

No 7.

Replied ; The principles of the canon law can have no influence in this case, seeing it is no rule with us, in determining either real rights or real burdens ; more especially, considering that the disposition thereof varied greatly, both with respect to teinds and the reparation of kirks, which was owing to this, that the civil law of the different countries had not paid so great a regard to religion as to establish any civil rule for repairing of churches ; and therefore the Popes, and others, who made the canons, had no other remedy but to take care of these things out of their church funds, in the best way they could. But now these matters are on a different footing, the civil constitutions of every kingdom having laid down other rules for the determination of such questions ; and particularly, our law, as to the reparation of the kirks, stands upon the foundation of the acts of Parliament, according to which the defender does not decline to pay proportionally as his teinds are valued in the cess-roll. And, with respect to the decisions quoted, they are not in point, seeing nothing else was determined in either of these cases, but that the produce of the church, such as seat rents, was applicable to the reparation of the church, because to that extent it might repair itself ; and consequently, those liable in reparation were only thought to be bound, so far as the produce of the church was not sufficient for the purpose, which cannot apply to this question betwixt the heritors and the titular.

THE LORDS found the Duke of Roxburgh no further liable than conform to his valuation.

C. Home, No 84. p. 137.

1739. February 20.

HERITORS of the Parish of Faulkland *against* the MINISTER and KIRK SESSION thereof.

No 8.

THE disposal of the area of the church was found to be in the heritors, and not in the minister and kirk session.

Fol. Dic. v. 1. p. 527. Kilkerran, (KIRK.) No 1. p. 323.

1740. December 4.

THE MAGISTRATES and TOWN COUNCIL of Elgin *against* the MINISTER and KIRK SESSION.

No 9.

Nomination of kirk-officers, viz. beadle, session-clerk, and precentor ; and to whom the emolu-

THOUGH the *ostiarius* was, before the Reformation, a church-officer, yet that seems to have proceeded from this circumstance, that the churchmen had then the chief care of the fabric, which now is not the case ; and so it was here found, that the nomination was not in the minister and his session, but in the magistrates.

Ibidem, Not only has a kirk session the power of naming its own clerk, but but as the Court itself is not in the Crown's nomination, it was thought inconsistent that it should be even in the power of the Crown to confer the office, or to grant to any other the power of conferring it.

No 9.
ments of bap-
tisms and
marriages be-
long.

Ibidem, As the precentor was before the Reformation a church-officer, then called *psalmista* or *cantor*, it would appear that the right of nomination is in the minister and kirk-session; but then the office may be conferred by a grant of the Crown; and so it was found in this case, where a grant of certain emoluments having been made by the Crown to the town of Elgin, for maintaining a music-master, who should be obliged to present in the church, the right of nomination of the precentor was found to be thereby conferred upon the town; the minister's own office being patronate, it did not appear why that of precentor, which he and his session were pleaded to have power to present to, might not be also patronate.

It was remitted to the ORDINARY to hear parties, whether the emoluments of baptisms and marriages belong to the session-clerk or precentor? which may happen not to be insisted on for the precentor; for it is thought clear on the following considerations, that they belong of right to the session-clerk; *1mo*, As to baptisms, what is paid upon that account is for obtaining the kirk session's order for the baptism, and recording it, with which the precentor, as such, has nothing to do; *2do*, As to the marriages, what is paid for these, is in the same way paid for obtaining the order of the kirk-session for the marriage, and recording of it; and of both, the session-clerk gives the extracts; *3tio*, It is not to the precentor, but to the session-clerk, that parties give up their names in order to marriage; *4to*, It is the session-clerk, and not the precentor, who certifies the proclamation of banns to have been made, and that there is no objection; *5to*, A precentor is member of no court, whereas a session-clerk is a clerk of court, makes minutes, keeps records of the session's proceedings in whatever falls within their cognizance; and particularly, the session being judge in the first instance of the objections to marriage, the record of said proceedings is kept by the session clerk; and *lastly*, The penalty in use to be consigned before marriage, is consigned in the hands of the session clerk, &c. &c. See PUBLIC OFFICER.

Fol. Dic. v. 3. p. 371. Kilkerran, (KIRK OFFICERS.) No 1. p. 323.

1760. July 9.

WATSON *against* WATSONS.

SEATS in churches, which, by the disposition from the kirk-treasurer, are devised to a person and his heirs, and others his nearest representatives whatsoever,

No 10.