

from minerals is of a very different nature : The subject is irretrievably exhaustible, and the profits are of the nature of a price for a commodity sold, not that of a rent for the mere use of the subject. Hence, no terce is due out of the mines of an estate ; Lady Lamington, 14th February 1628, No. 15. p. 15840 Belchier aganst Moffat, 30th June 1779, No. 40. p. 15863.

No. 3.

The Court were nearly unanimous in opinion, that the profit derived from a coal-mine, being of the nature of casual rent, should not be made to bear a share of a permanent burden. It was held to be very different from the payment of assessments for the maintenance of the poor, which are annual, and levied according to the rent really derived during the year ; and if the rent ceases, the assessment will cease also. But it is impossible to ascertain the value of a coal-mine, or what proportion it ought to pay along with the real estates in the parish. Two of the Judges, however, held, that the proprietor should pay a share for his coal : The population of the parish is increased by the operation of working it ; and though the rent is casual, they thought that a value proportioned to the risk might be fixed upon it.

Lord Ordinary, *Armadale*. Act. *Solicitor-General Blair, Robertson*. Agent, *Tho. Cranstoun, W. S.* Alt. *Hay, Thompson*. Agent, *Jo. Anderson, W. S.* Clerk, *Pringle*.

F.

Fac. Coll. No. 84. p. 144.

1807. June 10. MINISTER of DUNNING *against* The HERITORS.

THE Minister of Dunning, finding that the parish-church was not sufficient to accommodate his parishioners, applied to the presbytery to take the matter into their consideration. The presbytery cited the heritors to attend their meeting, received the report of tradesmen, and pronounced a judgment, finding that the church was insufficient, and that certain additions should be made to it.

No. 4.
Building and repairing churches is under the jurisdiction of the presbytery of the bounds.

The heritors being dissatisfied with these proceedings, presented a bill of suspension, which was refused by the Lord Ordinary. Upon advising a petition against this judgment, a doubt was started on the Bench with regard to the jurisdiction of presbyteries in such cases. The bill was accordingly passed, and the Lord Ordinary took the case to report on informations. The minister

Pleaded : The jurisdiction exercised by Presbyteries in all questions concerning the building and repairing of parish churches, has been acquired by inveterate usage, and has devolved upon them, as coming in place of the archbishops and bishops, and as exercising many of the functions which belonged to them during the period of Episcopacy. The act 1563, cap. 76. gives full powers to the Lords of the Secret Council, to advise and consult about "re-parrelling and uphalding of kirks." In virtue of these powers, the Council ordained the expense of repairing churches to be defrayed, two-thirds by the parishioners, and the remaining third by the parson ; which act was confirmed by 1572, cap. 54 ; and by this statute, on account of the unwillingness of the

No. 4. parishioners to assess themselves, the execution of the act was vested in the archbishops, bishops, and superintendents of the church, who have the power "of making and setting the taxation, as alswa for receiving of the samen." Under this is necessarily implied the power of ascertaining the amount of these taxations, which must be regulated by the extent of the repairs, more especially as it is clear the Legislature did not confer this power upon any other persons.

After the abolition of Episcopacy, all the powers formerly vested in the bishops, devolved upon the presbyteries, except such as were inconsistent with the form of presbyterian government, or were expressly bestowed by the Legislature upon other judicatories. Among others, the right of judging with regard to the repairs of churches, was assumed by presbyteries, who have uniformly exercised this power ever since; * 24th November 1630, Galashiels against Heritors of Lauder, No. 3. p. 7913.

Answered: There is no statute vesting in presbyteries the power of ordaining churches to be repaired by the heritors; and church judicatories cannot, in a matter of civil right, acquire an authority to any greater extent than has been vested in them by positive statute. The acts of Parliament quoted by the charger, do not bestow upon the bishop the power of ordaining the parson and heritors to assess themselves for the expense of the parish church. Whether the church stood in need of repairs, or required to be built anew, is a question purely civil, and of course to be determined by the courts of ordinary jurisdiction, which accordingly seems to have been the case; Balfour's Practics, p. 35. Parish of Ayton †, Shaw against Countess of Winton, No. 1. p. 7913. And by an express act passed in 1697, kirk-yard dikes are put under the cognizance of the civil courts, which makes it extremely probable that the churches were then understood to be under the same authority. It is true, that in many instances presbyteries have directed churches to be repaired, and their judgments have been acquiesced in; but nothing except a positive statute can confer upon them a jurisdiction in a matter of civil right.

The Lords, upon considering the argument more fully, were unanimously of opinion, that there was no foundation for the doubts formerly expressed, and that the jurisdiction in such cases was vested in the presbytery. They therefore found the letters orderly proceeded.

Lord Ordinary, *Bannatyne*, Act. *Procurator for the Church*. Agent, *Jo. Murray*, W. S.
 Alt. *W. Erskine*. Agent, *R. Aytoun*, W. S. Clerk, *Pringle*.
 J. *Fac. Coll. No. 282. p. 637.*

* * See the case of Dunbar, 29 June, 1804, No. 11. APPENDIX, PART I. *voce*

JURISDICTION.

* The charger further produced extracts from the records of various Presbyteries, to show that this power had been exercised by them in a variety of instances, from the establishment of Presbyterian government to the present time.

† The words of Balfour alluded to, are: The teindis and dewties of the parochin may be sequestrat and arrestit by the authority of ane Judge Ordinar, in the parichineres or tenentis handis, unto the tyme the prelate or persoun repair and reparrell the kirk, swa far as concerns his part. 17 Julii 1540, 29 Julii 1558.