1802. *June* 22. DAVIDSON *against* HILL.

No 27.
A separate retour is not necessary for each individual vote on the old extent.

AT a meeting of the freeholders of Stirlingshire, (13th January 1802), Robert Hill, writer to the signet, claimed to be enrolled upon the lands of Wester Glenboig. He produced an extract of a retour in favour of Charles, Duke of Lennox and Richmond, dated the 24th April 1662, which mentions, '*Decem mercatus terrarum de Enboggis* alias *Glenbog-Cunninghame et Macewin*.' And an extract of the retour of the special service of Robert Adam, dated the 28th July 1658, which bears, that the lands of Glenboig-Cunningham are a five-merk land of old extent. He *contended*, That as the Lennox retour proved the whole lands of Glenboig-Cunningham and Glenboig-Macewin, to be a ten-merk land, and as Adam's retour proved his part of them to be a five-merk land, the remaining half upon which he claimed must also be considered as a five-merk land of old extent. It was *objected*, That this was not sufficient legal evidence; but the freeholders repelled the objection.

Against this judgment, Harry Davidson, writer to the signet, one of the freeholders, presented a petition and complaint, and

Pleaded; There is no such thing as common law in questions with respect to the enrolment of freeholders; such matters are entirely regulated by statute. The qualification of a freeholder is ascertained by the acts 1587, c. 114., and 1681, c. 21. to be a forty shilling land of old extent. These statutes do not fix any particular sort of evidence by which this old extent is to be proved; and accordingly, until the act 16th George II. c. 11. every sort of proof was admitted. That statute was intended to remove the inconvenience of allowing all kinds of evidence before a court of freeholders, and laid down a rule, by which claims of this sort might at once be clearly decided. It requires the old extent to be proved, by a retour of the lands of a date prior to the 16th September 1681, and excludes all other evidence. Hill has not produced a retour of the lands of Wester Glenboig, conformable to this act of Parliament. By producing a retour of the whole, as a ten-merk land, and of a part as a five-merk land, it does not follow, that the remainder is to be considered as retoured at five merks; Macdowal against Buchanan, 20th February 1787, No 40. p. 8625; for the comparative value may have changed during the interval between the two retours, or the old extent may have been retoured by the agreement of parties; Kames's Law Tracts, Tr. 14.; Dallas, p. 887.; and, at any rate, the retour of Glenboig-Cunningham is *res inter alios* with respect to the extent of Glenboig-Macewin. It could nowise be binding on an inquest upon these lands, who must have retoured their value according to the evidence actually before them. This former retour might form a part of such evidence, and be a strong presumption as to the extent of the lands; but the act of Parliament excludes presumptions altogether, by requiring the actual verdict of a

No 27. jury in the form of a retour, and not the evidence which might be laid before a jury. Accordingly, although the most satisfactory proof could be adduced, by means of authenticated rolls, or otherwise, that the lands were of a much greater extent than what is required by the act of Parliament, the claim of the freeholder would not be sustained, because a retour is a *sine qua non* with respect to the value of votes claimed on the old extent; Stewart against Crawfurd, 22d February 1745, No 13. p. 8573. The claimant must produce a separate retour of his lands: If there be none, he has no right to a freehold; and if there be any, as he has not produced it, the *valent* clause must be presumed to be unfavourable to his claim.

Answered; The act 16th George II., requires the old extent of lands to be established by a retour; but this may be done either by one or more retours. Accordingly, it has been found, that a freeholder who produces two separate retours of two parcels of land, at twenty shillings of old extent, has a right to be enrolled; Malcolm against Ramsay, 23d January 1767, No 21. p. 8592.; Fordyce against Urquhart, 20th November 1757, No 36. p. 8619.; Wight on Elections. And if this be done, by adding two retours together, it may likewise be done by subtracting the amount of one retour from another. The claimant has here produced complete evidence, by means of retours, without having recourse to any other sort of proof, that his lands of Wester Glenboig have been retoured as a five-merk land of old extent: And this is all that is required by the act of Parliament, as was found, Belsches against Buchanan, 1790, (not reported, see APPENDIX.)

THE COURT (11th March 1802), dismissed the complaint; and, upon advising a reclaiming petition, with answers, they adhered to their interlocutor.

Some of their Lordships expressed great doubts, how far the evidence in this case, and in the case of Belsches, was conformable to the act of Parliament; but the majority of the Court seemed to hold, that it is sufficient if the old extent be established by different retours, although there be not a separate retour for each parcel of lands; or at least that it was too late now to go back upon that principle, which the Court had adopted in the cases alluded to.

For Petitioner, *Lord Advocate Hope, Solicitor-General Blair, Boyle, Bruce.*
Agent, *A. Abercromby*, W. S. For Respondent, *Erskine, Clerk, Campbell.*
Agent, *R. Hill*, W. S. Clerk, *Home.*

J. *Fac. Col. No 48. p. 98.*