SECT. II.

Can Retours be divided?—Retours of Church Lands.—Of Heritable Offices.—Objections to Retours.

1745. *February* 6. FREEHOLDERS of Lanark *against* HAMILTON of Westburn.

No 30.
Lands that were common to two heritors retoured to above L. 4, being divided by voluntary contract, do not entitle either.

HAMILTON of Westburn claimed a vote in the election of a member of Parliament, in virtue of his being proprietor of the just and equal half of lands retoured to be a twenty-merk land, and produced a voluntary contract, *anno* 1671, by which the lands, before common, were divided between him and his neighbour.

Objected, That a possession of lands *pro indiviso*, and so extended, could not give a title to a vote; and the voluntary division could not mend the matter, since there being no legal division of the extent, it did not appear what was the proportion of it allotted to either.

Answered, The contract mentions the particular extent of the several farms, making up ten merks to each of their proportions.

The LORD ORDINARY, 7th January, on advice with the Lords, sustained the objection; and this day the LORDS refused a reclaiming bill, and adhered.

Fol. Dic. v. 3. *p.* 405. *D. Falconer, v.* 1. *p.* 65.

1747. *February* 10.

Sir THOMAS KIRKPATRICK and Others, Freeholders of Dumfries-shire, *against* IRVING.

No 31.
Whether retours in church lands before the 1681 instruct the old extent?

Sir THOMAS KIRKPATRICK, and other Freeholders of the shire of Dumfries, in pursuance of the act 16th, Geo. II., entitled, "An act to explain and amend the laws touching the election of members to serve for the Commons in Parliament for that part of Great Britain called Scotland," applied to have Irving of Gribton struck off the roll of freeholders, on this ground, that the qualification on which he claimed a vote was the old extent, whereas his lands were church lands, which never were retoured.

Alleged for Gribton, That he produced a retour in 1659, in favour of Mary Welsh, as nearest lawful heir to John Welsh, her brother, in the four-pound land of Gribton, which bears, that these lands *valuerunt* of old L. 4 Scots, *et valent nunc* L. 12 Scots, and the statute on which the complaint is founded, neither requires nor admits any other proof of the old extent than a retour

No 31. preceding the 1681. And it is of no moment, that these lands may have pertained to the Abbey of Holywood before the general annexation 1507, as they may have been extended either before they came into the hands of the church, or thereafter, in pursuance of the act 1594; and that it was observable, that the charter of erection 1618, erecting these lands into a temporal lordship, expressly appoints them in time coming to be taxed, not with the church lands, but with the temporal lands, conform to the just rate and value thereof.

Answered for the complainers, That the statute on which the complaint is founded, did not alter the law with respect to the old extent, but only determines that no proof shall be admitted of the old extent, other than a retour prior to the 1681; but that it was not thereby intended, that a retour of date before the 1681 should make a qualification now, though, as the law stood before the 1681, the qualification would not have been good; and that so the Lords determined lately, Freeholders of Lanark *contra* Hamilton of Wishaw, No 11. p. 8572. And as it is admitted, that the lands are church lands, a retour of such lands was not sufficient to give a qualification, unless it was of date prior to their having come into the hands of the church. For though it appeared from the act 1594, that the legislature intended that church lands should be extended and subjected to the taxations conform to the pound-lands of old extent, yet nothing was more certain in fact than that church lands continued still to be assessed as they had been when in the hands of church-men, conform to Bagimont's roll, as appears from the acts relating to taxations, and the accounts thereof still extant. And therefore it is, that by act 35th, Parl. 1661, proprietors of church lands are allowed to vote, not upon the old extent, but upon their having ten chalders of victual, or L. 1000 of yearly rent. And, by the act 1681, after the valuation roll was re-established, which had obtained during the Usurpation, the qualification of such as had lands whereof the extent did not appear, was put upon the L. 400 of valued rent: That at no time retours of church lands had been regarded, as they had never been the rule for bearing public burdens; the extents found by these retours have always been considered as made at a venture, as the head of the brieve relating to the extent was answered by retouring the feu-duty or blench-duty for the old extent; and on that the very ground in the late case, Freeholders of Dumfries-shire *contra* Irving of Wysby, the objection to Wysby's retour was sustained. See No 16. p. 8576.

Notwithstanding this reasoning, the LORDS "repelled the objection."

What they proceeded on was, not that the act of Parliament on which the complaint is founded gives any greater effect to retours of date prior to the 1681 than such early retours had before, but that they thought this retour would have been good before the 1681. And in this they did not so much consider the possibility, that it may have been a retour in consequence of the act 1594, for it was agreed, that that act had never taken any effect; but they considered, that the lands may have been retoured before they came into

the hands of the church. In Irving of Wysby's case, the feu-duty, and the retour-duty were the same. Therefore, the LORDS considered the extent in that case to have been no other than a random answer to the head of the brieve, though even in that the Court was not unanimous; whereas here not only were the feu-duty and retour-duty different, but there was a distinct retour of the old and new extent; and all the question was, Whether in no case a retour of church lands could be sufficient? which was thought too strong a position to affirm. No 31.

Fol. Dic. v. 3. *p.* 405. *Kilkerran,* (RETOUR.) *No* 1. *p.* 495.

*** D. Falconer reports this case.

WILLIAM IRVING claimed a vote in the election of a Member of Parliament for the shire of Dumfries, in virtue of his lands of Gribton, which were retoured to be of value L. 4 of old, and L. 12 of new extent.

Objected, That these lands belonging to the Abbey of Holywood, and could not entitle to a vote on the extent, as church lands did not pay their taxes by the same rule with the rest of the kingdom, and therefore were not extended; and so was found in the case of Hamilton of Wishaw, No 11. p. 8572.

Answered, That the retour produced was precisely in the terms of the act of Parliament, and differed from Wishaw's, which bore but one sum for both old and new extent, to wit, the same with the feu-duty; and these lands might either have been extended before they came into the hands of the church, or since the Reformation, in virtue of the statute 1594.

THE LORDS repelled the objection.

Observed in a bill given in next session, but not received, as being without the reclaiming days, That this retour was a blunder, for it found the lands to have been of old extent worth so much, and that they are now worth more in time of peace; but this was not before the Court, when they pronounced their interlocutor.

Act. *Ferguson & Boswell.* Alt. *Lockhart.*

D. Falconer, v. 1. *No* 163. *p.* 214.

1753. *July* 26.

Colonel ABERCROMBIE *against* WILLIAM BAIRD of Auchmedden.

No 32.
A retour of lands holden of a subject is sufficient evidence of the old extent.

THE defender was enrolled in the roll of freeholders in the county of Banff, upon producing, as an evidence of the old extent of his lands, an extract from the records of Chancery, of a retour dated in the 1628; which extract bore, that the lands therein mentioned, then holden of the Earl of Marshall, *valuerunt, tempore pacis, summam decem mercarum monetae praedict.*