1761. *February* 27.

MR DAVID MONCRIEFF *against* JOHN ERSKINE, and Others.

No 37.
Objected to a retour, that it was not a verdict on a brief of inquest, and that the lands were church-lands, and as neither the new extent, nor feu duty, were specified, it did not appear that the old extent was distinct from the latter. Answered, no statute requires, that the retour should proceed on a brief of inquest, and the design of the retour was to fix the old extent, by which the lands were to pay taxes, and it must have been distinct from the feu-duty, because that was required by a statute passed recently before the retour. The retour was found to be sufficient evidence of the old extent.

THE defenders claimed to be enrolled as freeholders in the shire of Perth upon the old extent of their lands, which had all belonged to the abbey of Culross. As evidence of the extent, they produced a retour extending the lands of the Lordship of Culross, in obedience to a commission under the Great Seal in the year 1598. They were accordingly enrolled, and Mr Moncrieff complained, and stated the following objection.

This retour is not good evidence of the old extent of the lands. It is admitted that they belonged to the church, and no retour is sufficient for proving the old extent, but such as proceed upon brieves for serving heirs, wherein the old and new extent and feu-duties in feu-lands are set forth and distinguished. In the present retour there is no mention of the new extent or feu-duties; so that it does not appear that the old extents retoured are distinct from the feu-duties, as is expressly required by the act 1681.

This retour seems to be made in obedience to the acts 1594 and 1597, probably the former directing all feu-lands annexed and others to be retoured to merk and penny lands, that the owners may be known, and that they may be taxed. But neither of these acts directs the merks or pennies to be the old extent; and indeed it could not be so, as that extent, with regard to all but church-lands, was fixed in the time of Alexander III. or sooner; and supposing this was the old extent, the act 1474 requires the new extent also to be specified in retours, and the statute 1681 directs the feu-duties to be distinguished. This last act seems to have intended, that in church-lands, where the old extent does not appear to be distinct from the feu-duties, the proprietors should only vote by the valuation.

Answered for the respondents; That neither the act 1681, nor that of the 16th of George II. require that the retour should be upon a brieve for serving heir, or that it should point out the new as well as the old extent. Any retour therefore is sufficient for the purpose.

Before the Reformation, temporal lands were taxed by the old extent, and church-lands according to Bagimont's roll. After the church-lands were annexed to the Crown, and power was given to the King to feu them out, it was resolved that all the lands in Scotland should be taxed in the same manner; and, for that purpose, an act was passed in the year 1594, appointing all feu-lands belonging to the King to be retoured to merk and penny lands, that the feuers might be taxed according to their retours. This order was confirmed by act 281, 1597; and, in consequence thereof, a commission was issued under the Great Seal in the year 1598, by authority of which the retour in question was made. And the intention of this retour was to fix and ascertain the old extent of the lands in obedience to the act of Parliament.

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The old extent has always been, and still is, one of the qualifications that entitle freeholders to vote for commissioners to serve in Parliament. Before the act of the 16th of George II. this might have been proved by any legal proof; but now a retour prior to the 1681 is necessary, and the respondents have produced one in 1598. It is clear that the old extent therein contained must be free of the feu-duties; for this is particularly ordered by the acts 1594 and 1597; and as the intention of making this retour was to fix the sum for which these lands were to pay taxes, the jury never would confound the extent with the feu-duty. The retour in question, therefore, must be held as good evidence of the old extent, unless the complainer will reduce it. There was no occasion to point out the new extent in this retour; because it was only intended to regulate the payment of taxes, with which the new extent had no concern.

There is no doubt that the extent here retoured is the old extent. It is expressly declared in the retour to be so; and there was no difficulty in fixing it. Many temporal lands were acquired by the church after the days of Alexander III. when the old extent was fixed; and where such evidence of the extent did not remain, the act 1597 directs, that such lands should be 'retoured to 'the same avail, quantity, and proportion, as any other lands lying next adjacent to the same, holding of his Majesty, are retoured to;' and it is well known that this is the rule in chancery, by which inquests are directed to extend lands when no ancient record can be found of the old extent.

It has been the practice of the freeholders in the several counties of Scotland to receive retours like the present as the best evidence of the old extent. This, particularly, is the case in the county of Mid-Lothian, where the old extent of most of the lands is vouched by a retour dated in March 1554, and made for the same purpose with that in question. This retour was admitted to be sufficient evidence of the old extent, in the case Chalmers against Tytler, in the year 1755, No 34. p. 8615.

Replied for the complainer; That it was the old extent only which formerly qualified any man to sit in Parliament, either personally or by his representative; and it was the only valuation by which taxes were paid. But the material point here is, that church-lands never were properly extended nor paid taxes according to the old extent. The valuation in question is by no means the old extent, which was certainly as old as the days of Alexander III. and perhaps before that period. Though the retour bears to be made *juxta extentum antiquum hujusmodi terrarum*, the meaning is, that the lands were valued in proportion to the old extent of other lands of the same kind or quality, as the lands of the King's property were directed to be extended by the taxation act 1497. The respondents therefore must maintain, that this new valuation is to be held as equivalent to the proper old extent; but this they cannot do, unless they are able to show that it was held to be the real valua-

No 37. tion of the lands according to which they paid taxes; for upon that the right of voting for Members of Parliament has always been founded.

Upon considering the different acts imposing taxations in Scotland, it is clear, that the scheme of extending the church-lands, and making them pay the land-tax, according to the old extent properly so called, never took effect.

It is true, that the act 1594 directs these lands to be retoured to merk and penny-lands, that they might pay taxes accordingly; but it appears from the taxation acts 1597, 1621, 1633, and 1665, that they still continued to pay their taxes according to Bagimont's roll till the year 1657, when Oliver Cromwell's valuation was adopted as the general rule for paying taxes all over the kingdom. In the act 1597, a commission is granted to certain noblemen and prelates to make up an exact tax-roll, according to which this taxation was to be paid. Accordingly, there is still extant a roll of the taxations that was made up by these commissoners, of all the lands in Scotland that paid taxes by the old extent. In this roll the lands in Perthshire are particularly mentioned, but no notice is taken of the Lordship of Culross, or of any other church-lands in the county. In the acts 1621 and 1633, it is directed, that the taxations shall be uplifted from church-lands, in the same manner as formerly, and particular places are appointed where the prelates or lords of erection shall convene their vassals and feuers, in order to distribute the taxation among them in proportion to their possessions; and, among others, the burgh of Culross is appointed for the Lord of Culross to convene his vassals.

The reason why this scheme, with regard to church-lands, was not carried into execution, was, because the clergy were averse to it. This appears clearly from a retour of the old extent in the county of Aberdeen in 1548, recorded in the Sheriff-court books of that shire, in which it is particularly set forth, that neither the clergy, nor any person for them, would appear to give the Sheriff any assistance in this valuation.

The church-lands not only never paid taxes according to the old extent, but nobody ever voted upon that qualification. The act 1661 directs, that none shall vote upon church-lands but those who have L. 1000 Scots holding of the King, all feu-duties being deducted. The act 1681 adopts Cromwell's valuation as the rule for voting upon church-lands. Had the proprietors of these lands paid taxes and voted by the old extent, they would not have been distinguished from temporal lands, or L. 1000 Scots have been fixed as the qualification by the act 1661.

It is equally certain, that in serving heirs, juries never had any regard to the extent of church-lands made out by commissioners, as in the present case; but to answer that head of the brieve, they were in use to take the feu-duty of the lands for the old extent, which abuse was rectified by the act 1681. This is the case with regard to Mr Erskine of Balgonie, one of the respondents; and,

if the other respondents were to produce their retours, they would be found to be in the same situation.

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From what has been pleaded, it is clear, that the old extent of church-lands never was regarded, either in paying taxes, in voting for Members of Parliament, nor by juries in serving heirs; and therefore the respondents ought not to have been enrolled as freeholders.

The deed or retour founded on in the present case can never be considered as proper evidence of the old extent. The act of the 16th of George II. by the word retour, plainly means a verdict upon a brieve for serving heirs. Lord Stair and Lord Bankton define a retour to be the verdict of an inquest returned to chancery in answer to a brieve issuing from that office. It can never extend to such retours as the present, made upon a commission under the Great Seal.

Some church-lands may indeed have an old extent; but these can only be lands that were mortified to provostries or collegiate churches, none of which were erected before the reign of Robert III.; but this can never apply to lands belonging to monastries and abbacies, the greatest part of which were founded about the time of David I.; so that none of these lands ever could have been extended. The case of Chalmers against Tytler can have no influence upon the present question; because the retour 1554 comprehended nothing but temporal lands which had a proper extent. Besides, this point neither was debated nor determined by the Court.

THE LORDS repelled the objection made to the retour produced for the respondents, and dismissed the complaint.

Act. *Burnet, Montgomery.* Att. *James Erskine.* Clerk, *Justice.*

P. M. *Fol. Dic. v.* 3. *p.* 405. *Fac. Col. No* 25. *p.* 48.

1761. *July* 23.

Lieutenant JAMES STEWART *against* Mr DAVID DALRYMPLE.

No 38.
A retour bearing forty shillings of old-extent of church-lands found not to entitle to a vote. Reversed on appeal.

A COMPLAINT was entered in the Court of Session by Lieutenant James Stewart, against some freeholders of the shire of Wigton, for refusing to put him upon the roll of electors. It was *answered*, That the evidence produced of the old extent of his lands was a retour dated *anno* 1625, bearing indeed a *valent* clause of more than 40 shillings of old extent, but bearing at the same time the lands to be held of the bishop of Galloway; which cannot be good evidence of the old extent, because church-lands were never extended.

It was *urged* historically for the respondent, That the act 114th, Parl. 1587, appointing the small barons to elect commissioners to Parliament, entitles no freeholders to vote, ' but who has a forty-shilling land in free tenendry held of the King.' This clause is necessarily confined to temporal lands; because previous to it church-lands by act 29th, Parl. 1587, had been annexed to the crown; and therefore could not be held of the crown by small barons, or by