

No 3: that the poor of the said parish have right to the money arising from lending of mort-cloths upon hire within the said parish ; and sicklike, that the kirk session there hath the sole right to administrate the same, but prejudice to private persons to make use of their own mort-cloths belonging to themselves ; and decerned the defenders to forbear using mort-cloths of their own, or lending out the same for money, or otherwise, to others through the said parish, or any part thereof, in time coming ; but prejudice always to private persons to make use of their own mort-cloths belonging to themselves, as said is."

The decision does not appear in any printed collection, but the evidence of it was produced to the Court in the present question.

Act, *Geo. Wallace.*

Alt. *Lockhart.*

J. D.

Fol. Dic. v. 3. p. 373. Fac. Col. No 215. p. 315.

1765. June 26.

ANDREW BEVERIDGE, Precentor and Session-clerk of Dunfermline,
against JAMES BAYNE and Others.

No 4.

The kirk session of Dunfermline ordained, That whosoever in that parish should give up their names to be proclaimed for marriage, should give half a dollar to the poor before their proclamation. An action was brought against certain persons, who refused to pay this sum ; but it appearing from a proof, that the use of payment had not been general, the Court assoilzied the defenders.

The defenders in this case, who were sece-

THE kirk session of Dunfermline, by an act 23d January 1681, ordained, ' That whosoever in that parish should give up their names to be proclaimed for marriage, should give half a dollar to the poor before their proclamation.' This act was renewed 8th November 1719, upon a narrative, that the custom of paying the above sum was much worn out.

The pursuer, authorised by the kirk session, brought an action before the Sheriff, against the defenders, all dissenters of different denominations, and mostly seceders, for payment of this sum, founding his claim upon the acts of the kirk session and use of payment. As to the last, the Sheriff allowed a proof to both parties. The pursuer limited his to the period from 1718 to 1738, *i. e.* from the date of the last act of the kirk session to the secession. It appeared from the proof, that the use of payment had been pretty general, though not universal ; that the kirk session, on account of the reluctance of the parishioners, had resolved to accept what they would voluntarily give ; that numbers had paid less than the half dollar, and many, though people of substance, had paid nothing.

The Sheriff having given judgment for the pursuer, the cause was brought into this Court by advocacy, and, after a hearing, was taken to report.

The pursuer contended, That, by common and universal custom over Scotland, small sums, in some parishes more, in some less, were paid to the kirk session, for behoof of the poor, on occasion of proclamation of banns for marriage ; that the exaction of such sums had been authorized by a decree of this Court, in a case between the kirk session and seceders in the parish of Falkirk;

of which, as it is not in any printed collection of the decisions, proof was produced in process. The sum here demanded is very moderate, but one half of what was found due in the case of Falkirk.

Answered for the defenders ; This imposition is illegal, irrational, and impolitic ; illegal, for kirk sessions have no power to impose taxes of any kind ; irrational, being a constrained charity ; impolitic, being a tax upon the marriages of the poor. That being the case, it cannot be sanctified by use of payment, for any length of time. Besides, the plea of immemorial use is excluded by the act of the kirk session 1719, as well as by the parole evidence. That of Falkirk is but a single case, and differenced from this, in that immemorial usage was there proved. The pursuer's claim cannot be supported from the smallness of the sum ; because, if the kirk session may impose half a dollar, there appears nothing to hinder them from increasing the imposition to what sum they please.

“ THE LORDS sustained the defences.”

The pursuers' libel also concluded for payment of certain dues to the kirk beadles, on occasion of marriages and baptisms, founding this claim likewise upon an act of the kirk session, and immemorial usage.

Argued for the defenders ; These dues are only paid as a recompence for the beadle's trouble in attending at marriages, when solemnized by the parish minister, and for setting water, furnishing clean towels, &c. at baptisms, when administered in the parish church ; and, as the beadles are not put to this trouble by the defenders, they have no claim for the recompence. The act of the kirk session is no good foundation for this claim ; for the session have no power to impose taxes, neither can the pursuers derive any aid from common usage in this case ; on the contrary, that is in favour of the defenders, as hitherto these dues have been considered only as a recompence, and never exacted but when the service was performed. They have never been exacted from any species of dissenters through the kingdom ; and, even when a person of the established persuasion had occasion to apply to the minister of a neighbouring parish for marriage or baptism, it was the beadle of that parish who got the dues, and not the beadle of the parish where the person resided.

Answered for the pursuer ; Kirk sessions are a part of the church government, expressly authorized by law ; as such, they are entitled to have their proper officers, and to ordain for these such dues and perquisites as may seem reasonable, in their respective parishes.

Whether the defenders are entitled to the benefit of the toleration, may be questioned. But, supposing they are, the law certainly never meant to tolerate them in withholding of those small dues necessary for the preservation of order, or the payment of those officers which the constitution of the church, as by law established, has found expedient and necessary.

This point was also struggled by the seceders of Falkirk, in the case above mentioned, and determined against them.

No 4.
ders, also refused to pay certain dues to the beadles for marriages and baptisms, established likewise by act of the kirk session, and immemorial usage ; upon this ground, that these dues being a recompence for the beadle's trouble in attending at those ceremonies, the seceders, who put them to no such trouble, owed them nothing. The Court found the seceders liable in the usual dues.

No 4. "THE LORDS found the beadies entitled to the dues claimed by them."

Act. *Lockhart et Henry Dundas.* Alt. *Montgomery et Rolland.* Reporter, *Kames.*
A. R. Fol. Dic. v. 3. p. 372. Fac. Col. No 19. p. 37.

1773. November 17.

Sir JOHN NISBET of Dean, Bart. and Others, Heritors of the parish of St Cuthbert's, or Westkirk, against The KIRK SESSION of the said Parish.

No 5.

Heritors cannot vote in the election of a precentor and session-clerk. The sole right is in the kirk session.

THE question here at issue was, whether the kirk session have, by themselves, the exclusive right of electing the session clerk and precentor, or are they obliged to allow the heritors of the parish to have a joint voice in the choice of a person to fill these offices? This point was brought to trial in a suspension, at the Heritors' instance, of a resolution of the kirk session, to make choice of a person for these offices by themselves.

Pleaded for the Heritors, in the *first* place, That as the perquisites of the office arose from the Heritors, or their tenants, so, by the common law of Scotland, they fell to have a joint voice in the choice of the incumbent. *2do*, That the declaration of the act 1696, cap. 26, that the salary thereby appointed shall be by and attour the casualties which formerly belonged to the reader and clerks of the kirk session, seem clearly to shew, that the parochial schoolmaster was understood to be, *ex officio*, the reader and clerk to the kirk-session; and, accordingly it is so laid down by Lord Bankton, B. 1. T. 6. Par. 17. who cites a decision, Edgar, 7th Feb. 1724, Philp, *voce* PUBLIC OFFICER. It is clear, from these authorities, and particularly from the act 1696, that the heritors are entitled to a voice in the choice of a schoolmaster; and it is also clear, that the schoolmaster is entitled not only to the legal salary appointed by the act, but to the ordinary emoluments of the reader and session clerk. Can it therefore be supposed, that the kirk Session have a right to appoint a session clerk, to act separately from the schoolmaster, without any emoluments. This would be a very singular constitution; and, it is believed, has as little countenance from practice as from the statute. Whatever may be the case in burghs, it will be found, that, in the landward parishes, there is not any such thing as a session-clerk and schoolmaster being different officers.

Answered for the Kirk Session; Precentor and session-clerk was an ecclesiastical officer, and, as such, fell to be chosen by the church-judicatory, the kirk session; and the point has been always determined for the session; Magistrates of Elgin against Kirk Session, 4th Dec. 1740, *voce* PUBLIC OFFICER; and in the still later case between the Magistrates of Dundee and Carmichael, minister of Dundee, and the Kirk Session there, 19th November 1761.* *2do*, That the act 1696 related only to the perquisites of the office, which had no concern with the election, and could only regulate those parishes where the offices of

* Examine General List of Names.