

holding appointments immediately from Government, and paid from the public treasury; Luder's Reports, vol. 2. p. 541.—552; Wight, p. 278.

Mr Maxwell had, for a considerable number of years, by the appointment of the Commissioners of Supply, or for assessing the land-tax, held the office of their collector. The same Commissioners were, by 20th Geo. II. c. 3, and the subsequent acts, appointed to levy the window duties, and the income-tax, with power to name their collector. From them he held this additional office, receiving a proportion of the sums collected as his only recompence.

For Maxwell, *H. Erskine, Fergusson, W. Erskine, Campbell jun.* Agent, *A. Young, W. S.*  
For Heron, *Solicitor-General Blair, Hay, Cathcart.* Agent, *And. Macowbinnie.*  
Clerk, *Menzies.*

F.

Fac. Col. No 85. p. 187.

1803. February 11.

STEWART against GORDON.

AT the meeting for electing a Member of Parliament for the stewartry of Kirkcudbright, John Gordon of Lochdougan applied to be enrolled as a freeholder; to whom it was *objected*, That he was not possessed of the whole lands on which he claimed, as retoured prior to 1681 to a ten-pound land of old extent, having sold a part of them to Thomas Maclellan of Greenlane about two years ago for the price of L. 58.

The objection being repelled by the court of freeholders, the Honourable Montgomery Stewart complained, and

*Pleaded*; By § 8. of 16th Geo. II. c. 11, it is declared, that no person is or shall be entitled to vote, or to be enrolled, in respect of the old extent, unless such old extent is proved by a retour of the lands of a date prior to 16th day of February 1681; and that no division of the old extent made since the aforesaid 16th day of February 1681, or to be made in time coming, by retour or any other way, is or shall be sustained as sufficient evidence of the old extent. So that if a part of an estate retoured of old extent has been alienated by sale or otherwise, whether this part be large or small, it is impossible that the old extent either of the one part or of the other can be improved by a retour prior to 1681. The lands having a *cumulo* extent, when a part is alienated, the old extent is divided, and the part which is retained cannot possibly have the old extent of the whole, but only that part which may be ascertained to belong to it on a division: but, by the statute, no division since 1681 can be evidence of the old extent in a question of qualification, however great the proportion may be in which the one part exceeds the other, nor however great the original retour may be. The claimant must literally be in possession of the whole lands that were retoured *in cumulo* by the retour claimed on, and consequently he must have right to the whole *cumulo* extent. It is not enough, though it were

No 120.

No 121.

A retour prior to 1681, of a ten pound land, affords a freehold qualification, although a small part of it has been disposed of for a price for the purpose of straightening marches.

No 121. clear to demonstration, that if a division could be made, the share of the extent corresponding to the share of the lands retained by him would be much greater than forty shillings; Freeholders of Lanarkshire against Hamilton, 6th February 1745, No 30. p. 8603. ; Macdowall against Buchanan, No 40. 8625. The statute has always been strictly followed out, although better evidence of the old extent than retours has been produced; Stewart against Campbell, No 14. p. 8574, and Stewart against Crawford, No. 13. p. 8573; Wight, p. 167, 168.

Now, it is admitted that part of the lands of Lochdougan were sold to Maclellan, by a disposition, containing procuratory and precept. This was a field between two and three acres, bearing a proportional part of the old extent of the lands, in which the purchaser has already been infeft. The disposition acknowledges a full price to have been paid for it, with a clause of absolute warrandice, and all the usual clauses in a complete conveyance. This, however, has been represented as a mere accommodation, for the purpose of straightening the marches, owing to the road which has lately been made from Dumfries to Kirkcudbright, which cut off a small part of the estate of Lochdougan, adjoining to Greenlane, a part of which was cut off on the Lochdougan side. This idea did not enter into the view of the parties. There was no exchange of land, unless about seven square ells can be held so. A price was paid for what was sold, which was only about two acres out of one hundred belonging to Lochdougan on the same side of the road. But even if it had been an exchange of land, for the purpose of straightening marches, unless the portions of land received and given are equal in quantity and quality, the freehold qualification cannot fail to be affected; for a part of the land is given away, for which a price in money has been received. Unless there be no diminution of the tenement, to which the old extent applies, the qualification must be affected. The purchaser at present is only infeft base on his disposition, but he may also hold the subject as Crown vassal, his disposition containing procuratory as well as precept. There will thus be two Crown vassals in these lands, which were extended *in cumulo* by the retour founded on by Mr Gordon; and it cannot be supposed, that in lands held under the Crown, there is no old extent. A part then has been taken from the extent, and this division has taken place since 1681.

*Answered*; The lands are retoured as a ten pound land; and when the new road cut off this angle of Lochdougan not a four hundredth part of its value, and left also a small piece of the Greenlane estate detached, it became of consequence to straight the marches of the two properties. As the part to be given on the one part was greater than was to be received, the difference of course was to be paid in money. Accordingly, the disposition bears, the narrative ' of  
' a certain sum of money advanced and paid to me by Thomas Maclellan of  
' Greenlane, as the worth and value of the angle or pendicle of land after dis-  
' posed, and in order to square or straight marches for our mutual convenience

' and accommodation.' In giving off a small angle of two acres, for the express purpose of accommodating himself and his neighbour, it never was imagined that this could affect the right to vote upon a ten pound land. The object of the statute 1681 was plainly to prevent the multiplication of votes, by dividing the old extent of lands, but cannot affect this operation, when a small angle has been given off, which is at the same time declared to have no valued rent annexed to it, and to be free of all public burdens; so that there is in reality no division of the old extent, but the extent of the land is instructed by a retour prior to 1681. In former cases, an excambion was never held to diminish the evidence of the retour; Skene against Graham, No 108. p. 8684.; Hamilton against Bogle, No. 113. p. 8688.; Dunbar against Brodie, (1795. See APPENDIX;) Cunningham against Glen, (1797, See APPENDIX.) Retours are always interpreted liberally, so that a person is not deprived of his elective franchise, although there should happen to be a discrepancy between the values affixed to the separate parcels in the descriptive clause, and the *cumulo* value in the *valent*; and it is a matter of little consequence, whether there is an inaccuracy in framing the retour, or whether a trifling part of the lands has been given off. There is still sufficient evidence arising from the retour, that the lands are of a requisite valuation.

This was looked upon entirely as the common case of a straightening of marches, which, owing to the new road, the necessity of the case authorised. It could even have been compelled in an action for that purpose before the Sheriff. A canal might have the same effect of disjoining a small angle from one property, and laying it to another.

THE COURT found, (11th February 1803,) " That the freeholders did right in admitting the respondent on the roll."

To which judgment the COURT adhered, (1st March) by refusing a reclaiming petition, without answers.

For Stewart, *H. Erskine, J. Clerk, Ferguson, W. Erskine.* Agent, *A. Young, W. S.*  
 For Gordon, *Solicitor-General Blair, Hay, Cathcart.* Agent, *And. Macrobinnie.*  
 Clerk, *Menzies.*

F.

*Fac. Col. No 85. p. 188.*

1803. February 17. FERGUSSON against GLENDONWYNE.

ON 13th October 1801, a claim to be enrolled among the freeholders of Kirkcudbright was entered by William Glendonwyne of Glendonwyne, on the five merk land of Crogo. He was enrolled accordingly, and appeared at the meeting for electing their representative on 23d July. To his vote it was *objected* by James Fergusson of Crosshill, that Glendonwyne professed the Roman Catholic religion, and, having tendered the formula of the 8th Parliament

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A Roman Catholic found not entitled to stand on the roll of electors, though he had been admitted by the freeholders,