

Upon summing up the extents of the different lands composing the barony, as specified in the descriptive clause, it appeared that they did not amount to more than L. 15:3:4; whereas the *valent* stated the whole, *in cumulo*, at L. 16:6:0. From this discrepancy, it was *objected* by Mr Hamilton, That the retour could not be sustained as sufficient evidence of the old extent of the claimant's lands. This objection having been brought under the review of the Court of Session, it was

*Pleaded* for Mr Barns, By the uniform practice of the Court, ever since the decision in the case of the Lennox retour, about 40 years ago, a discrepancy of that sort, arising from an excess in the *valent*, has been held out to detract from the faith of the retour: For the cause of this excess must always be, either an error in calculation, or else the omission of some of the lands, or their being stated at too low a value, in the descriptive clause. In the present case, therefore, the discrepancy might, indeed, give some room to suppose that the old extent of the lands in question may have been a few shillings above four merks, but is plainly inconsistent with its having been below that value.

THE COURT repelled the objection.

Act. G. Fergusson.

Alt. Wight & Ja. Boswell.

L.

Fol. Dic. v. 3. p. 423. Fac. Col. No 1. p. 1.

1781. January 23. GENERAL FLETCHER *against* JAMES FERRIER.

At a meeting of the freeholders in the shire of Dumbarton in 1780, General Fletcher claimed to be enrolled upon certain lands, part of the Dukedom of Lennox; and, for proving their old extent, produced the retour of the special service of Charles Duke of Lennox, dated 25th April 1662.

The *valent* in this retour does not specify the separate values of the different tenements, but states the whole Dukedom to be L. 517:3:4 of old extent. To ascertain the several values, the claimant had recourse to the descriptive clause, where, to every tenement is prefixed a denomination by pounds, merks, and shillings, and the amount of the whole only falls short of the *cumulo valent* by L. 1:16:8. Upon this discrepancy it was

*Objected,\** The fifth head of the brief of mortancestry is that alone in which the inquest is called upon to ascertain the old and new valuations; and their verdict on this head only is to be regarded in questions respecting freehold claims. The descriptions are the work of the conveyancer, intended merely to denote the different tenements in which the heir is desirous of being served, and origi-

\* This objection was formerly over-ruled in a question respecting the same retour, quoted in the sequel; but, as it does not seem that the matter was then so fully treated, nor that any attempt was made to elide the presumptive evidence arising from the coincidence of the two clauses, by positive proof adduced from other retours, it has been thought proper to give a summary of the argument in this place.

No 24.

Found in conformity with Colquhoun *against* Freeholders of Dumbartonshire, No 12. p 8572.

Altho' there be a small discrepancy between the *valent* clause and the descriptive, the descriptive will be received as proof of the old extent.

No 24. nate in circumstances which cannot now be explained. For the most part they are taken, as these seem to have been, from the tax-rolls, which were made up by the sheriff-clerks of the different counties, not according to the old extent of Alexander III. referred to in the laws concerning elections, but from later valuations in 1366 and 1424, by which the public subsidies were paid in Scotland till 1667. See Kames's Law Tracts, *voce* RETOURS; Erskine's Larger Institute, RIGHTS OF SUPERIORITY.

The Court has been induced to sustain the evidence of retours, in which the several descriptive values, when joined, precisely agree with the *cumulo valent*; but, in the present case, they do not correspond; and, as this is a question, not of equity, but of positive law, where the Court is not at liberty to make arbitrary distinctions, the smallness of the discrepancy cannot vary their judgment.

Some of the descriptions in this retour particularly mention the old extent, from which it may be inferred, that the other denominations are taken from another standard.

Further, the objector is now enabled, by evidence not before the Court when this retour was formerly under challenge, No 12. p. 8572. to show that the descriptions in this retour cannot refer to the old extent.

*1mo*, Many of the tenements composing the Dukedom of Lennox are contained in the retours of the estates of Luss and Ardincaple, and in those of the family of Napier. They are there expressly retoured to sums different from, and less than those in the present retour.

*2do*, The old Earldom of Lennox, in the middle of the 15th century, devolved upon heirs portioners. One half went to the family of Darnly, to whom the Dukes of Lennox succeeded. The other half divided betwixt the ancestor of Mr Haldane of Gleneagles, and Elibabeth Monteith, married to Lord Napier. From an accurate investigation of the subjects contained in the retour founded on by the claimant, it appears, that they are all parts of the old Earldom, with the exception of four, whose extent is only L. 74. After this is deducted, the descriptive sums amount to L. 441 : 6 : 8. The old extent of the lands contained in Elizabeth Monteith's retour, in the fourth of the old Earldom, is only L. 125; of course, the descriptive sums in this retour are nearly twice as great as they ought to be, if they were meant to denote the old extent.

*3tio*, It appears from the titles produced for the claimant, that the family of Lennox were, at the period of this retour, possessed of 24 tenements not enumerated in the descriptive clause. These would be admitted to a share in the *cumulo valent*; so that the sums annexed to the lands specially mentioned, have been estimated by some other rule than the old extent.

*Answered* for General Fletcher: The statute 16th Geo. II. restricts the proof of the old extent to retours, without limiting the consideration of the Court to any particular clause in them. It is therefore sufficient, if, from the whole, satisfactory evidence can be collected of the old extent.

The universal practice in retours, is to describe the lands by the old extent. The near coincidence of the two clauses in this retour proves that to have been done in this case. Where the descriptive values exceed the *cumulo valent*, the discrepancy may be fatal to the credibility of the retour; because there it cannot be determined what tenement is described beyond its real extent. The amount of the present objection is, that some of the lands may be entitled to a larger valuation than is given them in the descriptions.

There is no distinction in this part of our law betwixt the most ancient valuation, supposed to have taken place in the reign of Alexander III. and the later ones, by which the land-tax was paid, till after the Restoration. And the reason of the law, which is, that persons subject to a certain share of the public burdens, should likewise have a share in the legislation, militates against such a distinction.

When a freehold qualification is to be made out upon the old extent, all required by law is, that the same shall be ascertained by a retour preceding the 1681. And no objection can invalidate that evidence, which does not arise from the retours founded on by the claimant. A contrary practice would tend to unhinge the faith of all retours, and would be the source of endless disputes.

But, further, the retour of Elizabeth Monteith is in 1474; that of the Duke of Lennox in 1662. Many transactions might have taken place betwixt the co-heiresses and their successors. If necessary, the claimant is able to show that such actually existed.

The 24 tenements pointed out by the objector are parts of those which are particularly named. Although they were not; the legal presumption in such a case would be, that the inquest had them not under their consideration, otherwise the *cumulo valent* would have been increased.

' THE COURT repelled the objection.'

Act. *Hay Campbell.*

Alt. *Wight et H. Erskine.*

C.

Fol. Dic. v. 3. p. 403. Fac. Col. No 19. p. 37.

1781. March 6. ROBERT SCOTT against JOHN HAMILTON.

MR SCOTT, in evidence of the old extent of the lands on which he claimed to be enrolled as a freeholder in the county of Ayr, produced a retour, in which these lands were contained among others.

The *cumulo valent* in the retour extended the whole to L. 7 : 6 : 8; but the descriptive values, when joined, amounted only to L. 5 : 6 : 8.

THE LORDS were of opinion, That this difference was too considerable to be imputed to an error in calculation; and, on this account, refused to sustain the retour, as ascertaining the old extent of the lands belonging to the claimant.

Act. *Geo. Fergusson.*

Alt. *Ja. Boswell.*

C.

Fol. Dic. v. 3. p. 403. Fac. Col. No 43. p. 80.