if the other respondents were to produce their retours, they would be found to be in the same situation. No 37.

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

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.