

No 38. any barons. Further, it is certain that church-lands were never brought under the old extent, to which the foregoing clause evidently refers; and accordingly, though church-lands were all along subjected to a part of every taxation, yet that part was subdivided upon particular lands, not by the old extent, which did not comprehend them, but by Bagimont's roll and other old rentals of these lands. It is true, that the bulk of the church-lands were afterwards parcelled out to be held of the crown; and it was thought reasonable, that the proprietors of such lands, though they could not have the qualification of a forty-shilling land, yet might be entitled to vote upon an equivalent value. Hence the act 35th, Parl. 1661, 'That besides all heritors holding a forty-shilling land of the King *in capite* (meaning heritors of temporal lands) also heritors &c. who held formerly of bishops or abbots, and now of the King, shall be capable to vote, provided their yearly rent amount to ten chalders of victual, or L. 1000.' From this deduction it evidently appears, not only that the foregoing retour must be erroneous, as far as it bears an old extent of church-lands; but also, that no proprietor of such lands can be entitled to vote, except upon the last mentioned qualification of the act 1661.

To this reasoning nothing could be opposed, but the bare possibility that the lands in question might have been temporal lands in the reign of Alexander III. when the old extent was established, and have afterwards been acquired by the church. But to this the obvious answer was, That it is incumbent upon the complainer to give evidence of his qualification, by proving that the lands in question were temporal lands when the old extent was made, according to the inviolable maxim *affirmanti incumbit probatio*. The retour plainly is no proof, nor even presumption of this fact. For the *valent* clause, being found in most retours, and necessary in all retours of temporal lands, came to be thought by ignorant practioners to be essential; and so was commonly added in the retours of church lands, to which it had no relation.

'THE LORDS sustained the objection to the retour, and dismissed the complaint.' (Reversed on appeal.)

*Fol. Dic. v. 3. p. 406. Sel. Dec. No 183. p. 248.*

\* \* \* The matter of this case is included in No 18. p. 8579.

No 39.

1761. July 28.

STEWART *against* DALRYMPLE.

This objection was repelled, that a retour named no more than twelve persons of the inquest, as it appeared from the records of chancery, that the numbers were various, and frequently less than twelve.

*Fol. Dic. v. 3. p. 404.*

\* \* \* This case is No 18. p. 8579.

\* \* \* The same was found in Stewart against Maxwell, No 20. p. 8591.