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

No 33. special powers of intrommitting with rents, granting feus, &c. would have been superfluous, had an unlimited property been intended.

2*do*, The lands hold neither blench, ward, nor feu; and therefore, though they were *in commercio*, they could not give the right of voting for a Member of Parliament.

Of old, only temporal lands belonging to barons appear, by our law, to have given a right to sit in Parliament; church-lands, lands mortified for pious uses, burgage-lands, gave no such privilege. After the freeholders were allowed to send commissioners to represent them in Parliament, the act 1587, James VI. Parl. 11. cap. 114, appointed these commissioners should be chosen by none but such as had a forty-shilling land, in free tenandry, holding of the King. This would appear to exclude church-lands, and much more lands mortified to pious uses. The act 1681, which introduces valuation in place of extent, makes no variation in respect of tenure; on the contrary, it limits the right of election to those infeft 'in kirk-lands now holden of the Crown, or other lands holding 'feu, ward, or blench,' of his Majesty. Further, till 1712, mortified lands were always excepted from the supply-acts; and, by consequence, were not liable in public burdens; hence it is evident, That, to make mortified lands a title of enrolment, were, in every sense, contrary as well to the words as to the true intent and meaning of the act 1681.

Answered for David Dalrymple and the other complainers, to the *first* objection; That though the lands in question were mortified lands, yet they were the property of the College; and as there is no law or statute to the contrary, the College must have that power of alienation which is inherent in property. In the *next* place, Supposing dilapidation could be charged against the principal and masters of the College, which was not pretended to be the case here, yet that was *jus tertii* to the defenders; and an action of reduction upon that head could only be competent to succeeding principals and masters. Had the complainers' titles been lands purchased from an heir of tailzie, or from a minor, these circumstances might afford reasons of reduction to their proper parties, but could never be the foundation of any objection to the qualification for having a vote.

To the *second* objection on the act 1681; That, according to the proper construction of the words of the clause, 'Whether kirk-lands now holden of the 'King, or other lands holding feu, ward, or blench, of his Majesty,' the words 'ward, feu, or blench,' do not apply to kirk-lands, they only apply to 'other 'lands holding of his Majesty;' and therefore they could not be intended to apply to lands mortified to pious uses; because mortified lands are in the same class with kirk-lands, whereof the usual *reddendo* was prayers and tears.

But supposing there was doubt upon the construction of the act 1681, how far lands, held by mortification tenure, could entitle to vote, yet that doubt is entirely removed by the act 10th Geo II. which, without distinction of

the nature of tenure, provides, That lands holden of the King or prince, liable in public burdens for L. 400, shall in all cases be a sufficient qualification. No 33.

" THE LORDS found, that the complainers, in virtue of their titles produced, are sufficiently entitled to be inrolled in the roll of freeholders for the shire of Aberdeen; therefore ordained all of them to be added to the said roll."

Alt. *George Brown.* Alt. *Burnet et J. Gordon.* Clerk, *Kirkpatrick.*

S. *Fol. Dic. v.* 3. *p.* 405. *Fac. Col. No.* 146. *p.* 217.

1755. *November* 13.

ANDREW CHALMER of Easter Dalrye *against* WILLIAM TYTLER of Woodhouselee.

No 34.
The objection, that the extract from chancery of a retour did not bear, that the seals of the jurors were appended, nor mentioned the name or subscription of the clerk, was repelled.

MR TYTLER claimed to be enrolled as a freeholder of the county of Edinburgh for the lands of Foulfuird, as being a forty-shilling land of old extent.

In a proof of which assertion, he produced from the Chancery an extract of a writing, which bears, That on the 3d day of March 1554, an inquisition was made before the Sheriff of Edinburgh, by certain persons 'qui jurati dicunt, 'quod terræ comitum dominorum et baronum et libere tenentium vicecomita-'tus de Edinburgh, extendunt ad valorem subscript. respectique antiqui exten-'tus.' In this writing the lands of Foulfuird are valued at 40 shillings. It concludes with these words, *in cujus rei testimonium;* but it does not bear, that the seals of the jurors were appended; neither does it make mention of the name of the clerk, nor of his subscription as clerk.

The freeholders enrolled Tytler at the Michaelmas meeting 1755. Chalmer preferred a complaint against this enrolment; and *objected*, That the writing produced for Tytler could be considered only as the draught of a retour which had never been completed.

Answered for Tytler; Retours must be held to be authentic when registrated by the proper officer of the law. This retour is not indeed recorded at length; but the same objection might be made to the authority of the record of many charters, wherein the names of the witnesses are omitted; and instead of the testing clause, these words are inserted, *testibus ut in præcedenti charta.* The same is the case in sasines; the law requires that they be inserted at length in the record; but this has been frequently neglected in practice.

" THE LORDS repelled the objection."

Act. *Sir Da. Dalrymple.* Alt. *Rae & A. Pringle.* Clerk, *Kirkpatrick.*

D. *Fol. Dic. v.* 3. *p.* 404. *Fac. Col. No* 163 *p.* 243.