'terms of the said assignation, in proportion to the other teinds of the said parish, but not in any greater proportion; and that the appellant, claiming under the said James Earl of Findlater, who was entitled under the said tack and prorogation, and was also patron of the said parish, is bound, under the terms of the said assignation of 1656, to relieve the respondent of such part of the minister's stipend as he shall pay yearly during the continuance of the said tack, over and above an equal portion with the rest of the teinds of the said parish comprised in the said tack and prorogation of tack, the said tack and prorogation of tack being, as between the appellant and respondent, to be deemed to have continued until the expiration of the said term of 203 years with respect to all the teinds of the said parish, in regard that during the said term no title to the said teinds could have been obtained by any person, except subject to the said tack and prorogation of tack, without the act and concurrence of the said James Earl of Findlater, or of those claiming under him; and therefore, if any title to any of such teinds has been obtained, discharged from the said tack and prorogation of tack, the same must have been obtained by the act of the said James Earl of Findlater, or of those claiming under him: And it is ordered, that with these findings the cause be remitted back to the Court of Session, to do therein as shall be consistent with these findings, and as shall be just.'

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Appellants' Authorities.—2. Ersk. 10. 51. and 52; 2. Connell, 233. 238, and Cases there quoted; 3. Stair, 2. 2.

Respondent's Authorities.—Arbuthnot, Dec. 2. 1698, (7751); Forbes, Dec. 9. 1713; Dunbar, Jan. 17. 1750, (15863); 2. Connell, 238.

J. CHALMER,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 24.)

THOMAS DUNLOP DOUGLAS, Esq. Appellant.—*Skene.* No. 67.
Sir JAMES COLQUHOUN, Respondent.—*Forsyth.*

Freehold Qualification—Member of Parliament—Retour.—Held, (affirming the judgment of the Court of Session,) That a retour of feu-lands bearing the old extent to be £4: 3: 4, and the new extent and feu-duties to be £4. 5s., was not sufficient to establish that the lands were a forty shilling land of old extent.

THE appellant Thomas Dunlop Douglas, having claimed to be enrolled in the roll of freeholders of the county of Dumbarton, produced in support of his claim,—1. A charter of resignation

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The reddendo in this Crown charter was in the following terms:—'Reddendo inde annuatim dictis Thomæ Dunlop Dou- 'glas ejusque prædict., nobis nostrisque regiis successoribus im- 'mediatis, legitimis superioribus earundem, summam quatuor li- 'brarum quinque solidorum monete Scotiæ apud terminos Pente- 'costes et Sancti Martini in hieme, per equales portiones, nomine 'feudifirmæ, si petatur tantum, idque pro omni alio onere, exac- 'tione, demanda, seu servitio seculari.'

2. An instrument of sasine thereon;—and, 3. A retour of the service of one of the former proprietors of the estate, dated the 19th of October 1496, in order to prove that the lands were a forty shilling land. In relation to the valuation of the lands, the retour was thus expressed:—'Et quod dicte terre, cum pertinen., valent 'nunc per annum quatuor libras et quinq. solidos monete hujus 'regni, et valuerunt tempore pacis quatuor libras tres solidos et 'quatuor denarios ejusd. monete; et quod tenentur de dicto 'S. D. N. Rege et suis successoribus in feudifirma et hæreditate 'pro annua solutione prefat. S. D. N. et suis suprascriptis dicte 'summe quatuor librarum et quinq. solidorum ad duos anni ter- 'minos, festa, viz. Penthecostes et S^ti Martini in hieme, per 'equales portiones, ac duplicatione dicte feudifirme primo anno 'introitûs cujuslibet hæredis in et ad dictas terras, cum pertinen.'

The freeholders having sustained the claim, Sir James Colquhoun presented a petition and complaint, praying to have Mr. Douglas's name expunged from the roll. In support of this complaint he objected,—1. That it was requisite by the statute 1681 that a claimant in virtue of the old extent should be 'in posses- 'sion of a forty shilling land of old extent, holden of the King 'or Prince, distinct from the feu-duties and feu-lands:' that by

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this was meant, not merely that the valuation should be retoured separate from the feu-duties, but that it should amount to forty shillings, independent of and under deduction of these feu-duties: that it had been a common practice for juries to retour the valuation at the amount of the feu-duties, and it had been decided that where a party founded on a retour of feu-lands, where the valuation and the feu-duties were either the same, or nearly the same, it was to be held that the jury had just adopted the feu-duties as the valuation, and therefore that there was no evidence of the lands being a forty shilling land of old extent, and that the retour in question was precisely in that situation, because the lands held feu; and while it was stated that the old extent was £4: 3: 4 Scots, it appeared that the feu-duty was £4. 5s. Scots, being only a difference of a halfpenny sterling.—2. That it appeared from the former charters and other titles of the lands that the feu-duty had been originally £4 Scots, and had been gradually increased by augmentations, first to £4: 3: 4 Scots, and then to £4. 5s.: that, in making the present retour, the jury had evidently adopted the immediately preceding feu-duty as the old extent, viz. £4: 3: 4, and the then feu-duty, (which had been augmented to £4. 5s.,) both as the new extent and the feu-duty actually payable;—and, 3. That although it appeared from the reddendo clause that the sum there mentioned was to be paid 'nomine feudifirmæ, si petatur tantum,' yet this could not establish, contrary to the whole tenor of the titles, that the lands were held blench: that the introduction of these words was explained by the circumstance, that a former proprietor held the heritable office of Coroner of Dumbartonshire blench for payment of a penny Scots, si petatur tantum; and that this had been introduced into the former titles, and these words retained per incuriam, after the proprietor had ceased to hold that office. On the other hand, it was contended by Mr. Douglas,—1. That as the statute 1681, c. 21, merely required that the vassal should be in possession of a forty shilling land of old extent, 'distinct from the feu-duties 'or the feu-lands,' it was quite sufficient that a retour was produced, prior to the 16th of September 1681, bearing that the lands were a forty shilling land of old extent, and that this was stated separately and distinct from the feu-duties: that it was proved by the retour in question that the old extent was £4: 3: 4, whereas the feu-duties were retoured not only separately and distinctly from that valuation, but at a different sum, being £4. 5s: that although it had been decided that where the jury returned no distinct and separate answer, setting forth what the old extent was, and merely mentioned the amount of the feu-duties or new

July 16. 1823. extent, adding in general terms, ‘ et valuerunt tantum tempore ‘ pacis,’ it was to be presumed that the jury merely adopted the feu-duties as the old extent, but that no such presumption could exist where a separate answer had been made as to both points, and that the circumstance of there being a small difference between them showed that the jury could not at random have adopted the feu-duties as the old extent.—2. That in terms of the statute 16. Geo. II. c. 11, it was not competent to resort to any other evidence on the subject than that of a retour; and therefore, as the documents produced by Sir James Colquhoun were not of that nature, the Court could not look to them, but must be guided entirely by the retour founded on;—and, 3. That the terms of the reddendo clause established that the lands could not be regarded as feu-lands, and therefore that the provision of the statute 1681, c. 21, could not apply. The Court, on the 2d of June 1821, by a majority ‘ sustained the complaint; found that the ‘ freeholders did wrong in enrolling the respondent in the roll ‘ of freeholders in the county of Dumbarton, and therefore ‘ granted warrant to, and ordained the Sheriff-clerk of the said ‘ county to expunge the respondent's name from the roll;’ but found no expenses due.

Mr. Douglas having reclaimed, the Court ordered a hearing in presence, and thereafter, on the 18th of June 1822, adhered to the interlocutor complained of.*

The *Lord Justice-Clerk* was of opinion,—1. That the Court could not regard the collateral evidence which had been referred to by Sir James Colquhoun, but that the question must be decided entirely by the legal import and effect of the retour itself. —2. That if the question had arisen for the first time, he would have had very great difficulty; but that a principle had been established by a series of decided cases, that although the old extent and the feu-duties were retoured separately from each other, yet if they were the same, or nearly the same in point of amount, it was to be presumed that the jury had just adopted the feu-duties as the old extent, and therefore the retour did not prove that the lands were a forty shilling land of old extent, distinct from the feu-duties;—and, 3. That that principle applied to the present case, and therefore that Mr. Douglas was not entitled to be enrolled.

Lords Craigie and *Robertson* concurred in this opinion.

Lord Glenlee, on the other hand, held that the decisions went

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* See Shaw and Ball. No. 556.

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no further than to show, that where the old extent and the feu-duty were retourēd at the same sum, the retour was to be considered as not sufficient to establish that the lands were of the requisite valuation; but that here the old extent was retoured at one sum, and the feu-duty and the new extent at another and a different sum, and therefore these cases did not apply to the present one. And as there was a distinct and separate answer made in terms of the statute 1681, the retour was effectual to prove that the lands were of the requisite valuation, and it was not competent to go into collateral evidence to redargue this.

Lord Bannatyne concurred in this opinion.

Mr. Douglas having appealed, the Lord Chancellor moved, and the House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

Appellant's Authorities.—(1.)—1594, c. 233; 1597, c. 281; 2. Craig, 17. 36; Balfour, 430; Skene de Verb. Sig. voce Extent; Freeholders of Linlithgowshire, June 14. 1746, (8574, see also the Notes of L. Kilkerran's Session Papers, Adv. Lib. No. 64, and Elchies' Notes, p. 268); Freeholders of Perthshire, June 24. 1747, (8576); Kerr, Nov. 10. 1747, (8577, and Elchies, No. 49. M. P.*); 3. Ersk. 8. 66.—(2.)—Cranstoun, May 16. 1816, (F. C.); Gibson, June 13. 1818, (F. C.); Nicolson, May 15, 1819, (F. C.)

Respondent's Authorities.—(1.)—2. Craig, 17. 29; 3. Ersk. 8. 67; 2. Ersk. 5. 33; 1457, c. 71; 1503, c. 90; 2. Craig, 17. 36; Dallas, 886; 1594, c. 229; 1597, c. 277; Freeholders of Linlithgow shire and Perthshire, ut supra; Hamilton, Jan. 19. 1745, (Elchies, No. 23. M. P.); Kerr, Nov. 10. 1747, (ib. No. 49); Dickson, Nov. 10. 1747, (ib. No. 48.)

H. RIDDELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 25.*)

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* In Lord Elchies' printed report it is said that 'both the old and new extent were retoured to 7 merks and 4 pence, and the feu-duty to 7 merks and 40 pence;' but it was stated by the appellant that this was an error, as it appeared from the printed retours, p. 4, that instead of 4 pence it was 40 pence, and that the retour added, 'et valuerunt tempore pacis summam antedictam.'