession; and a condescendence being accordingly given in, the COURT pronounced this judgment:

'Having resumed the consideration of this cause, with the foregoing condescendence in behalf of the pursuer, and answers for the Duke of Montrose defender, they find the condescendence not relevant; sustain the defence for the Duke of Montrose, and assoilzie him from his process.'

Lord Ordinary, *Monboddo*. Act. *W. Robertson*. Alt. Lord Advocate. Clerk, *Campbell*.  
*Fal. Dic. v. 3. p. 253. Fac. Col. No 72. p. 136.*

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## SECT. VIII.

Relief competent to the Heritor, whose land is taken for a Glebe.

1635. February 12. COCK against PARISHIONERS of Auchtergovan.

No 32.

An heritor's lands had been anciently the vicar's glebe. They had been afterwards feued, but before the act prohibiting such feus. He was obliged to give up these lands for the minister's glebe, and was found entitled to the statutable relief from other heritors of the kirk.

JOHN COCK writer having the right of feu of a piece of kirk-land in Auchtergovan, which was feued in *anno 1562*, and since continually possessed by him and his predecessors, while lately that the same was designed to the minister, and evicted by him for his glebe; pursues the rest of the parishioners, heritors of the kirk-lands, for their proportional part of his relief; and they *alleging*, That he ought to have no relief, because by the act of Parliament 1563, the vicar's manse and glebe are discharged to be feued; and this land libelled, designed to the minister, was the vicar's glebe of old, and therefore the feuar thereof ought to have no relief; and albeit the pursuer's feu be in *anno 1562*, and so a year before the act of Parliament, yet it must fall under that act, because the feu was not confirmed until the year 1565, and so is null, and therefore is alike as if it had been feued after that act.—THE LORDS repelled the allegiance, and found that there ought to be relief granted. And it being thereafter *alleged* for one James Rattary a parishioner, that his lands ought not to be sub-