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.*

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In a complaint of this enrollment, it was *objected*, That a retour of lands holding of a subject at the date of the retour, was not sufficient evidence of the old extent; for that as the taxations formerly payable to the Crown were proportioned upon the Crown's vassals, according to the old extent, it was necessary the extent of the lands of such vassals should be fixed and known; and it is to be supposed, that for this reason, the act 1474, James III. Parl. 7. cap. 55., directs, "That retours should contain the auld extent." But with respect to lands held of subjects, this regulation was unnecessary, because the vassals of subjects were not directly liable to the King's taxations, but were only so to their own superiors in relief of such taxation; and it was argued, that this relief was not in proportion to the true old extent, but was according to the benefit these sub-vassals had by their feus; or, according to the agreement they made with their superiors. In support of this, it appears, that in many charters granted by subject superiors, the old extent had been screwed up to the same with the feu-duty, and had been so returned by juries, who were under no necessity to enquire of the real old extent, except where the lands were held of the King or Prince. And this hypothesis best accounts for the *proviso* in the act 1681, Charles II. Parl. 3d. cap. 21., "That the old extent must be distinct from the feu-duties in feu-lands;" in which case, the Court hath always refused to sustain the retour as a proof of the old extent.

Answered for the defender, That the act 1474, without distinction, appoints all retours to contain the old and new extent. All retours, without distinction, are upon a brief from the Chancery to the King's judges. Without distinction, they are the verdicts of a jury upon oath; which verdicts, until falsified in course of law, the Court is bound to take for proof. To speak of two old extents for the same lands, viz. of one in respect of the superiority, and another in respect of the property, is a thing unheard of in our law. The act 1681 requires indeed, that the old extent be distinct from the feu-duty, which is the case here; but it makes no distinction of old extents; that is, it gives no ground to suppose, that there ever were two old extents in respect of the same lands.

In like manner, the act 16th, Geo. II. mentions retours in general without distinction. How then can the Court distinguish? Before this last act, the Court has found charters alone to be evidence of the old extent. By this act, all other evidence of the old extent, except that of the retours prior to 1681, is cut off. The pursuer's doctrine would reduce this evidence to a still more narrow basis; for it would exclude above one half of the retours in Scotland.

"THE LORDS repelled the objection to the retour, that the same being of lands holding of a subject, is not sufficient evidence of the old extent."

For the Pursuer, *R. Craigie, A. Lockhart.* For the Defender, *Ja. Ferguson, Ro. Dundas.* Clerk, *Kirkpatrick.*

S. *Fol. Dic. v. 3. p. 404. Fac. Col. No 82. p. 122.*

No 32.

*** Lord Kames reports this case.

1753. *July* 26.—AT a meeting of the freeholders of the county of Banff, 29th September 1752, William Baird of Auchmedden, claimed to be enrolled for the lands of Northfield, and part of the lands of Whitefield, as being a forty-shilling land of old extent; to vouch which, he produced an extract from the records of Chancery, of a retour of John Keith of Northfield, as heir in special to William Keith of Northfield, his father, dated 18th September 1628, bearing, That the said lands holden of the Earl of Marshall *valuerunt tempore pacis summam decem mercarum monetæ prædict.*; and upon this production, he was accordingly enrolled.

A petition was presented to the Court of Session by Colonel James Abercrombie of Glasshaugh, complaining of this enrolment, for the following among other reasons, That the retour produced is not good evidence of the old extent, being of lands held of a subject. This point was argued before the Court in a long pleading, and it carried by the plurality to repel the objection against the retour. I was one of few that thought the objection good, and gave my reasons with that conciseness which is proper in a Court consisting of so many judges, each of whom is equally entitled to give the reasons of his opinion. But as the subject is curious, I shall here give the arguments at full.

I begin with the following proposition, That, as by the act 1681, a forty-shilling land is made a qualification to entitle a freeholder to elect and be elected a Member of Parliament, no retour can vouch that qualification but what at the same time is legal evidence of the old extent, to subject the freeholder to his proportion of a taxation imposed in the ancient form. And that no retour of lands held of a subject can afford such legal evidence, I endeavoured to make out, after premising the following observations; 1*mo*, A certain proportion of the land-tax, as at present modelled, is laid upon every shire; and the commissioners sub-divide this proportion upon all the lands of the shire, whether held of the King or of a subject, in proportion to the latest valuation of each parcel of land. Old taxations were levied in a different manner. In the days of Alexander III. all the lands in Scotland, as contained in the charters of the King's immediate vassals, were valued, and a distinct value not only put upon each barony, but often upon each tenendry of the barony; and this was in order to raise a tax. We read of later valuations for the same purpose. But still the latest of these came, in process of time, to be old enough to be known by the name of the old extent; and of these, several valuation-rolls were no doubt made up, which served not only as a rule for future taxations, but were more immediately useful to ascertain the King's casualties of ward, marriage, non-entry, relief, &c. Accordingly, when a sum was agreed by Parliament to be raised for the uses of the public, so much was

No 32. laid upon the clergy, so much upon the King's vassals, and so much upon the burghs. The King's vassals paid their part *primo loco*, each contributing a share in proportion to the extent of his lands as stated in the above rolls. And they had relief *pro rata* against the vassals, feuars, and, in general, against all under them who had any real interest in their lands, and probably rentalers and tenants were included.

2*do*, The said roll of the old extent was a sufficient rule as long as the lands entered in that roll, at a certain valuation, remained entire in the same vassal, whether the original family or a purchaser holding of the Crown. But in process of time, lands, whether barony or tenendry, valued *in cumulo* in the said roll, being dismembered into parts, and each purchaser holding of the Crown, it became uncertain by what rule a new tax should be levied; the said roll not answering for the old extent of the several parts now separated and divided. Had the public taxes been as frequent and constant as they are now-a-days, a remedy must have been invented *instanter*. But if a small tax was imposed for the expense of an ambassador, or such like, it was levied perhaps without any precise rule, as parties could best agree. The splitting of old baronies and tenendries had another bad consequence regarding the King more immediately, which required a more instant remedy; and that was that the King's casualties of ward, marriage, non-entry, &c. were rendered thereby in some measure uncertain. It is presumed, that it was this circumstance principally which introduced a new head or query into the brieve of inquest, namely, What is the value of the land? This fact was to be tried by the inquest, and they had a good rule for determining it, which was to divide the old extent betwixt the parcel contained in the retour, and the remaining parts of the barony, in proportion to the true rent of each part. This was a slow remedy, but must have been a compleat remedy in time; because no heir had access to his ancestor's lands holding of the King, otherwise than by a retour. These retours afforded at the same time a compleat rule for levying any taxations that were afterwards imposed. It is true, that these retours did not afford always a compleat rule for levying a taxation. For, after lands came to be *in commercio*, the King's vassals multiplying exceedingly, and land being split into smaller and smaller parts, it might well happen that a tax was imposed at a time before the old extent of all these different parts was ascertained by retours. As we became more accurate by experience, a remedy was provided which brought on a perfect equality among all the King's vassals. What I have in view is the act 281, Parl. 1597, bearing, "That it had been the custom to charge barons for payment of the taxation imposed upon the whole barony when it was entire, notwithstanding of parts being dismembered; therefore ordaining, that such dismembered parts shall be retoured by the sheriff, to the avail and quantity proportional of the hail barony; and that the barons shall be entitled to relief according to that proportion."

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3*tio*, A retour of land held of a subject superior is, it must be confessed, a legal act of a very heteroclite nature. For what has the Crown to do with the entry of the heirs of any but its own vassals? Every superior is bound by the feudal covenant to enter the heir of his own vassal; and if he refuse, the natural remedy is to take a decreet against him, which being *ad factum prestandum*, might be followed, first with horning, and he still continuing contumacious, with an application to the over lord, or rather to the Sheriff, to interpose and give infeftment. But it would appear that our forefathers were misled by the form of entry competent to the heirs of the King's vassals, and thought that the same remedy might be applicable to the heirs of other vassals. The tenor of the brieve paved the way to this mistake; which, though intended only for the King's vassals, was not expressly limited to them in words. But this form, however proper with regard to the King's vassals, is extremely irregular with regard to the vassals of subject superiors. The subject superior is not made a party; and yet the brieve contains many questions which are ascertained by the inquest that affect his interest extremely. Nay, his interest may be affected by every single head of the brieve; and yet no opportunity is given him to appear for his interest. A verdict pronounced by a jury in such circumstances may be a good proof against the heir, but ought not to militate against any other person. In short, in whatever way this legal act has crept into practice, one thing is evident, that it is in a very ill digested form. And this opinion may be delivered with great firmness, when the English law is considered. Their brieve of *diem clausit extremum* answers to our brieve of inquest, as far as it relates to the heirs of the King's vassals. But there is no such thing known as a brieve for serving the heir of a sub-vassal, except in this special case, where the land of the superior happens to be in the King's hand by ward, and who therefore acts in place of the superior. See Fitz-Herbert, p. 55[8].

Other considerations present themselves with regard to retours, where the lands hold of a subject. What if the Earl Marishall had a Chancery? Is it lawful to apply to the King's Chancery for retour, neglecting the superior's Chancery? And if the superior has no Chancery, is there a difference to be put betwixt a superior who has a Chancery, and one who has not? At any rate, it ought to follow from the nature of the thing, that if it be at all formal for the heir of a sub-vassal to apply to the King's Chancery, he ought not to have access till he first instruct his superior's refusal to grant a precept of *clare*.

These observations are applicable as follows: A retour of land held of the King, is, in its nature, legal evidence of the old extent. The whole procedure affords the greatest certainty; the fact is tried by an inquest, all parties concerned being present, the King by his Sheriff, and the heir personally. The King has an interest that the old extent be engrossed in the retour, and the heir has an interest that no more but the true extent be engrossed. But with regard to the retour of land held of a subject, it cannot, from the nature of the thing, afford any evidence of the old extent. For, in the *first* place, this retour evi-

No 32. dently is intended for no other purpose, but as the first step of diligence, to force the superior to receive the heir of his defunct vassal, when he refuses to grant a precept of *clare constat*. To this purpose, it may be necessary to prove, that the ancestor died at the faith and peace of our sovereign Lord, that the land is held of such a superior, by such a tenure, and that the heir is of perfect age: But surely, to the effect of a legal compulsion against a superior, to force him to receive the heir of his vassal, it is not necessary that the extent of the land be proved, whether old or new. And therefore, because of the maxim, that *actus agentium non operantur ultra eorum intentionem*, no faith is to be given to the facts set forth in the service, in answer to the questions concerning the old and new extent put in the brieve. From these considerations, it appears evident, that with regard to the entry of a sub-vassal, the questions contained in the brieve about the old and new extent, and the answers to these questions contained in the service, have slipt in by analogy and imitation, without being in any measure necessary. And indeed for what good reason should they be engrossed in the service, which is but a suppletory act, when they never are engrossed in a precept of *clare constat*, which is the principal act. 2*do*, Such a service can be no evidence against the superior, who is not made a party to the process, if it can be called so. And for this very reason, were there no other, such service can be no evidence of the old extent. For, in absence of the superior, what certainty can the heir have of the particular lands belonging to the superior and his vassals, comprehended in the superior's retour under one old extent; and suppose he should guess at these lands, what certainty can he have of the true rent, which yet must be had, in order to ascertain what part of the old extent of the whole is to be laid upon the particular land to which the service relates? 3*tio*, Suppose the superior should agree with the heir of his vassal to engross a particular sum as the old extent, the service would be no evidence against the other vassals of the barony, with regard to the burden imposed upon them, of relieving their superior of the taxation *pro rata*. They would never be forced to submit to an imaginary valuation, when they had a certain rule for their relief, which was to proportion it according to the true and real rent of each parcel of the barony. And indeed this will be frequently the only rule that can possibly be made use of. The King's vassals must always be retoured; but if a subject superior do his duty by granting precepts of *clare constat*, his vassals can never have occasion for a brieve out of the Chancery. Suppose, then, that among many vassals of a barony, one or two only can produce retours, the old extent contained in these retours can never be set against the true rent of the other vassals' lands, in order to proportion the taxation by way of relief.

Upon the whole, though by the act 16th Geo. II. a retour before the 1681, is made the only evidence of the old extent; yet it is not said nor intended, that any retour indifferently shall be held as legal evidence: And from the spirit and intention of that statute, it must hold that a retour, which, in a ques-

tion about levying a taxation in the ancient form, would afford no evidence of the old extent, can never be held complete evidence of the old extent with regard to the qualification of a voter for a Member of Parliament. This rule holds against a retour of land held of a subject; for, in proportioning the taxation at the first instance among the King's vassals, their retours only are the rule. And, in proportioning the relief among the vassals of a barony, the true rent must be the rule, and not the retours of one or other vassal. And accordingly, we have the strongest authority that such a retour is no legal evidence of the old extent; no less than the act 281st, Parl. 1597, quoted above. There the King's property-lands, for the first time, are ordained to be retoured in order to be taxed; and the rule there for ascertaining the old extent is not any retour indifferently of adjacent lands of the same real rent with those of his Majesty's property which are to be retoured, but retours only of the King's vassals; for what other reason, but that other retours afford no satisfactory evidence of the old extent? No 32.

I concluded with this observation, That a man to be satisfied of the above doctrine, needs but look over the retours of vassals holding of subjects; in many of which, an old extent is set down at random and for form's sake, without regard to probability, not to talk of truth. Nothing more common than in land holding feu of a subject, to engross the feu-duty in the retour, in place both of the old and new extent. And Craig, lib. 2. dieg. 17. § 36, goes so far as to lay it down for a rule, that this must always be done. 'In emphyteosi, 'non est diversus novus extentus ab antiquo: Unus et verus canon est, qui con-'venerat; et is extentus neque incrementum neque diminutionem admittet, 'itaque pro eodem retornatur.' And this practice apparently misled the Sheriffs in retouring lands holding feu of the Crown, in pursuance of the act 233d Parl. 1594. The feu-duties have certainly been engrossed in those retours, in place both of old and new extent; and it must be for this reason that they are specially excepted by the act 21st, Parl. 1681, as being no evidence of the old extent to afford a qualification for electing or being elected a member of Parliament. Had the same precautions been used here that are directed by the above mentioned act 1597, the retour must have been good evidence of the old extent. And, by the bye, when a retour of land, holding feu of the Crown, directed by the act 1594, is by law no good evidence of the old extent, why should a retour of land held of a subject be more authentic; Further, to judge how slovenly retours are made up when they contain useless or unnecessary clauses, let a retour of an annualrent-right be another instance, in which it was the constant practice to engross the interest of the money lent, in place both of the old and new extent. Besides, when we inspect the retour under consideration, it is really *felo de se*. Probably the lands of Northfield were let for ten merks yearly, when they were given off to be held ward of the family of Marishall. Therefore they have got the name of a ten-merk land, which is a common designation in the like cases. But surely lands which at

No 32. this day do not amount to above 1000 merks yearly rent, could never be valued so high as ten merks yearly in the days of Alexander III, or in any after valuation, supposing such to have been. It may be further observed, that the barony of Troup possibly might be extended in the days Alexander III, but it is not supposable that the lands of Northfield, including a part of the lands of Whitefield, were at that ancient period valued separately. This is beyond all credibility.

In answer to this chain of reasoning, I could find nothing plausible but the following argument: That by the statutes Robert III, cap. 1. § 3, it appears that a brieve was taken out of the Chancery, for serving to lands not only held of the King, but to lands held of a subject; that the brieve was the same in both cases; that by authority of a sworn inquest, the extent of the lands was ascertained in both equally; and therefore both retours must bear equal faith. It was added, that the act 55th Parl. 1474, ordaining the new extent to be engrossed in retours as well as the old, makes no distinction betwixt retours of the heirs of the King's vassals and of the vassals of subjects. And so authentic is the one as well as the other, that neither can be taken out of the way but by a proper reduction, which is necessary even when the extent only is quarrelled; of which Balfour, tit. (of Brieves) affords us several instances.

It is obvious to reply, That a retour of the heir of a sub-vassal may be legal evidence of all the facts contained therein, which must be ascertained, in order to give the retour its proper effect. But answers to questions that are not material, are not to be relied on as legal evidence; for this very reason, that they are foreign to the purpose; and, in fact, instances in abundance are given above, how little retours are to be trusted with regard to such facts. This matter cannot be better illustrated, than by a general service, which proceeds by authority of the very same brieve that is the foundation of the special service. Now, if a scrupulous jury, in serving a person heir in general to an ancestor who had a disposition of land without infeftment, should think it incumbent upon them to answer pointedly every single question contained in the brieve as in a special service, I beg only to put this question, Would the general service be legal evidence of so many foreign facts which are nothing to the purpose? I believe this will not be contended; and yet a retour of land held of a subject affords no better evidence of the old extent than such a general service would do. The act 1474, it is true, is not *ex figura verborum* restricted to retours of the King's vassals. But as there is little accuracy in the language of these times, we must have recourse to the subject matter which points out retours of the King's vassals only. And how can it be otherwise, when retours are only necessary with regard to the King's vassals, and but occasionally with regard to other vassals, to be a compulsitory against a refractory superior. And *lastly*, as to reducing retours for a wrong extent, no doubt the same is competent at the instance of the King, who, by an extent less than it ought to be, is hurt with regard to his casualties as well as taxes. But with regard to the retour of a

sub-vassal, I know but one instance of a reduction at the instance of the superior of such a retour, upon the head of error in the extent. The superior had good ground to challenge an error in the new extent, because it regulates some of the superior's casualities. But the old extent contained in this retour was also challenged; and I must acknowledge, that to find this competent to the superior is one authority against me, though not a direct one. But it will be considered as a very slight authority, when the following defence was sustained to assoilzie the jury, That the old extent of the land contained in an authentic roll was not shown to them, and therefore they were at liberty to make the old extent what the party thought proper. Maitland, 17th July 1562, The King and Lord Drummond *contra* The Inquest, and George Wisehart for his interest, *voce* RETOUR. This at the same time shows, how little such a retour is to be depended on. No 32.

Sel. Dec. No 50. *p.* 58.

*** Similar decisions were pronounced 28th July 1761, Stewart against Dalrymple, No 18. p. 8579.; and 29th July 1761, M'Kie against Maxwell, No 19. p. 8589.

1755. *March* 4.

Mr DAVID DALRYMPLE Advocate, Captain FORBES of New, ROBERT SIMPSON of Thornton, *against* Sir JAMES REID of Bara.

No 33.
Lands mortified with a *reddendo* of *preces et lachryma*, and afterwards sold, found to give a title to vote.

BY charter, in the 1574, James VI. granted to the College of Aberdeen certain lands and superiorities, particularly, the chaplainries of Westhall and Falayrule, &c. declaring, 'Quod omnia dicta beneficia in totum remanebunt, 'tanquam unita et annexata incorpora et mortificata, ut proprius reditus dicto 'nostro collegio pro perpetuo in futurum: Tenenda pro perpetuo mortificat, in 'futurum, cum potestate ipsis per seipsos, dictis beneficiis terris annuis reditibus, eorundem utendi, occupandi, intromittendi, et desuper disponendi; et 'dicta beneficia et capillanias in feudi-firmam, seu assedationem locandi, &c. 'Reddendo nobis, &c. servitium communium supplicationum et orationum, '&c.'

The pursuers having purchased these subjects from the College, claimed thereon to be enrolled in the roll of freeholders in the county of Aberdeen; but their claim was rejected. They complained to the Court of Session; and the defenders maintained the following objections, viz. 1*mo*, That the subjects in question appeared, from the complainers' charters, to be mortified lands; and that, by the common law, mortifications are unlienable; the College of Aberdeen had only a power of administration, not of alienation. Craig, lib. 1. d. 15. § 7. says, 'Inter prædia ecclesiastica numerantur, et collegia religiosa, et rite insti-'tuta, quorum res, sine consensu regis, alienari, et in feudum dari, non pos-'sunt.' In this case, the words of the charter are explicit; and the grant of