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"Electoral Law and Procedure in Eighteenth and  
Early Nineteenth Century Scotland."

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# Electoral Law and Procedure in 18th and early 19th Century Scotland.

## Chapter I

### County Representation before 1707.

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The subjects of electoral law and the conduct of politics in 18th century Scotland have been curiously neglected. Of modern studies E. and A. Porritt, "The Unreformed House of Commons", vol. II, pp.3-181, is an important pioneer work, but too general in approach and indigestible in form. Holden Furber's book on "Henry Dundas" is a valuable study of the greatest of the political managers, but it fails to penetrate the heart of the matters with which it deals due largely to a defective knowledge of the electoral system. James Fergusson, "Making Interest in Scots County Elections", S.H.R., 1947, and W.L. Burn, "The General Election of 1761 at Ayr," E.H.R., 1937, are more penetrating articles dealing with the shire and burgh of Ayr respectively. But in varying degree all these works fall short by confining themselves too narrowly to the projects of the politicians as revealed in their personal papers. The latter is an important source of information, but the peculiarities of the Scottish system were such that private correspondence and memoranda rarely yield the entire story. In brief, it is not enough to know what politician A in the shire of B planned at any

given moment, nor is it enough to know who his confederates were and whether or not they could reckon upon ministerial support. These, of course, are important considerations, but where this is the sum and substance of our information Scottish county elections will mystify at every turn. To find out what actually happened at elections one must have recourse to sources hitherto unused - namely, the minutes of the Freeholders and, where relevant, the records of the Court of Session. It is at this level that real knowledge of the operation of the electoral system in Scotland begins. Other sources extend this knowledge and invest it with much needed detail, but these official records form the basis on which any well-founded analysis of politics in 18th century Scotland must rest. In the following pages an attempt is made to utilise them for the first time.

To continue the survey of the literature, one special topic, Old Extent, has fared better than others with Professor J.D. Mackie's well annotated edition of Thomas Thomson's exhaustive "Memoria<sup>l</sup> on Old Extent". On more general matters, usually accounts of particular elections and especially the more engaging forms of roguery employed, there are fugitive references in local histories and sometimes in the papers read to learned societies. These are often of local value but otherwise of little importance. Not in this category but worthy of mention is Sir Charles Elphinstone Adam's essay introducing "The Political State of Scotland in 1783", an all too brief but excellent account of some of the leading features of the system in the counties.

Of the older literature there are three outstanding



treatises on election law, but these, while admirable for elucidating the legal complexities of the system (particularly in the counties), rarely give an adequate account of the political manoeuvrings that produced the cases. Alexander Wight, "Rise and Progress of Parliament", 2 vols. 1806 (first edition 1784) is the pioneer work, and considering the purpose it was meant to serve, that of a manual or guide to election law, excellent in every way. Drawing heavily on Wight, as is the manner of legal authors, but in some respects a fuller and more illuminating exposition is Robert Bell, "Treatise on the Election Laws, as they relate to the Representation of Scotland", 1 vol., 1812. A poorer work than either of its predecessors, to which again it obviously owes much, is Arthur Connell, "Treatise on the Election Laws of Scotland", 1 vol., 1827. Yet in spite of its inferior quality Connell's work is in many ways the most useful of the three, not only because it was published a bare five years before the Reform Act, but also because Connell illustrated the decisions by opinions taken from the Session Notes kept by Lord Hailes, a source of information that can no longer be traced. All three authors were advocates, Wight one of the leading pleaders on election cases in his day, and Bell an authority on conveyancing, a subject of exceptional importance in the old system of elections in the Scots counties. Their works, therefore, are authoritative and must form an indispensable part of the groundwork of any study of the 18th century electoral system. In the following pages, even where no specific references are made to them, the writer is

throughout deeply indebted to these old authors.

The reasons for this strange neglect are not far to seek. The subject is highly legal, abstruse and complex enough not to invite attention; but that is not the answer, for historians often tackle subjects which are, to all seeming, as arid and forbidding. In truth, in this, as in the study of other aspects of Scottish history, the Union of 1707 has had an inhibiting effect. There has been in the past a too ready assumption that the Union marked the end of Scottish history and that thereafter in these islands British history is the sole reality. But British history, as conceived by its practitioners, is something of a legal fiction, for too often what its devotees understand by the term is simply English history. Yet this is to refuse to come to grips with realities, and of these not the least is the fact that from 1707 until 1832 - and in attenuated form beyond that latter year - Scotland had an electoral system quite distinct from, and markedly different from, that of England.

This fact has never been obscured, and yet, despite the known importance of the 45 Scottish members in the House of Commons, little or nothing has been done to elucidate the means whereby these gentlemen were returned to Westminster. The result has been a prolific growth of legend, much of it based upon the acid comments of the Scotto-phobes of the reign of George III. John Wilkes' refusal to aid the ambitious young James Boswell in a Scots burgh contest on the ground that it was but "Goth against



Goth" is too well remembered and too faithfully reproduced. That Scotland was one venal nest of corruption is probably the only impression that has registered with posterity. In the words of the most recent writer on the subject, Professor Norman Gash, "from 1707 to 1832 Scotland resembled one vast rotten borough."<sup>1</sup> Elsewhere the same writer remarks that the term "a Scotch job" was notorious. In the sense that it was widely believed, no doubt it was notorious, but notoriety is no infallible index to truth. That 18th century Scots politicians were corrupt none would be found hardy enough to deny. But in reality did "a Scotch job" differ in essence from a Walpole job, a Cobham job, a Pelham job, a Bedford job, a Leicester House job, a Henry Fox job or any other 18th century political job? Such jobbery was all of a piece and the Scotch job was probably notorious only in the sense that the ferreters out of good things hailed all too clearly from north of Tweed. In short, it was their Scotchness that made their jobs notorious, and not just the methods employed. That the Scottish electoral system was corrupt in the 18th century is not to be denied, but corrupt in precisely what way? An uneasy silence is all the answer accorded this awkward question. The legendary answer that arose in the opening decades of the long reign of George III was later strengthened by the Scottish reformers, such as Francis Jeffrey and Henry Cockburn, and not so entirely on a reasoned appraisal of the situation that obtained in their day as

later quarriers in their works have imagined. They were advocates in politics no less than at law - a fact that is not always recognised. Legend is an odd drug. It either lulls into dumb acquiescence or provokes to iconoclastic fury. In the following pages an attempt is made as dispassionately as possible to ward off both effects and to try, in Matthew Arnold's magnificent counsel of perfection, "to see the thing as in itself it is."

It might seem that the logical starting point would be the representation granted to Scotland under the terms of the Act of Union, but this is not the case for the Act said nothing about franchises. The truth is that the Act determined the representation that Scotland was to have at Westminster, but that the franchises and the machinery of election were already determined by the law and custom of Scotland. This is true both of the counties and, to a lesser extent, of the burghs, but it would be well to consider first the case of the counties.

The basic statute is that of 1587 which introduced the system of representation for the shires.<sup>2</sup> It was the essence of the problem that originally all tenants-in-chief were required to render suit to the King's Council from which at some indeterminate point in the 13th century Parliament emerged. Inability to enforce attendance of the lesser barons had, however,

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2.

A.P.S., vol.III, pp.509-10; for a detailed account of the earlier constitutional history of Scotland and the events that led up to this important statute, see R.S. Rait, "The Parliaments of Scotland", passim.



been a problem from the days of James I. In 1427<sup>8</sup>/James had passed an Act outlining the essentials of the scheme adopted in 1587 and which the later Act described as "gude and lovable." The Act of 1587 was in fact the last of many which had grappled with the problem of the lesser barons. It sought to end the matter by obliging the smaller tenants-in-chief in each sheriffdom or stewartry to choose annually at the Michaelmas Head Court "two wise men, being the kingis freeholders" to represent them in Parliament. The Act does not say "tenants-in-chief", but like those of 1425, 1427, 1457 and 1503 speaks of "freeholders." This has given rise to some confusion. What precisely was meant by a freeholder? Lord Cooper has shown that "freehold" was then accepted Scottish usage for liferent, but it is difficult to see in what way this can be identified with the statute of 1587.<sup>3</sup> Not only is this hard to reconcile with the wording of the Act itself, but it is completely at odds with the statute of 1661 which specifically granted liferenters the franchise. As we shall see, the terminology employed in these early statutes dealing with the county franchise is capricious, but regard the matter how we will we cannot force the equation of "freeholder" and "liferenter".

What then did "freeholder" imply? The answer can only be

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3.

See Juridical Review, 1945, T.M. Cooper, "Freehold in Scots Law", pp.1-5, and W.C. Dickinson's comments on this, *ibid.*, pp.135-151. Professor Dickinson is right to reject the freeholder of 1587 as a liferenter, but falls into error over the statute of 1661. Vide infra.

the traditional one - the freeholder mentioned in these statutes, whatever the term may have implied in other contexts, was simply a small tenant-in-chief, one who held lands direct of the king but whose lands were of slight extent and had not been erected into a barony. This is consonant, as Professor Dickinson shows, with the process of differentiation in the estate of the barons that was so well marked a feature of the 15th century.<sup>4</sup> The earliest writers on the county franchise all recognised this. In 1710 William Forbes defined the position crudely but in no uncertain terms - "All such as hold their Lands immediately of the Sovereign, are called here Freeholders: whereof some are called Great, and some Small Barons. The Nobility are the Great Barons."<sup>5</sup> Wight and the other treatise writers hold to the same interpretation. Lord Cooper's liferenter is, in this context, a red herring.

Closer examination of the Act of 1587 drives home the point. It was for its time carefully drafted and its provisions, so far as the scanty records of the sheriff courts of the late 16th and early 17th centuries will permit of judgment, scrupulously observed. Only tenants-in-chief could render suit to the Head Courts where the elections were to be made. Furthermore, the freeholders were restricted to those holding by the old feudal tenures of ward and

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4.

W.C. Dickinson, op. Juridical Review, vol.57, pp.140-1.

5.

William Forbes, "A Letter from William Forbes Advocate to his Friend in England .... concerning the Law of Election of Members of Parliament etc.", 1710 (N.L.S. 5.757-13), p.4. This is a mere pamphlet, ill arranged and poorly composed, but not as contemptible as its format might suggest.



blench. The king's feuars did not attend the Sheriff Courts, nor were their lands assessed on the Old Extent. But the forty-shilling freehold which the Act laid down as the qualification for the franchise was of Old Extent although not specifically designated as such.<sup>6</sup> In the face of all this evidence it can only be concluded that the freeholder of the Act of 1587 was simply a small tenant-in-chief. If for "freeholder" we substitute "liferenter" the Act of 1587 becomes nonsensical.

Another point which may then have obscured counsel, and certainly did later, was that the freeholder of the early representation Acts was being made to approximate in some sense to the traditional elector in the English counties. Certainly it is odd that in 1587 the elector in the Scottish sheriffdoms and stewartries should be a forty-shilling freeholder. This may or may not have been a conscious plagiarism, but later the term "freeholders" was used in a generic sense to describe all electors in the Scottish counties even though these differed widely in status and qualifications. This was what Forbes had in mind when he set out to enlighten his English friend on the electoral machinery of Scotland. As in England, the freeholders in Scotland were the county electors but there the resemblance ended. It is these semantic variations that make it impossible for the earlier statutes to be used to bolster up theories as to

why a freeholder was a liferenter or what not. Indifferently, they speak of "barons", "heritors", "freeholders" - but these were all used as synonymous terms, and the use of "freeholders" to denote all county electors rapidly came to be the sense that prevailed and was accepted usage all through the 18th century.

Little is to be learned of election procedure from the scanty records of the Head Courts that have been uncovered. A few items have been printed in the "Records of the Sheriff Court of Aberdeenshire", but they throw little light on the subject. They do, however, reveal that only those who owed suit to the Sheriff Court might elect. The earliest election recorded, that of 1596, did not take place at the Michaelmas Head Court, but was still described as being made by "the haill barrowniss within the Shreldome of Abirdein."<sup>7</sup> Nor does it appear that elections were made annually, but whenever the need arose. This was not outside the terms of the Act of 1587 which stipulated annual elections at the Michaelmas Head Courts but also allowed elections to be made at such other times as were convenient to the freeholders or to the king. That is the substance of the Act, and there is no need to recite in detail the entire procedure of summons and returns. On the last head the only point of interest is that commissions had to bear the signatures of at least six barons or freeholders, a requirement that was not always easy to meet, for in some of

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7.

D. Littlejohn, ed., "Records of the Sheriff Court of Aberdeenshire", vol.I (1904), p.372-3.



the small shires the number of freeholders might well fall short of this number. Finally the barons were to defray the expenses of their commissioners but no scale of payment was laid down and since the commissioners could not bring diligence against defaulting freeholders this provision seems to have been generally evaded. For its time the machinery was ambitious, perhaps over ambitious, and for fifty years after the passing of the Act the representation of the shires was fitful and sporadic. The Head Courts were busy institutions and the whole question of representation probably viewed as an annoying and not altogether necessary imposition.

It was not indeed until after the Restoration that a Parliament, that of 1681, contained commissioners from every sheriffdom and stewartry. By that time the attitude of the freeholders had greatly altered. The civil war in the reign of Charles I was not entirely a religious struggle, and the constitutional element so easily recognisable in the English civil war was by no means lacking in the Scottish upheavals. Scotland too had its corpus of legislation aimed at the deliverance of Parliament from the iron grip of the Lords of the Articles and the prerogative of the king.<sup>8</sup> While it is true that the Act Rescissory of 1661 abrogated these measures it required more than a statute, however sweeping its terms, to kill the political ideas and aspirations

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8.

Charles Sanford Terry, "The Scottish Parliament, 1603-1707," 1905, first gave these developments the prominence they deserve. They are admirably summarised, with selections from the main documents, in W.C. Dickinson and G. Donaldson, eds., "Source Book of Scottish History", vol.III, ch.V.

that had been fostered by the brief life of a Parliament untrammelled by the king or Articles rigged in his favour. All the Royal Commissioners from the Restoration to the Union experienced the truth of this, and indeed the members of the Cavalier Parliament itself could be refractory on occasion. It is, therefore, from the Restoration that Parliament began to play a more vigorous part in Scottish life and that the barons and freeholders began to covet the commissions that entitled them to take part in its deliberations.

Most of the information on this subject is contained in the proceedings of the "Committee anent the Controverted Elections" which from 1669 was regularly set up at the beginning of each Parliament or Convention.<sup>9</sup> As well as genuinely endeavouring to end malpractices, however, the Committee was used by the Executive to manipulate returns. This was particularly true of the Convention of 1678 which opened with many controverted elections to be settled. The Duke of Lauderdale was then in grave difficulties and forced to use the Committee to gain a favourable Convention, a fact that did not escape the sharp eyes of Gilbert Burnet. Burnet accused Lauderdale of manipulating the returns, among other devices "by carrying elections, or at least disputes about them, which would be judged as the majority happened to be

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9. A.P.S., vol.VII, p.552, 19 Oct., 1669, for its first institution, and thereafter passim. E.B. Thomson, "Parliament of Scotland, 1690-1702", 1929, ch.VI, pp.55-65, is a digest of the evidence from this source.



at first." Danby it appears was not the only statesman who was then striving to solve the problems of what was later to be technically known as "management". As a result of these moves, says Burnet, the Duke was master of "four parts in five of that assembly,"<sup>10</sup> a point borne out by the compliant manner in which it granted three years supply, without which Lauderdale's tottering policy must have collapsed even more ignominiously than it did. The records bear out Burnet's account. Yet even with the important proviso that the Committee could be used as an instrument of management its work reveals some interesting features. How far the objections that were sustained in 1678 were just, how far fabricated to suit Lauderdale's purposes, is not known. Some of them probably were genuine, and at anyrate, quite apart from the needs of the Executive, malpractices at elections were clearly becoming common. So too were frivolous complaints to the Committee as this body, perhaps sardonically, noted in 1678. In an attempt to forestall these time consuming controverted returns, it was suggested by the Committee that no complaints should in future be received except such as had been moved at the election meetings concerned, or in the case of double returns.<sup>11</sup> This became standard procedure.

Two important statutes illustrate, and indeed help to

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10.

Gilbert Burnet, "History of My Own Times", ed. Airy, vol.II, pp.148-9.

11.

A.P.S., vol.VII, p.218, Report anent Objections against Elections.

account for, this heightened interest in Parliament. An Act of 1661 aimed specifically at bringing in the feuars. Professor Dickinson finds some difficulty in the Act<sup>12</sup> in that besides all heritors who hold a forty-shilling land of the king IN CAPITE, all heritors, liferenters and wadsetters holding of the king, and others who held their lands formerly of the bishops or abbots but now hold of the king, whose annual rent amounts to ten chalders of victual or £1,000 Scots, all feu duties being deducted, should have the franchise.<sup>13</sup> There is in fact no mystery here. In 1587 the payment of feu duties had been the only returns made by feuars, but by 1661 they were contributing to the cess on their real rent.<sup>14</sup> The object of the Act, then, was to enfranchise the feuars so as to secure fuller representation of taxable lands. For the first time, too, provision was made for liferenters and wadsetters. These developments were necessitated by the desertion of Old Extent (finally abandoned in 1665) in favour of assessments based upon actual value. The Act also went a long way towards vanquishing old prejudices against attending Parliament by ordaining that the commissioners should be paid £5 Scots for their daily allowance while attending Parliament and a pro rata payment towards travelling expenses. If Caithness and other awkwardly situated parts were

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12. W.C. Dickinson, *op. Juridical Review*, 1945, pp.136-7.

13. A.P.S., vol.VII, p.235.

14. R.S. Rait, "Parliaments of Scotland", p.212.



to be represented such an enactment was, in the prevailing poverty of the country, well nigh indispensable.

The second Act referred to, that of 1681, was the most important of all, for with few substantial alterations it remained the basis of the system of election <sup>in</sup> ~~on~~ the counties until 1832.<sup>15</sup> It was evidently introduced to widen the electorate, define the franchise more strictly, and also to improve election procedure and prevent malpractice. It established two alternative qualifications for the franchise. First of all, there was to be the forty-shilling freeholder as before, but now definitely qualified as of Old Extent. It also enfranchised those who held lands valued at forty shillings of Old Extent in feu-farm, but in reckoning Old Extent the feu duties must be distinct.<sup>16</sup> The Old Extent was an obsolete system of taxation supposed to date back to the days of Alexander III.<sup>17</sup> How the Old Extent was to be instructed the Act does not say, but in practice the only real proof lay in the production of a retour from chancery, i.e. the return of a jury in a brieve of inquest describing the lands and their valuation on the Old Extent. Such retours might be of considerable antiquity, often dating from the 16th or 15th centuries when the Old Extent was used for fiscal purposes. This, however, imposed a heavy strain on the records of Scotland which were not always well kept, and the Act recognised

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15.

A.P.S., vol.VIII, pp.353-4, 17 Sept., 1681.

16.

For a brief discussion of this problem, vide infra, ch.II.

17.

For a very full discussion of this difficult subject, see Professor J.D. Mackie's annotated edition of Thomas Thomson's "Memorial on Old Extent", which is a mine of information.

that in a great many cases Old Extent could not be proved. Also some lands, the old kirklands, never had been valued on the Old Extent. For these reasons an alternative qualification was defined, based on a modification of the device used in 1661 to enfranchise the feuars. The real value of £1,000 Scots was deserted as being too high and the qualification fixed on "lands lyable in publick burden, for his majesty's supplies, for four hundred pounds of valued rent." Whatever the origin of the lands, whether old kirklands or not, and whatever the tenure, those "publickly infeft in property or superiority" of lands of this value held of the king or Prince of Scotland should have the right to vote.

The words "in property or superiority" were later made the starting point of some peculiar developments which did much to create havoc in the 18th century. Sir Robert Rait thinks that this was due to the influence of Stair, who insists in his "Institutions" on the rights of superiority.<sup>18</sup> A dissent must be registered on this point. Stair had to take cognisance of the rights of superiority; they were implicit in the feudal law of Scotland, and it is misleading to accuse him virtually of creating the concept of dominium directum. Anyway, the insistence on superiority is in accord with the whole history of representation in Scotland.

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18.

R.S. Rait, "Parliaments of Scotland", p.213.



<sup>Vassals</sup>  
~~Cassals~~, except in the anomalous case of Sutherland, could not vote.<sup>19</sup> In fact, it may even be that Stair, who is said to have drafted the statute, was seeking to widen the electorate by enfranchising those who enjoyed usufruct as well as those who enjoyed superiority. Certainly the wording of the statute as it stands supports this view, and some other provisions seem to support this construction. In these the right to vote was conferred in special circumstances. On the expiry of the legal an appriser or adjudger might be enrolled if the lands on which the adjudication were brought was of the requisite valuation. Similarly, proper wadsetters might vote. This was a form of mortgage which gave the wadsetter every right to the lands, either of returns or pertinents, such as the right to vote, saving only the fee. Apparent heirs might vote on the qualifications of their predecessors; husbands might, by courtesy right, vote for wives who held the fee to requisite valuations. Liferenters if infeft in lands of sufficient valuation might vote, and, in their absence, the fiars on the same lands. These were all variations on the one theme, that the vote lay in land of the requisite valuation and that in all circumstances the land ought to be represented.

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19.

The sheriffdom of Sutherland was not instituted until 1633, when John Earl of Sutherland gave up his rights of regality. But since the Earl still held ~~in~~ most of the land IN CAPITE and was as a nobleman debarred from electing or being elected for the estate of the barons his immediate vassals were allowed to vote. A.P.S., vol.V, pp.62-3, 28 June 1633. No franchise qualification was fixed until the Act 16 George II (1743) required electors in that shire to be infeft in lands valued at £200 Scots per annum. Many anomalous cases arose from these vague arrangements, for which see Rait, "Parliaments of Scotland", p.216.



Indeed the more one examines this Act the less inclined one is to accept the condemnation that has been its lot. Too many, like Sir Robert Rait, read into it all the abuses of the 18th century. There is, as will appear, no warrant for this whatever. Met on its own terms, those of the late 17th century, the Act, from being the worst of the representation statutes, becomes the best. So far from being a curious blot on Dalrymple's great name it proves a perfectly worthy memorial, quite in keeping with the massive and clarifying intellect that produced the famous "Institutions of the Law of Scotland".

The Act of 1681 also further defined the machinery of the electoral system. The terminology employed is curious and serves to illustrate the remarks already made on this head. The word "freeholders" was now used in a generic way to describe all those electors whose names, designations and valuations should be inserted in a Roll that was to be compiled in each sheriffdom and stewartry. It was to be drawn up "whether lying within stewartries not haveing commissioners, or bailiaries of royalty or regality", a reminder that lands within these categories were probably excluded from the previous representation Acts. The list was to contain the valuations and designations "of the fiars, liferenters, and husbands, having right to vote for the same." Later the statute enacts that "the whole heritors, liferenters and wadsetters" within the shire shall be responsible for the expenses of the commissioners. Clearly, nomenclature was of the vaguest and it would be a risky business to assume that words were always



used in their strictest technical senses. Thereafter the "freeholders" (so runs the statute) were to meet each year at the Michaelmas Head Court to revise and adjust the Roll. This, the Barons' Head Court or Michaelmas Head Court, derived from one of the three full sessions of the Sheriff Court,<sup>20</sup> but in pursuance of the Act of 1681 it came to constitute a new life for itself. In the 18th century it was often, and in one sense, accurately described as the Court of the Freeholders. But it was not really a Court at all, once it had severed connections with its parent. It was not fenced, nor, accurately speaking, did it possess a jurisdiction. It was rather a meeting on which certain statutory powers had been conferred.\* All the same it would be pedantic not to use the terms "Court" and "jurisdiction", not only because they have been sanctioned by usage but also because the exact status of the Head Court was not defined over the greater part of the period between 1707 and 1832. The freeholders certainly believed that they constituted a Court and that they possessed a jurisdiction and for the most part the judges of the Court of Session agreed with this view.

Some marks of its shrieval origin remained to the end. Between meetings, for example, its records were held by the sheriff

20.

See W.C. Dickinson, "Sheriff Court Book of Fife", pp.XIV-XV.

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See Connell, "Election Laws", p.85, who gives Lord Auchinleck's view of the matter in Mackenzie v Macleod, 9 Feb., 1768; "Auchinleck, - As to competency, the freeholders hold a meeting, not a court. That is an abuse in language."

or steward clerk and indeed in the 18th century to expedite matters it was common for that official to be chosen ~~to act~~ to act as clerk at the Michaelmas meetings. Something too of the wide jurisdiction of the parent body remained all through the 18th century. The Michaelmas Head Court did not deal only with electoral matters. All sorts of business connected with the shire could be discussed at these meetings - the laying on of Rogue Money, the standard rate at which servants should be hired, business connected with the Supply, the maintenance of jails and hospitals, the building and maintenance of roads and bridges, and all the odds and ends of business that might crop up from time to time. None of this rested on a statutory basis; it arose purely as a matter of expedience to help out local government in an age in which the machinery of local government was notoriously weak. But the Reform Act of 1832 recognised that the Head Courts performed valuable services in these ways and while abolishing the Head Courts took care to transfer these duties to the Commissioners of Supply.

The really important point to notice here, however, is that under the terms of the Act 1681 the sheriff emphatically had no jurisdiction in the Barons' Head Court. This was not at all to the liking of the sheriffs, particularly the hereditary officers, and they frequently contravened the Act. Nevertheless the ultimate decision went against them. In 1700 one return from Wigtown was quashed largely on the grounds that the sheriff had



taken part in the election meeting and even claimed, ex officio, to act as preses.<sup>21</sup> This decision in Parliament settled the issue and was based entirely on the Act 1681. Only in the case of election meetings, which followed the same forms as the Head Courts but were differently constituted, did the sheriff retain some vestige of authority. It was he who was charged with formally intimating an election meeting, which was to be held in the head burgh of the shire at the usual place of assembly for the sheriff court between the hours of mid-day and 2 p.m. In the absence of the last elected commissioner to Parliament the sheriff or steward clerk was empowered to open the meeting and to take the votes for preses and clerk. Once these offices were filled the sheriff clerk handed over the papers of the freeholders and ceased thereafter to participate quod sheriff clerk, although as a matter of convenience he might act as the clerk elected by a majority of the freeholders. Finally, the sheriff acted as the returning officer. All else was in the hands of the freeholders.

How exactly did one gain admission to the Roll of Freeholders? It was possible to be registered only in two ways: either by satisfying the barons at Head Court or election meeting that the claimant was formally infeft in a sufficient valuation and ready to take the Test Oath, or failing that, by having his case appealed to Parliament or if that were not sitting to the Court of Session. Before

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21.

A.P.S., vol.X, p.203, p.223, 224-5.

1707 such appeals would have been couched in protests against returns of commissioners. There are, however, no recorded protests against non-enrolment, which, even allowing for the vagueness of reporting, would suggest that before the Union such pleas were rare. Indeed, the protests in the controverted returns are often against undue enrolments. The importance of the Roll cannot be overstressed. Its existence was the great difference between the Scottish and English systems. Not until 1832 was a register of electors introduced in England, but in Scotland from 1681 onwards the Roll of the Freeholders played an increasingly important part in elections. Apart from this, the system that operated in Scotland between 1681 and 1707 in a general way resembled the English, except that in certain circumstances appeal might be had to the Lords of Council and Session. In the beginning procedure was simple. A claimant for enrolment would submit to the freeholders charter, sasine, and some proof of valuation. For this last, if possible a retour to instruct Old Extent would be produced, although a charter if sufficiently precise in its terms might be accepted in place of a retour, and in the case of valued rent a certificate from the Commissioners of Supply would be required. The claimant had to be a major, willing to take the Test Oath and later the Oath of Allegiance to William and Mary along with the Oath of Abjuration. Failure to comply with any of these requirements would justify the freeholders in refusing to enrol. Once admitted to the Roll the freeholder could take part in all the deliberations of Head Court and election meeting.



This was what the law required but in practice the freeholders were not sufficiently checked and they probably ran their affairs in whatever haphazard fashion appealed to the majority. It is impossible to be precise on this point and it would be rash to generalise. In the absence of minutes of the freeholders from 1681 to 1707 it is dangerous to speculate, but the absence of such minutes suggests that the Head Courts either did not meet annually or did not take their work too seriously, at least so far as the keeping of records was concerned. Only Banff (1664), Lanark (1673), Ayr (1702) and Haddington (1702) have records that antedate the Union. A close inspection of these, and a diligent search of the records of other sheriff courts, would probably prove of great value, but these records are held locally and, besides, considerations of time and space have precluded any attempt to analyse them here. All the same, in the absence of such a close analysis it is probably unjust to stigmatise the electoral system before 1707 as defective and the subject of little interest in the counties. Rait, dazzled as ever by the Stubbsian vision, can only compare the English and Scottish systems with dire results for the latter. This judgment arises from bad perspectives. Sir Robert tended to judge all representative institutions by the largely hypothetical case Bishop Stubbs made out for the English Parliament in the Middle Ages. By this standard the Parliament of Scotland emerges as a forlorn orphan doomed to spend its days in a home for waifs and strays. But, as well as being dominated by the past,

Rait, in a sense, was dominated by the future. He read back into the late 17th century all the abuses that disfigured the electoral system in the 18th century. His conclusion that the Scottish system was still in its swaddling clothes and that there had been no time to establish a tradition is convincing only if one assumes that it takes at least 300 years to establish a tradition. There is in fact evidence that in Scotland a parliamentary tradition was firmly established between the Restoration and the Union. We could do no better than illustrate this heightened interest in Parliament from a revealing incident that occurred in one of the Highland counties that are too often dismissed as verging on Ultima Thule.

On 16th October 1697 Sir Robert Munro of Fowlis, wrote to Hugh Baillie, the Sheriff Clerk of Ross, returning an extract of the political state of the shire, and at the same time explaining why Munro of Lemlair's claim to be enrolled was good.<sup>22</sup> The extract from the minutes of an election meeting is of the utmost interest, revealing as it does that the election technique that dominated the 18th century was already in its essentials fully worked out. In the form of a diagram the extract is given as follows:-

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22.

W. McGill, "Old Ross-shire", vol.I, No.264, Sir R. Munro to Hugh Baillie, pp.99-100. Incidentally, the correspondence proves that freeholders' records were kept in Ross-shire but have since been either destroyed or lost.



[Ross of] Balnagown offers	8
[Mackenzie of] Garloch	14
[Mackenzie of] Scatwall	16
[Mackenzie of] Coule	7
[Mackenzie of] Allangrange	1

The total number of votes cast was, therefore, 46.

The report continues and from here on must speak for itself:

"Its objected that the preses Kilravock ought not to vote except in the caise of Equalitie in voteing. Its ansered that ye laird of Kilravock tho preses ought to be receaved in respect yt. qn. the objections hinc inde are decydit by ye committee for controverted elections Kilravicks vote agt. ym. yr. is no objection may cost the ballance. The Laird of Balnagowan protested is not a free election in respect that many of the barrons were imposed upon by letters <sup>antipciating</sup> ~~anticipating~~ [sic] the election and oyr. methods taken to keep barons from being pnt. to vote qch. are contrar to law and that therefor commissiones may be signed separatim and every baron to sign according to his vote . . . . took instrumnts." A curious instance of lack of interest this! Ross of Balnagowan, a Revolutioner, managed to have the Jacobite Scatwell's return quashed, but without himself gaining the coveted commission. He

failed again the following year, on which occasion we find him writing to Hugh Baillie, "Assured freind, Faile not by this express to send me ane extended protestatione containing all the objections against Foulis and such as elected him."<sup>23</sup> Ross and Munro were both firm Revolutioners, so the contest cannot be said to have been entirely due to the passions let loose by the events of 1688-89.

On the whole, the electoral system of Scotland as it stood on the eve of the Union compares favourably with that of England. Considered from the point of view of regional representation the Scottish system was much better proportioned and much more logical. What is more it was consonant with the social and economic realities of the times. This may surprise those whose knowledge of the old system of representation is confined to the pages of the urbane Henry Cockburn. It will be no shock to anyone acquainted with conditions in the late 17th century. At that same time the English representative system was becoming more anachronistic. Even Clarendon admitted that Oliver's reforms "were meet to have been made in better times." The undoing of Oliver's work and the rise of management almost wrecked the system of representation in England. The Scots system lived; that of England was fossilised. In Scotland each shire had traditionally been allowed two commissioners but in 1690 certain of the larger shires were granted additional representatives.<sup>24</sup> The Revolution produced no such

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23.

W. McGill, "Old Ross-shire", vol.I, p.100.

24.

A.P.S., vol.IX, p.152.



results in England although it occasioned some criticism of the existing arrangements. These are important points that are too often overlooked. Whilst not wishing to idealise the situation, it must be said quite firmly that in its last days the old Scots Parliament was by no means the contemptible institution it has so often been depicted. It is impossible to read through its Acts and accounts of its proceedings and maintain the impression that it was a hollow sham. It was also well served by an electoral system superior in most respects to that of England. In the latter country the looseness of the electoral machinery was notorious. In fact, the real weaknesses and defects of the Scottish Parliament arose not from institutional shortcomings but from the dependence of the Executive upon the English court. The tragedy of the Parliament of Scotland lay in the fact that once it had slowly freed itself from complete dependence on the monarch and fitted itself in every respect to act as an independent legislature it was hampered at every turn by the needs and requirements of the king's other kingdom.

There were undoubtedly defects in the electoral system, both in theory and in practice, but abuses before the Union seem to have been on a small scale. The manipulation of returns, the occasional resort to violence, these were symptomatic of weak local government, and common to both the English and the Scottish systems. Indeed, even in the 19th century such manifestations were not unknown. Allowance must be made for the times, and there is no evidence that malpractices undermined free elections. The work of the Committee

could, and very often did, set matters to rights. A far more ominous feature perhaps was that shortly before the Union votes on bare superiorities were being sustained.<sup>25</sup> Yet we have to be careful here, for these cases were not in the same category as the nominal votes created on bare superiorities in the 18th century - that was a later and completely different development of which no traces can be discerned before 1707. To cite one of the cases in 1701, Mitchell of Daldilling had sold the property on which he was enrolled but retained the superiority. By the wording of the Act 1681 he was still clearly an eligible voter. Similarly, Broun of Coalston fell heir to a superiority although not possessed of the property. There was, so far as one can judge from the evidence, nothing nominal or fictitious about these cases. Superiorities were definitely subjects of value and the situations in the cases cited above rose from a natural series of business transactions. An interesting mystery is the fate of those who held the property of such lands. Were they ever enrolled by virtue of their rights of property, and were they disfranchised as a result of these decisions? Only close scrutiny of the records of the freeholders for the period 1681-1707 can answer these questions. Of more significance at the time was the objection made to John

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25.

A.P.S., vol.X, 2 Jan.1701, pp.237-9, where objections against several Ayrshire voters were rebutted on the plea that they had retained their superiorities and that these conferred the right to vote. The same view was upheld in the case of Robert Broun of Coalston in West Lothian, A.P.S., XI, 19 June 1703, p.62.



Campbell's commission for Ayrshire in 1701. This was that he was not an indefeasible freeholder, but enrolled in virtue of lands disposed to him in trust by his brother, the Earl of Loudon.<sup>26</sup>

Campbell purged himself of the charge by oath, but undoubtedly the use of trust conveyances was known before 1707, although to what extent they were employed can only be matter of conjecture. The writer inclines to believe that franchise abuses were not widespread before the Union, but that they became so after that event and largely as a consequence of it.

The only serious objection in the shires might arise from the smallness of the electorates. Yet such criticism depends overmuch on hindsight and considerable anachronism. We have no precise numbers but at most the county electors cannot have numbered more than 1500. The figures we have from individual counties indicate that numbers were fairly constant from roughly 1681 until the 1760s, when the proliferation of fictitious freeholds began in earnest. For example, in 1665 the freeholders of Ross numbered 31.<sup>27</sup> In 1697 46 freeholders voted at an election, reflecting the increase in the electorate consequent on the Act 1681.<sup>28</sup> In 1702, 30 freeholders compeared at a Head Court to adjust the Roll, but others

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26.  
A.P.S., vol.X, p.237-9.

27.  
W.McGill, "Old Ross-shire", vol.I, p.93.

28.  
Ibid., pp.99-100.

were certainly on the Roll who did not attend on that occasion.<sup>29</sup>  
 In 1741, 34 votes were cast at an election.<sup>30</sup> In 1765 the Roll consisted of 43 names.<sup>31</sup> By 1782, owing to the growth of fictitious votes, it had swelled to 83.<sup>31</sup> The same trend is noticed in Cromarty and Stirlingshire.<sup>32</sup> If these numbers are<sup>84</sup> all representative they are not out of harmony with a country whose population was then, roughly, little over one million, whose society was predominantly rural and whose social nexus was decidedly feudal. Taking all these factors into consideration, not forgetting the social and political theories that underlay the system, if more electors were required where were they going to come from? It is easier to ask than to answer such a question. What an independent Scotland would have made of the radicalism of the late 18th century it would be idle to speculate. On the whole, Sir Robert Rait's conclusion that feudal ideas would have proved too strong for the rights of man is as sound as any inference on such a speculative topic can be. The Scots have always <sup>u</sup>crisiously blended democratic social ideals with authoritarian institutions, and certainly the state trials of 1794, and in these not merely the conduct of the judges, indicate that authority did not lack champions. Be this as it may, the Parliamentary system that came to an end in 1707

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29. W. McGill, "Old Ross-shire", vol. I, p. 100.

30. Ibid., p. 101.

31. Ibid., p. 400. In 1782, the votes were categorised as follows: Real Barons; Property Lands 37; enrolled on superiorities to heirs, 4; enrolled on lands, partly property and partly superiority, 3; enrolled on liferent superiority, 39 - total 83.

32. For Cromarty, vide infra, chapters III-VI; for Stirlingshire, see Minutes of Freeholders, 11 vols., Reg. Ho.



was not feudal in any backward, obscurantist or selfish sense.

The Acts of the Parliaments from 1660 onwards speak for themselves and show a higher regard ~~for~~<sup>for</sup> what Cromwell in one of his rambling lucubrations once called "the meaner sort in Scotland" than is evidenced by the supposedly broader based English Parliament for what one of the agitators at Putney in 1647 termed "the poorest He tha<sup>t</sup> is in England!"<sup>33</sup>

Again it was a true representative system that evolved latterly in Scotland. The very term used to describe one of the small barons who sat in Parliament, "commissioner to the Parliament", is significant. He was commissioned to represent the freeholders of that shire, and by implication their feudal dependents. His task was not just to air his views or cast his vote on national politics, but to defend and advance the interests of his own shire, to see that it was not too heavily taxed, to furnish it with lucrative fairs and everything else that would promote its life and prosperity. There was indeed more than an element of "transformismo" in the Scottish idea of representation, and, in

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33.

Sheriff W.A. Alison first pointed out the important contributions made to the national life by the Scots Parliament, in Blackwood's, 1834, vol.36, article, "The Old Scottish Parliament", pp. 661-72. Although designed as a counterblast to Whig political ideas it is a sound paper, and the A.P.S. bears out his main contentions, particularly on such matters as poor relief and education. W.C. Dickinson and G.Donaldson, eds. "Source Book of Scottish History", vol.III, illustrate these themes admirably. It is not, of course, argued that statutes were then automatically implemented in practice, but at the same time the Acts from 1660-1707 very definitely show more than mere good intentions. Despite frequent falling short of high ideals they laid the foundations for the social and economic development of Scotland in the 18th century. Wanting such foundations the Union of 1707 might not have proved so happy.

considering the charges of corruption so often laid against Scottish Members of Parliament in the 18th century, it must never be forgotten that the old Scottish ideal of representation did not die with the Union but throve in a new environment to which it was but too well adapted. Venal the Scots members tended to be, but it was not just personal venality. The 18th century Member who could not visibly promote the interests of his county was apt to be suddenly rejected. The pressure of his electors bore on him in a way that seldom arose in English constituencies. As an instance of this the following excerpt from an election meeting for the shire of Midlothian, held on 8th October 1710, is both revealing and typical. "Then the Meeting proposed that who ever should be elected to represent this Shyre should serve Gratis and be oblidge to free the Shyre of fees or wages and besyde should take particular care of the affairs rights and priviledges of the sd. shire . . . . and that he shall receave and represent whatever greavances and representations shall be sent him by the Shire of their Comittie and shall negotiat and manadge the Same as he will be answerable to the Shire." A Committee of the Shire was regularly appointed and consisted at this time of 16 of the most substantial freeholders. Any three were to form a quorum and they were to meet from time to time as affairs required to draw up and pass on grievances and representations to their Member.<sup>3:4</sup> This was common-form in



Midlothian and when, for example, on 20th. October 1774 Henry Dundas was elected to serve the shire in Parliament such a Committee was appointed "to Correspond with the Representative and to meet as often as they shall see cause."<sup>35</sup> A similar procedure was used in Stirlingshire and of this there is some remarkable evidence in the shape of "Instructions by the Gentlemen Freeholders of the Shire of Sterling To their Representative for the ensuing parliament" which are dated 14 September 1727.<sup>36</sup>

Immediately after the election of Henry Cunningham of Boquhan on 14 September 1727 these instructions were handed to him. "First, You are with all necessary diligence to repair to London so as to be present at the opening of the Parliament and to give punctual attendance each Session from the Sitting down thereof that your Country in general & Constituents in particular may not suffer through your absence.

←—Second, You are to use your outmost endeavours toward procuring redress of Such grievances as the plurality of your Constituents or any Person or persons by them appointed shall from time to time represent to you and to forward all applications from them for that purpose whether by address to his Majesty, petition to either or both houses of Parliament or remonstrance to the

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35.

Records of Sheriff Court of Midlothian, Freeholders' Minutes, vol.3, pp.9-10. Exactly the same procedure was followed in 1775 and 1777 when Dundas was re-elected.

36.

Cunningham Graham Muniments, section 3 (not yet inventoried), Reg. Ho.

Ministry, which address, petition or remonstrance respective you are to present in person." Then follows a long list of specific measures that he was to support by every means in his power - repeal of the Malt tax, more expedition on the carrying out of capital punishment in the northern shires, agitation for a full and free pardon (for Jacobites, obviously), repeal of the Septennial Act and the bringing in of a Triennial Bill, opposition to any further taxation in Scotland. Articles 8 and nine are extraordinarily revealing and must be given in full. "Eighth, In all other things that shall happen to be proposed in Parliament You shall vote in the manner that to you shall appear to tend most to the good of your Country in General and Constituents in particular - and give under your hand if required by any five of your Constituents the reasons that induced you to vote in any particular case as to which you had not time to wait their sentiments Ninth, Before each Session of Parliament You shall by a letter Signify to your Constituents that you are willing at a certain day & place within the Shire which you are to name, to meet with them in order to receive their farder instructions for the good and interest of the Shire & Country in General, and during the Sessions of Parliament You are to correspond with and acquaint them or a Committee of them of all material occurrences in Parliament particularly Such as may more immediately concern the Shire you represent or any other part of North Britain."

Every page of this document was signed by the preses of the election meeting and by Henry Cunningham as the elected freeholder.



Not content with this the freeholders then required an explicit promise from Boquhan that he would faithfully observe these directions. "I Henry Cunninghame of Boquhan Esquire Do promise and engage upon Honour truth & Honesty That I shall punctually observe and execute the foregoing instructions consisting of nine articles and shall conform my Self to what farther instructions shall be transmitted from time to time by my Constituents to me relative to the interest of North Britain in General and the Shire of Sterling in particular the same being subscribed by a plurality or Quorum appointed by them In witness whereof," etc. This copy was evidently given to Boquhan, while some common-form phrase, such as that already cited for Midlothian in 1774, was inserted in the Minutes of the Freeholders.

All this differed greatly from English practice. In England the member's connections with his electors tended to be of the slightest and usually of a cash in hand nature. Such a <sup>m</sup>ember, if of a philosophical turn of mind, might justify himself as being representative of something on a higher plane. The real distinction, however, lay in the differences between English and Scottish election procedure. The commissioner had to court the freeholders; the English member could often secure his return by influence and manipulation. Not that these were unknown in Scotland but unless they were geared to the Scottish system their effects could easily be dissipated. If, for example, Edmund Burke had addressed the ideas contained in his <sup>Address</sup> ~~Letter~~ to the Electors of Bristol" to the freeholders of Stirling, however acceptable he

might have been to them otherwise it is doubtful in the extreme if the most massive use of influence and gerrymandering would have secured his return. Henry Dundas understood this perfectly. The great secret of his success, indeed, was in catering for the elements of venality implicit in any such idea of representation. Henry was great simply because any member who served the Dundas interest palpably and materially furthered the interests of his shire.

The Porritts saw but misunderstood this phenomenon.<sup>37</sup> They cite the case of Renfrewshire in 1763 to bolster up their axiom that the Scots electorates were hopelessly venal, wedded indissolubly to the royal prerogative and the Pension List. The member for Renfrewshire, Craufurd, had criticised the Peace of Paris, to the annoyance of his constituents who ticked him off in no uncertain terms. The Porritts half-realised that the connection between the freeholders and that one of their number whom they had chosen to represent them in Parliament went deep, but what they did not sufficiently realise was that it derived from the old system of representation in Scotland, that it survived the Union and was indeed a potent factor in the conduct of politics throughout the 18th century. The highest praise that Mrs. Grant of Rothiemurchus could bestow upon Charles Grant, who represented Inverness-shire from 1802 until 1818, was that "The north country owed him much;

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37.

E. and A. Porritt, "Unreformed House of Commons", vol. II, p.153.



we got canals, roads, bridges, cadetships, and writerships in almost undue proportion."<sup>38</sup> It was perhaps this idea of representation, plus the strong claims of kinship, rather than surfeit of original sin on the part of individual Scottish members that gave their "jobs" a certain notoriety.

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38.

Mrs. Elizabeth Grant of Rothiemurchus, "Memoirs of a Highland Lady, 1797-1830", ed. Lady Strachey, 1911, p.272.

## Chanter II

### Electoral machinery in the counties, 1707-1832.

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Many, if not most, of the abuses prevalent in 18th century elections can be attributed to the effects of the Union. That this last was a necessity few serious students of Scottish history are likely to dispute. Yet admirable as was the work of the two sets of commissioners and of the two legislatures it would be folly to place the treaty on a pedestal. In some ways the effects of the Union were bad and recognition that the overall effects were good should not prevent us from attempting to assess the influence of these less happy developments. There is no need to blame the treaty makers. In itself the Treaty and Act of Union was a work of enlightened statesmanship, but inevitably it could not make provision for every unforeseen, and perhaps unforeseeable circumstance that might arise. Article 22 dealing with the representation of Scotland in the Parliament of Great Britain is very much a case in point.<sup>1</sup>

The first thing to notice is the drastic reduction in the number of representatives. The last Scottish Parliament con-

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1.

A.P.S., vol. XI, pp. 446-453; the Act, however, is found most conveniently in G.S. Fryde's admirable edition, "The Treaty of Union of 1707".



tained 33 commissioners from the shires; thereafter these same shires would return <sup>30</sup>~~26~~ Members of Parliament. As a result seats were soon at a premium, the more so as Westminster promised to be a more fruitful source of largesse than Edinburgh. The result of this was at once apparent in the Scots counties. In the very first year of the Union the politicians were busy building up their "interests", in the English election jargon that was soon all the rage. Later we will examine some of these developments in detail, but here it is sufficient to say that the brief glimpse that the Seafield Correspondence affords us of these activities is typical. Sir William Baird's letter to Lord Seafield in February 1703 soliciting his Lordship's support in the impending election for Midlothian is revealing. He begins with a general prospect - "There are a greatt deall of pains takeing hear, for securing the ensuing elections thorow the shyres of North Brittain". He then gives details of the pains he had been at in Midlothian. He tried to win over James Baird, among others, but the latter had first to consult with Seafield, for as James put it, "under God I owed my ryse and being to your Lordship." Sir William protested that he was willing to be Seafield's man and "go into all his measures."<sup>2</sup> This was typical of the increased influence of the nobles on county elections after 1707,

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2.

"Seafield Correspondence", S.H.S., New Ser., vol.III, pp. 441-2.



an influence that arose from circumstances shortly to be considered. Indeed this, and other forms of corruption and undue influence, had been foreseen by some of the anti-Union propagandists, particularly Fletcher of Saltoun and Hedges.<sup>3</sup> Their jeremiads were not just the products of an overblown patriotism and indeed within months of being made some of their predictions were demonstrable facts.

The great Duke of Queensberry, first political manager after the Union, was soon enthusiastically and openly rigging elections, largely by means of trust conveyances.<sup>4</sup> These were the crude early versions of nominal and fictitious votes whereby a complete estate that would carry the vote was disposed in both property and superiority to the prospective voter on the understanding, whether drawn up as a formal "back-bond" or not, that the assignee would when required reconvey the lands to his author. Such dispositions became very common after the Union and proved difficult to check. The preamble to the Act 12 Anne which sought

3.

J. Mackinnon, "The Union of England and Scotland", ch. VIII. Fletcher himself stood for East Lothian in 1708 but fell a victim to the corrupt practices he had prognosticated. See, W.M. Mackenzie, "Andrew Fletcher of Saltoun", pp. 299-300.

4.

W.L. Mathieson, "The Awakening of Scotland, 1747-97", p. 18, citing Somers' Tracts, XII, 628.

5.

For examples of the trust conveyance, see Robert Bell, "Treatise on Election Laws", p. 75, Case of Earnot of Craigie against Freeholders of Kincardineshire, 19 June 1746; Forester against Fletcher, 9 Jan., 1755, *ibid.*, p. 76, and for a fuller account of this excellent illustrative case, Faculty Collection of Decisions, vol. I, No. CXXIV.



to abolish them puts the case very clearly. "Whereas of late, several conveyances of estates have been made in trust, or redeemable for elusory sums, no ways adequate to the true value of the lands, on purpose to create and multiply voted in elections of members to serve in Parliament for that part of Great Britain called Scotland . . . ." To counter these the Act ordained that infeftments must be registered one year before the writ of election was issued and that as well as this each claimant for admission to the Roll had to take an oath of Trust and Possession. These checked trust conveyances little if at all and despite threatened penalties for perjury would-be freeholders in this condition blithely took the oath laid down in 12 Anne and another more stringent one contained in 7 George II. Yet qualifications of this type had obvious dangers - suppose B did not rediſpoſe to A? No such case is recorded, but the device was obviously a clumsy one and it rapidly went out of favour once more subtle conveyancing forms had been elaborated.

This brings us to what was to be the most important single factor in electioneering in the Scots counties in the 18th century, namely the creation of nominal and fictitious votes. Before the Union, as we have noted, these seem to have been virtually unknown. So long as elections had been closely scrutinised by a Scots Parliament familiar with the law of Scotland they were not much in evidence, but after the Union it was a different story. That the creation of nominal and



fictitious votes was raised almost into a system in the course of the 18th century was due mainly to the failure of the Act of Union to provide adequate supervision of the work of the Head Courts. The slippery ingenuity of the lawyers could have been checked but the legal machinery whereby restraint might have been imposed was lacking. On the question of franchises and election procedure <sup>ti</sup>Article 22 of the Union says nothing, except that they were to continue as hitherto. This, the work of the Scots themselves, was to deal a fatal blow to the system of elections in the shires. Undoubtedly, it was always understood that the House of Commons would decide controverted returns, but if the treaty-makers imagined this would of itself obviate all causes of dispute in electoral matters they were gravely in error. The Scots should have known that some stricter provision would be necessary to review franchise cases from the Head Courts. The Septennial Act aggravated the problem and anyway the Election Committees of the House of Commons played politics and evinced not the slightest interest in the involved franchise disputes carried to them from time to time in controverted returns.<sup>6</sup> What precisely was to become of franchise questions? Suppose a claimant were refused admission to the Roll, unjustly as he held, to whom was he to turn for redress? Formerly, he would have laid

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6.

Robert Bell, "Treatise on Election Laws", p.30, p.386.



his complaint before the Scots Parliament and if that were not sitting the Court of Session. At the Union a great error was made in not granting the Court of Session the right to review franchise cases. Wanting such review jurisdiction, elections could actually be decided long before they were made by the freeholders, who were not even bound to any rigid procedure, enrolling and expunging just as the majority saw fit. In a late 18th century case, Macleod against Goodman (1790), the judges gave some interesting comments on the position of the Court of Session before the Act 16 George II conferred a review jurisdiction upon it. From the Union to 16 George II, says Lord Eskgrove, there was no instance of a man coming before the Court as a freeholder. The Lord President's contribution to the discussion was even more illuminating. "On the abolition of the Scottish Parliament, it would have been a nice question, whether political questions like this could have come here in the recess of Parliament? His Lordship looked for cases in the interval betwixt the Union and 16 George II but he could find none. It was never understood that the Court had a jurisdiction, or at least it was never attempted to be made use of." The Lord President concluded, "that the

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hands of the Court are tied up by the terms of the Act 16 George II, the only authority under which they hold their jurisdiction."<sup>7</sup> This was not quite the case but it was near enough the truth and indeed is that species of falsehood that is historically more significant than truth absolute itself. This was what the judges believed, and this was what they acted upon. As a matter of fact, however, Lord Elchies in his "Decisions" records a few such cases from 1733 onwards. For example, in December 1740 it was held in an election case from Dorwickshire that the Court of Session by virtue of the Act 1631 was competent to review franchise cases.<sup>8</sup> Elchies gives 13 such cases between 1733 and 1743, but perusal of these makes it plain that the Court was most unhappy about the situation and spent much of its time debating whether or not it was really competent to hear these cases. Some of them, too, turn upon points of feudal law, which was always within the competence of the Court, but which in these particular instances had a secondary bearing upon elections. After 1743,

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7.

Robert Bell, "Treatise on Election Laws", pp.335-6.

8.

Lord Elchies, "Decisions of the Court of Session", vol.I, s.v. Member of Parliament, No.2, 5 Dec. 1740. There are no franchise cases before 1743 recorded in any other collection of decisions, such as those of Kames "Remarkable Decisions, 1716-52;" Edgar, "Decisions, 1724 - " (1742); Kames, "Dictionary", (1741); Home, "Decisions, 1733-44 (1757); Kilkerran, "Decisions, 1733-52 (1775); Woodhouselee, "Dictionary" (1797).



however, Elchies "Decisions" show a remarkable change in the attitude of the Court, which goes far to substantiate the opinions of the judges in Macleod against Goodsman.

For almost 40 years, therefore, the freeholders in their Head Courts were, for all practical purposes, laws unto themselves. Failure to recognise this all important point has badly obscured counsel.<sup>9</sup> Not until the Act 16 George II was a serious effort made to cope with the problem. The extraordinary proliferation of franchise cases after 1743 is testimony to the powers granted the Court under this Act. The freeholders in shire after shire made vigorous attempts to purge their Rolls, often no doubt with a view to the majority party securing any advantages that might be going. But there is no point in being too cynical. In at least one shire, Stirling, an honest endeavour was made to clear the Roll of nominal voters, the freeholders who brought the charges against those irregularly enrolled even stenting themselves to bear the legal costs.<sup>10</sup> Yet in the Scots counties the damage had been done. A bad tradition had been established, too many of the unhealthy practices of the unregulated years were accepted as standard, the Act of 1743 did not confer a definite

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9.

Forritts, "Unreformed House of Commons", vol.II. ch.XXXIX, miss this point entirely, with sad loss of perspective.

10.

Minutes of the Freeholders of Stirlingshire (Reg. No.) vol.II, pp.1-35.



enough jurisdiction upon the Court of Session and for long the Court was too timid to explore the limits of its powers. The appellate jurisdiction of the House of Lords, nowhere stated in the Act of Union but soon imposed in practice, had also a vicious effect upon the Scottish electoral system, as on other branches of Scots law. Undoubtedly one of the factors that inhibited the Court of Session at a time when the bench was occupied by a remarkable succession of learned and public-spirited judges was precisely the dread of turning the House of Lords loose upon the law of Scotland. In due place we shall cite one outstanding instance of their Lordships sitting in their judicial capacity inadequately instructed by the law officers of the Crown who themselves stood in need of not a little instruction in the intricacies of Scots law.

It is time now to examine briefly the main provisions of the Act 16 George II. These were occasioned by the palpable facts that both returning officers and freeholders in their Head Courts were breaking the laws with impunity - in the very words of the preamble to the Act "by reason that the laws in being have either provided no sufficient punishment for such offences, or, where penalties are provided, it has been found by experience to be extremely difficult, and scarcely possible to recover them." Sundry provisions were brought in to restrain the partiality of returning officers. If the sheriff as returning officer failed to make the return precisely as it was delivered to him by the



Clerk of the Election Meeting he was to stand liable in a penalty of £500 sterling. (XVII). The same penalty applied to the Clerk of the freeholders. (XVI). The decrees of the Court of Session in franchise cases to be brought in terms of the Act were to be intimated to the Sheriff or Stewart Clerk who was to make the necessary adjustment in the Roll, either enrolling or expunging as the case might be. If he delayed to do this, or failed to obey the decree in any respect whatever, the Clerk was to be liable in penalties of £100 sterling. (V). The Clerk was also charged with the regular keeping of the Roll and Minutes of the freeholders. If he were remiss here, by failing to produce the records as required or guilty of falsifying them in any way, he was again held liable to a penalty of £100 sterling to be recovered by any person capable of suing. (XII). Again, it was provided that if the sheriff clerk, who in the absence of the last elected commissioner might open an election meeting, received the vote of one who did not stand upon the Roll in the choice of preses and clerk he should for every proved transgression be fined £300 sterling. (XIII). These were severe enough penalties to <sup>5</sup>restrain the "ministerial officers", as they were sometimes called, and the number of protests against false returns notably diminished after 1743.

It proved more difficult to keep the freeholders in order. This the Act made a sincere effort to do, and indeed most of its provisions were sensible. The sum and substance of the numerous



provisions on this head was that the Roll was to be more strictly regulated and the Michaelmas Head Courts to meet annually. In the first place, to prevent surprise at meetings of the freeholders claimants were required to undergo a stricter procedure than had hitherto obtained. No person, whatever his titles, could be enrolled until he was publicly infeft and his sasine registered for at least a year before his claim was considered.<sup>11</sup> Documents to instruct, i.e. prove, this along with either a retour to show Old Extent or a certificate of valuation showing the valued rent, had to be laid before the freeholders. (X). Furthermore, even if these provisions were observed, if the claimant failed to deposit a copy of his claim and titles with the Sheriff or Stewart Clerk two clear calendar months before the Michaelmas or election meeting he could not be enrolled. This, presumably, was to give the freeholders time to check the validity or otherwise of the claim (VII). Objections to freeholders standing on the Roll had to undergo the same procedure. (VII). All these provisions were strictly interpreted in the Court of Session, and

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11.

Holden Furber, "Henry Dundas", p.194, makes a curious error here. He believes that voters had to be on the Roll for a year before they could vote, giving as his authority a statute which he does not identify. In fact, this is a misreading of 16 George II (X), which stipulates that no claimant for enrolment shall be entertained unless publicly infeft and his sasine registered for one year. Furber refers to the case of Dunbartonshire in 1730, but that case, Telfer against Forrier (Connell, p.67; Wight, p.220) turns upon whether the sasine had been registered for one year. Joseph Irving, "Book of Dunbartonshire", vol.I, p.334-7, whom Furber cites as his authority, states the facts correctly.



there are even cases where minutes were counted if the statutory times were involved.<sup>12</sup>

Yet the statute was weak, and from its weak points there came some strange developments. An outstanding example of this lay in the fact that the system of elections propounded in the Act depended upon annual Head Courts which should regularly and fairly adjust the Roll of electors. (II). This was a wise provision but unfortunately the Act did not lay down any statutory procedure to enforce the summons of a Head Court and no penalties to be exacted if it should fail to meet. This gave rise to an extraordinary case in Cromarty in 1753 when a claimant who had undoubtedly gone through all the forms prescribed by the Act was nonetheless thwarted by the refusal of the freeholders to convene as a Head Court.<sup>13</sup> Equally serious were the most important of the provisions which gave the Court of Session a review jurisdiction over the acts of the freeholders. (III, IV). It was well to allow unsuccessful claimants to appeal to the

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See, e.g., Elliot of Arkleston against Fergusson of Craigdarroch, 15 Jan., 1762, Fac. Coll., vol. III, No. LXXVII. Elliot claimed to be enrolled at the Michaelmas Head Court held at Dumfries in October 1761 on titles admitted by all to be unexceptionable. Nonetheless, the freeholders refused to enrol him on the grounds that his claim had not been handed in two clear months before the meeting. Fergusson objected that it fell short of this by two hours. The Lords thought this was stretching things rather fine and ordered Elliot to be enrolled.

13.

Mackenzie against Freeholders of Cromarty, 20 Dec., 1753; Connell, p.21; Ficht, p.157. For a detailed account of this affair, vide infra, chapter IV.



Court of Session; well to allow freeholders to protest against the acts of the Head Court either for wrongfully enrolling or expunging. Such complaints, incidentally, had to be brought within four calendar months of the events complained of, which also occasioned some hasty arithmetical calculations from time to time. Again, to prevent frivolous complaints the Act stipulated that where the judgment of the freeholders was sustained the complainer was to forfeit £30 sterling with full costs of suit. (VI). But for long all this was wasted endeavour. The judges of the Court of Session held that their jurisdiction was strictly limited by statute, and the plain truth is that the statute did not give them sufficient powers. For one thing, it did not really define either the jurisdiction of the Court of Session or of the freeholders. So circumstanced, it is easy to see the heavy disadvantages under which the review court laboured. It could not, and this was most important, enforce any decree upon the freeholders that did not arise immediately and obviously from the express terms of the statute 16 George II. On the other hand, the means at the command of the freeholders to manipulate enrolments were infinite. The slightest technical flaw in a document, even a clerical error, was sufficient grounds for them to reject a claim. Their procedure once the meeting was formally opened was regulated by no statute whatever; yet, as we shall see, the fate of an election could depend upon the order in which the majority of the freeholders agreed to transact their business.



All this was clear to the judges, but equally clear was the fact that their jurisdiction, such as it was, was founded on statute and not in equity. For at least 50 years after 1743 the Court of Session was manacled by the very Act which conferred upon it a review jurisdiction in franchise cases. There is absolutely no evidence that the judges were corrupt or that their decisions were biased. Yet owing to the defects of the statute of 1743 and to the all too complete jurisdiction of the House of Lords the Court of Session, quite unwillingly, became one of the main instruments in perverting county elections in Scotland. The judges were uneasily aware of this and from time to time one of the bolder brethren would speak out harshly, and truthfully, against the absurdities of the position, but not until 1790 did the Court of Session win a major victory against corrupt practices in county elections.

From 1743 until 1832, 220 franchise cases are recorded, a fair number which certainly does not include some that have gone unreported.<sup>14</sup> These cases are an important source of information but it is impossible to construct on them a rigid theory of

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14.

The number is estimated as follows - from "Faculty Collection of Decisions, 1752-1832", 196; Elchies' "Decisions, 1733-54" (1813), s.v. Member of Parliament, 24.

electoral law and procedure between the Union and the Reform Act. From the narrower view-point of the lawyer this was done, quite legitimately, by Wight, Fell and Connell. But from the point of view of the historian the absurdity of such procedure is soon manifest. The truth is that decisions varied greatly from time to time. In the 1740's and '50's the Court of Session was content to eat humble pie and restrict itself narrowly to the statutory powers conferred on it by the Act 16 George II. In this period the Court accepted and bolstered up with decisions practices that had sprung up in the Head Courts in the unregulated era between 1707 and 1743. This soon bred as many ills as it cured and in the '60s and '70s the Court was forced to broaden its attitude and particularly it sought to widen its jurisdiction over the freeholders. This was true especially of the growth of nominal and fictitious votes which in the '60s began to assume dangerous proportions. One must not be misled here by the fact that the total number of votes in 1783 was estimated at 2,662.<sup>15</sup> True, as an electorate this was small, but so must have been any electorate in 18th century Scotland that was based on a freeholder franchise. The damage done by nominal and fictitious votes was out of all proportion to their numbers, numbers which it must be remembered fluctuated greatly. Few fictitious votes survived the life of the assignee. Many were made in the form of wadsots, redeemable within 5 or 7 years - designed in fact to meet a particular "election job", as the jargon had it. Nonetheless,

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15.

Sir C.E. Adam, ed., "Political State of Scotland in 1783", p.XXXII.



fictitious votes could, and did, wreck the principle of free election that the statutes vainly sought to protect. Again, the ramifications of freehold cases were extraordinarily wide and in some important respects it was found to be impossible to maintain the timid attitude that tied the Court overstrictly to 16 George II. The conveyancing and registering of lands and their valuations for cess were far too important to be overturned by the bold averments of freeholders or would-be freeholders. Before going on to outline briefly the main problems that arose, and the cases that illustrate these, it must be clearly understood that the attitude of the Court was not the same throughout, but that in no instance can this be imputed to corruption or negligence. Indeed, the main objects of sympathy in some of these intricate and perplexing cases were the judges, whose thankless task it was to provide what justice they could hampered by inadequate jurisdiction and a court of further appeal that was at best ill-informed and capricious, and at worst corrupt.

One other important provision of the Statute 16 George II remains to be noticed, namely section VIII, which sought to regulate votes on Old Extent. All sorts of abuses and malpractices had arisen here, one might almost say naturally, so confused and

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involved was the entire subject. Indeed, to speak of "abuses and malpractices" is perhaps to prejudge these issues, for in truth there was no absolute procedure that could be accepted as standard. How could there be when quite clearly there was no consistency in the definition or computation of old Extent?<sup>16</sup> Historically, whatever its exact origin, the Old Extent was the fiscal system used to tax the estate of the barons, as distinct from that supposedly founded on Bagimont's Roll to tax the Church. The sense of this was never lost but unhappily the records are, and it seems always were, so confused as to render further definition impossible. So that whether we agree with Thomas Thomson that the new extent was not employed until 1366 or with his editor that it was probably in use from the reign of Robert I the end result is the same - a mystery. For our purposes, the important point to grasp is that the Old Extent was first employed for franchise qualifications and thereafter retained its privileged position, even when it had become obsolete and ever more dark and mysterious. Medieval emphasis on precedent and custom explains its retention in the 17th century in the face of competition from the more logical system of real rent. Whether 17th century Scotland may properly be described as medieval is not the point at issue here, but the retention of the 40/- freehold of Old

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16.

On this entire subject see T. Thomson, "Memorial on Old Extent", ed. J.D. Mackie. For different views of Old Extent, passim, but particularly pp.89-96, 23-242.



Extent as a parliamentary franchise clearly drew its inspiration from the past.

To prove true Old Extent on lands held IN CAPITE by ward or blench was by the 18th century not the easiest of undertakings, but in many instances it could be done. It may be that, as Professor Mackie maintains, the task would have been rendered lighter had Old Extent been required to be proved from the financial records and not from brieves of inquest. But that was precisely the rub. Were the financial records equal to the task? Now, if difficult in the case of lands traditionally assessed on the Old Extent what was the case of lands that traditionally were not, but might just possibly have been so extended later? Feu-lands, including some old kirklands, might have come within this category. An Act of 1594 required the lands of all the king's feuars to be so assessed, but it apparently broke down. In 1597 all unretoured land was to be retoured, but care was to be taken to see that feu-duties were deducted from gross rent, which rent was then to be given in terms of Old Extent by comparison with lands in the vicinity already so valued. These Acts may indeed have been generally abortive, but however it came about it is certain that by 1631 lands held in feu-farm were assessed on the Old Extent, factitious Old Extent or "true" Old Extent matters not.<sup>17</sup>

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17.

That some feu-lands were certainly assessed on Old Extent, see Robert Bell, "Treatise on Election Law", p.192. The point is fully brought out by Professor Mackie, "Memorial on Old Extent", pp.324-5.

This important fact was recognised by the Act of 1631 which says clearly and without any possibility of ambiguity that the 40 shilling freehold of Old Extent shall confer the vote, provided that feu-duties be distinct in feu-lands. These words are measured and deliberate and cannot be explained away. The difficulties of instructing this Old Extent were formidable by reason of the loose system of retouring that had come into vogue. Whether this was done deliberately or not, as Thomson maintains, in order to relieve the kirklands of the heavy incidence of taxation supposedly derived from Baginnet's Roll it makes no odds at law. Professor Mackie puts the matter in a nutshell: Thomson wrote a fine historical monograph, but as pleading at law it was not faultless.<sup>18</sup> His opponent had the weight of precedent on his side and once the doctrine of STARE DECISIS, once alien to Scots law, had firmly enplanted itself after the Union, legally there could be no bad precedents.

The problems of Old Extent, then, were essentially those of instructing the claim. The Act of 1681 erred in not strictly defining the means that should have been employed and as well as retours, charters and even sasines were accepted as proofs.<sup>19</sup> A

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18.

Thomson, "Memorial", ed. Mackie, p.300.

19.

See Lord Woodhouselee, "Decisions" (1797), vol. I., s.v. Member of Parliament, p.402.



far more serious abuse, however, was the division of retours into 40 shilling lots. This was effectively prevented by the Act 16 George II, which required that Old Extent could only be instructed by production of a retour to chancery dated before 16 September 1681, and that such retours should be indivisible. On the subject of retours Thomson was the great authority and he proved beyond any shadow of doubt that as a source of evidence they were just about the least reliable imaginable. Professor Mackie further emphasises the injustice of this provision.<sup>20</sup> But an Act of Parliament cannot be overthrown simply on the grounds that it is based on historical or even legal absurdities, and so the judges were stuck with the retours. Furthermore, the Extent must be specifically entered in the Valent Clause of the retour and not merely in the Descriptive Clause. The reason for this was that the latter is merely a general description of the lands whereas the former was sworn to by the jurors under oath.<sup>21</sup> If the Valent Clause were in CUMULO (i.e. the valuations on one estate given as a lump sum) and it agreed in every respect with the Descriptive

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20. Thomson, "Memorial on Old Extent", ed. Mackie, p.89.

21. Stewart against Campbell, 22 Feb., 1745, Falconer "Decisions", vol.I., p.83.

Clause the retour was found to be sufficient evidence.<sup>22</sup> If, for example, the Descriptive Clause of a retour described four separate parcels of land each valued at 40 shillings of Old Extent and the Valent Clause gave the cumulo valuation as £8 of Old Extent those ineft in the separate valuations as described in the Descriptive Clause would be entitled to vote. The whole business, however, was wildly ad hoc. The identification of the lands described in these old retours was by no means easy. In fact, we may well be excused from pursuing the matter any further. The historical and legal problems connected with its study have been fully set out by Professor Mackie. Anyway, from the point of view of 18th century politics it was of minor importance, since even before 1743 votes on Old Extent do not seem to have been as numerous as one would have expected. And certainly after 1743 the great bulk of the freeholders were enrolled, in one capacity or another, on the other qualification of £400 assessed rental. It is impossible to give statistics for this, but it is the unmistakable impression conveyed by such Minutes of the Freeholders as are available in Register House.

The difficulties connected with Old Extent were too great, the claim too apt to be quarrelled, and unless the claimant had a cast-iron retour on which to found he was well advised to aim at

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22.

Case of Freeholders of Kentfrowshire, 18 Jan., 1745, Elchies' "Decisions", S.V. Member of Parliament, No. 22.



the other qualification. For one thing precise identification of lands mentioned in old retours was difficult, and, indeed, in the absence of any real knowledge of ordnance surveying or cartography there were always suspicious question marks hovering over these old retours. The names of lands changed and were transposed; yet often little account seems to have been taken of this. In short the whole question of Old Extent was in a thoroughly unsatisfactory condition. Of a total number of 220 franchise cases between 1743 and 1832, 28 deal with Old Extent. This is a relatively high incidence, considering the fact that votes on valued rent were much more numerous. The answer probably is that, owing to the difficulty of instructing Old Extent, a far higher proportion of such claims came before the Court of Session. And indeed of the 28 cases counted all are concerned with just one theme - the difficulty of proving Old Extent. In the case of the other qualification it was always possible to instruct valuation and the only contested claims in this respect rose from definite sharp practice on the parts of the Commissioners of Supply.

The objections that might be urged to the claim on £400 Scots, however, were many. Often the Commissioners of Supply, part of whose duties it was to furnish certificates of valuation, acted in the most arbitrary and partial manner. The earliest case on this subject, that of Abercrombie against Leslie of Melross, was the archetype. At Michaelmas 1752 Colonel



Abercrombie complained against the enrolment of William Leslie on the grounds that no legal evidence of valuation had been produced to instruct the claim. A division of CUMULO had been required to yield Leslie a vote, but, averred Abercrombie, this had not been done by a legal meeting of the Commissioners of Supply. What had happened was that four Commissioners friendly to Leslie had convened privately, without legal summons, and had divided the CUMULO. Although nothing could be urged against the accuracy of the decreets of division, yet the Court found the meeting illegal as not being held in accordance with the statute of 1690. Leslie was accordingly ordered to be expunged from the Roll of the Freeholders.<sup>23</sup> The case of Cunningham against Stirling, decided a few months later, reinforced this decision, although in this case the illegal division of CUMULO took place in 1739.<sup>24</sup> Even where the Commissioners had made mistakes in valuating and the claimants had been enrolled thereon an offer by the Commissioners to furnish a new and accurate certificate could not prevent the freeholder concerned from being expunged.<sup>25</sup> In

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<sup>23</sup>•Fac. Coll., vol.I, No.LXVIII, Colonel Abercrombie against William Leslie of Melross, 21 Feb., 1753.

<sup>24</sup>•Fac. Coll., vol.I, No.XCVI, Captain Robert Cunningham against George Stirling, 9 Jan., 1754.

<sup>25</sup>•Fac. Coll., vol.I, No.CXXIX, John Callendar of Craigforth, Advocate, against Robert Bruce of Kennet, Advocate, 17 Jan., 1755.



the case of Forester of Denovan against Sir George Preston of Valleyfield, however, it was held that the freeholders were bound to take cognisance of a certificate of valuation if ex facie good.<sup>26</sup> The truth is that it was slowly being borne in upon the judges that much more was at stake than a few paltry votes - many of which were notoriously nominal anyway - and that unless care were exercised, the whole basis of the assessment of the Supply might be undermined or at least become hopelessly entangled in litigation. The matter came to a head in the preparations for the General Election of 1768 in which nominals were being created on all sides, and the Commissioners, breaking up into rival parties, were busily dividing CHIBULOS to their client's advantage.

Elsewhere we discuss in detail the important cases that rose as a result of such proceedings in Cromarty.<sup>27</sup> Here it might be of some benefit to outline the similar developments that took place at the same time in Forfarshire. As early as 1765 the Earl of Panmure, an Irish peer and sitting member for the county, was aware that an opposition against him was forming and accordingly he had recourse to the increasingly popular device of making

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26.

Fac. Coll., vol.I, No.CXLI, Thomas Forester of Denovan against Sir George Preston of Valleyfield, 18 Feb., 1755.

27.

Vide infra, chapters IV - VII.



votes.<sup>28</sup> In 1765 he created six different superiorities on his estate, followed by 18 early in 1766 and 19 in the Martinmas term of that same year - in all 43 votes, a fair number for a Scots county.<sup>29</sup> The Earl of Strath<sup>h</sup>more, brother of Thomas Lyon, the rival candidate, also began to create votes.<sup>30</sup> Each side, school-boy fashion, later accused the other of initiating these dishonourable practices, but it is abundantly clear from the evidence that if indeed Fannure was the original sinner it was only a case of getting his blow in first. Strathmore did not lag behind, but unfortunately he found that his estate was too restricted to wipe out the headstart Fannure had made for himself. A landowner friendly to the Strathmore interest, Hunter of Burnside, was induced to create votes for the use of Thomas Lyon and this brought about a near parity.<sup>31</sup> In fact it was diamond cut diamond; each interest could count as many genuine and prospective fictitious votes as its rival. In such a situation adroit control of the Commissioners of Supply could easily secure

28.

For William Maule, Earl Fannure, see, "Complete Peerage", vol.X, pp.306-07.

29. Session Papers, vol.665:52, Memorial for John Scot, writer in Edinburgh, 29 Jan.1768, pp.1-2. The whole of volume 665 is devoted to "Forfarshire Elections, 1765-69", and is a perfect mine of information on the subject. Only the baldest of bald summaries can be given here.

30. For John Lyon (afterwards Howes), Earl of Strathmore, see, "Complete Peerage", vol.XII, p.400.

31.

Session Papers, vol.665:27, Answers for David Ogilvie of Aereavie, to the Petition and Complaint of George Skene et al., 12 Dec. 1767.



victory. The Commissioners could so delay or falsify divisions of CUMUIO as to press the advantage of the interest that controlled their meetings. At the statutory meeting of the Commissioners on 30 April 1766 Panmure's party got off to a good start, one of his main partisans, Sir John Ogilvie of Inverquharity, being chosen convener. For some reason or other the meeting was sparsely attended and Lyon's friends were absent. Most probably the Commissioners had not met regularly for years and Panmure's party had sprung a surprise meeting. At anyrate the convenership was held to convey great tactical advantages. At this time it was usual to regard the convener as being elected from 30th April to 29th April, and it was believed that he alone could summon a legal meeting. The advantages, then, of securing this office seemed obvious. Lyon's friends, however, were unready to give up the struggle so easily and at subsequent meetings they launched a counter-attack. In an endeavour to rob Panmure of the tactical advantage implicit in Sir John's convenership they moved several motions designed to prevent surprise meetings. The majority accepted these and Sir John as convener was obliged to do likewise. The rules were that two weeks notification of meetings, by advertisements in the public papers, was to be given, and also that no meeting should assemble before 10 a.m.<sup>32</sup>

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32.

Session Papers, vol.665:1, Bill of Suspension for Sir John Ogilvie and others, against George Skene of Skene, 28 Feb. 1767; *ibid.* Bill of Suspension, Commissioners of Supply for the County of Forfar, against Sir John Ogilvie of Inverquharity and John Ross.



On 30th September Panmure and six others presented a petition for a division of CUMULO, but the Commissioners by 37 to 35 refused to carry it out. The majority gave as their reasons that the division was required for an illegal purpose, namely the creation of nominal and fictitious votes, and that it was no part of the duties of Commissioners of Supply to aid and abet such projects.<sup>33</sup> Panmure and others appealed to the Court of Session which ordered the Commissioners to make the division. They were ministerial officers and required to perform any duties that fell within their province irrespective of the ends towards which divisions were to be employed. Even with the backing of the Court Panmure felt uneasy, and so he had Sir John Ogilvie break his pledge and summon a meeting for 16 December on only two days notice. Further, the meeting opened at 9. a.m. and but for the frantic intervention of Lyon's party would have been over and done with by 10 o'clock. The divisions had indeed already been worked out in the lawyers' chambers in Edinburgh, and the meeting was to be merely an essential legal formality.

The Clerk to the Commissioners, William Kerr, was tied to the Lyon interest and he described graphically how news of the meeting was brought to his house shortly after 9 a.m., how he hastily dressed himself and armed with the Supply papers broke in

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33.

Session Papers, vol. 665:27, Answers for David Ogilvie of Aircavio, 12 Dec., 1767, p.3.



upon the meeting only to find that he had been superseded in his office by a total stranger, John Ross. Others of Lyon's supporters soon appeared upon the scene, angry words were exchanged and a near riot ensued. Finally, Lyon's party gained control of the meeting and on Sir John's refusal to give on his word of honour an undertaking to observe the rules he was deposed from the con-venorship and George Skene of that ilk elected in his place. The division of CUMULO ordered by the Lords of Session was not carried out and bitter complaints were carried to the Court of Session. Each side accused the other of malpractice, only too justly as the Lords of Session were to discover, and this stormy meeting sparked off a bitter legal war that lasted until 1769.<sup>34</sup> Panmure was finally elected but only after what was then known in election jargon as a "vast struggle in the legal field."

The extraordinary importance of the Court of Session in Scottish county elections is, indeed, one of the main differences between the English and Scottish systems. In this the question of the control of the Commissioners of Supply was often vital. Often the freeholders were the Commissioners and naturally their political affiliations were intruded into their labours as Commissioners. Some remedy had to be found or else, as these cases made abundantly plain, elections would be settled by a

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34.

Session Papers, vol. 665, passim; for early proceedings of the Commissioners of Supply, 665:1, the two papers already cited on the Bill of Suspension and the Answers thereto.

majority of the Commissioners of Supply. On the basis of these Cromarty and Forfar cases, which had a marked general resemblance, it was decided that it was not necessary for the convener to summon a meeting and that any meeting of Commissioners that acted in a fair and impartial manner (which did not, in particular, falsify valuations) would be sustained. Furthermore they were required to divide a valuation when so desired, irrespective of the purposes or suspected purposes this division was supposed to serve. If this led to the creation of nominal and fictitious votes then it was for the freeholders and the Court of Session to decide on these matters.<sup>35</sup>

As to the actual valuation of estates the subjects valued were extensive and indeed included anything "whereby yearly profit and commodity ariseth."<sup>36</sup> Grain yield was assessed at the agreed fiars' prices per boll, and t<sup>~</sup>iends, feu-duties, tenements, mills, fishings and boats all were included. In theory the valuation of the county and the apportionment of cess upon the individual proprietors was supposed to be checked on 30th April each year at

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35.

On this subject generally see Connell, "Treatise on Election Law", pp.120-2, and the decisions cited there, particularly Pulteney against Gordon, 24 Dec., 1767 (Fac. Coll., vol.IV, No. LXXI); for this case vide infra, chapters V, VI; see, too, Earl Fannure against Commissioners of Supply of Forfarshire, 15 Nov., 1766, Woodhouselee, "Decisions", vol.I, p.411.

36.

A.P.S., VI, pt.I, pp.27-36, Act of Convention, 15 Aug., 1643. On the whole topic of valuation, Bell, "Treatise on Election Law", pp.46-71, is most illuminating.



the statutory meeting of the Commissioners of Supply. In practice, once the valuation of the county was established to the general satisfaction the Commissioners rarely bothered to meet regularly. In some counties Supply business was transacted at the conclusion of the freeholders' meeting at Michaelmas, a convenient enough arrangement since in most counties the freeholders formed the substantial body of the Commissioners. But, whether the Commissioners met regularly or not, a request for division of CUMULO, on whatever plea, had to be complied with. Often this was necessitated by the sale of lands, but it might just as easily be the first step in the creation of nominal freeholds.

Incidentally, the valuations placed on the different counties help to explain the relative numbers of freeholders in the different shires. It can be no accident that the numbers tended to be highest in those shires that had the largest valuations. Bell gives some extremely interesting information on this subject, information dating presumably from about 1812. No absolute calculus can be drawn up, because, of course, in individual shires great estates held by noblemen would account for much of the valuation, although these would contribute their quota of freeholders of the nominal type. Considerations of space preclude the reproduction of Bell's table but one or two points from it must be discussed. Fife, assessed at £362,534 Scots (omitting the odd shillings and pence), had 188 freeholders on its Roll. Perth, valued at \$335,000 Scots, had 145 free-



holders. Ross, valued at £75,000 Scots, had 72 freeholders. As already indicated the equation is by no means perfect, largely because of the nominal votes. Thus Ayrshire had 220 freeholders although only assessed at £191,605. This county must have reached saturation point, as had Dumbartonshire with 65 freeholders for a mere £33,327 Scots of valuation.<sup>37</sup> And indeed we know that these shires were torn by savage election contests in the 1770s which threw up large numbers of fictitious votes.<sup>38</sup> Yet, as Bell pointed out, his table demonstrates that in not a few counties many votes could still be made, which so far from regarding as heinous he recommended should be done, and indeed went to great pains in his work to illustrate how best it could be done. By 1812, however, many were of the opinion that the county electorates in Scotland were far too small and that nominal and fictitious freeholds were as good a means of extending them as any. This was an idea that died hard both in England and Scotland. However, Bell probably failed to take into account certain factors that would have helped to explain the apparent discrepancy.

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37. Bell, "Treatise on Election Law", pp.194-5.

38. For Ayrshire, see James Fergusson, S.H.R. 1947, "Making Interest in Scots County Elections"; for Dumbartonshire, Commons Journals, vol.38, 7 Nov., 1731, Petition of Hon. Keith Elphinstone, p.14, Petition of Freeholders of Dumbartonshire, *ibid.*, p.14; also Joseph Irving, "Book of Dumbartonshire", vol.I, pp.334-7, and a few items in Ross Muniments, Reg. No., dealing with the elections of 1774 and 1780, particularly No.563, Elphinstone to Robert Buchanan, 16 Nov.1774, and No.551 Duke of Argyll to Robert Buchanan, 29 April 1779.



he noted in certain shires between valuations and parliamentary freeholds, notably the effect of entails which were an effective bar to the creation of votes on tailzied estates. Anyway, nominal votes were created to serve definite election purposes, not to increase the number of independent votes. Indeed, in the 18th century proper they rarely led to independent votes. Society was still feudal and that "lawte" that Barbour sang in the 14th century still held a high place in any Scottish catalogue of the virtues and graces of man. The evidence all favours the view that they were made for no other purpose than to serve definite "interests" and the evidence is equally clear that that was the only purpose they did serve.

Indeed, nominal and fictitious votes were a purely malignant growth which, thanks to the looseness of supervision in franchise cases, could, and frequently did, destroy the essence of free election which underlay the system. Odd in its development the county representation of Scotland may have been, but that it should rest upon free elections is written deep in the statutes. After the Union the machinery was thrown badly out of gear. The inevitable result was the undermining of free elections and the rise of a system of rigging technical enough to merit the name of a science. Here one of the most important factors was the creation of nominal votes. As already noted for the first 30 years of the Union this was mainly done by splitting retours or the making of trust conveyances on lands valued at £400 Scots.

The Act 16 George II killed the former, and the latter were superseded by more refined conveyancing. The fundamental discovery here was that perfectly good votes, in form at least, could be created simply by separating the superiority from the property, and after 1743 such "airy freeholds" became common. The whole subject is a difficult one, again largely because of the inconstant attitude of the Court of Session. Thus again in the 1740s and 1750s the evil was allowed to grow, strengthening itself by precedent after precedent. In 1753 a curious case was decided which serves to illustrate the complexity of the problem. In the first place it shows that the mere purchase of a superiority was no good evidence of nominality. Captain John Scott purchased the superiority of part of the estate of Hempriggs in Caithness, which estate then stood valued in CUMULO at £3,600 Scots. Scott made over part of his purchase to Sir Robert Gordon and Hay of Leys. All three obtained Charters under the Great Seal, were duly infeft and entered claims for enrolment before Michaelmas 1751. Their claims were instructed by the usual instruments but Captain John Sutherland of Forse and a majority of the freeholders refused to enrol the claimants. The Court of Session gave the decision against the freeholders and ordered the claimants to be enrolled.<sup>39</sup> This is an unusual case,

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39.

Fac. Coll., vol. I, No. LXXI, Captain John Scott and others against Captain John Sutherland of Forse, 3 March, 1753.



the nearest perhaps one gets to the actual sale of votes in the 18th century. Yet, and here we approach the real difficulty, it would not be accurate to describe such votes as nominal and fictitious. Votes on naked superiorities had been sustained by the Scots Parliament before the Union and were undoubtedly legal. The only difference between the Caithness votes and those questioned in Ayrshire in 1700 arises from the element of sale, and that was not enough to defeat them. Such cases, though, were rare if only because political requirements usually ensured that superiorities did not come into the open market, but were more the subject of private transactions among friends and relations.<sup>40</sup> In fact, Scott against Sutherland stands without follow. Undoubtedly, however, estates held in both property and superiority were of enhanced value if they qualified for the vote, even more so if they could make several votes. Sometimes, too, unscrupulous sellers did not always tell the truth in this respect. For example in 1756 Maclean of Lochbuie sold the lands of Ardlussa and Knockintavell in Argyll to Macneil of Collonsay, representing that each was a two mark land of Old Extent. Collonsay desired to be an elector, thought these lands would answer his purpose and closed the deal. But proof of the Old Extent in the shape of a retour was not forthcoming, the actual rent was well below

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<sup>40</sup>.

Sir James Fergusson, S.H.R., 1927, "Making Interest in Scots County Elections", furnishes excellent illustrations of this side of electioneering.

£400 Scots and so Collonsay still found himself unenfranchised. He suspended payment to Lochbuxy and insisted either for a reduction of the sale or an abatement of the price. Lochbuxy took the matter to law, pleaded that the franchise question was irrelevant, it being no part of the agreed transaction, and besides which, he noted with that smug air of virtue which 18th century gentlemen could so easily and unconvincingly assume on just such occasions, it was indecent to allege that the vote had a value in terms of money "and contrary to the spirit of the British constitution." Collonsay met him on the same lofty plane. The privilege of election, to guard the honour and property of himself and his fellow-citizens, was what really distinguished the Briton from all lesser breeds. The Lords agreed with Collonsay, held that the lands qualifying for a vote was an essential part of the contract and ordered a reduction in price.<sup>41</sup> Quite clearly the fact that property was purchased with no other view but to qualify for the franchise was not in itself regarded as reprehensible, and was indeed held to be a perfectly worthy and natural aspiration.

This brings us to what was to be the accepted criterion in judging whether or not votes were nominal or fictitious - namely, intention. This was, indeed, the only fair criterion

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<sup>41</sup>.

Fac. Coll., vol. II, No. XXVIII, Maclean of Lochbuxy against Donald Macneill of Collonsay, 23 June, 1757.



to adopt for the result of the fortuitous developments we have already outlined, and the peculiarities of the feudal conveyancing of Scotland, was that it was difficult to distinguish the good vote from the bad. In Scotland subinfeudation had continued unchecked and nothing analogous to the English freehold or fee simple emerged. As a result an out and out sale of lands could not take place, and this could only be effected by a complicated series of feudal instruments, the end result of which was to infeft B, the purchaser, in the place of A the disponer. To make a "freehold" in the Scottish sense B had to be received in A's place as a direct vassal of the king. This was a most complicated process, including the final symbolical infeftment with stone and turf.<sup>42</sup> The number of votes on absolute and indefeasible infeftments in property and superiority together, which seems to have been the general intention of the Act of 1681, was very small and could never be large. So closely, too, could the lawyers in the 18th century parody, or, rather, faithfully reproduce, bona fide titles that it was most extraordinarily difficult to distinguish the good vote from the bad.<sup>43</sup> For a time the Court of Session interpreted these developments in this

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42.

On this subject, see, Robert Bell, "On the Completion of Titles to a Purchaser", 1815, passim; and Walter Ross, "Lectures on the Law of Scotland", vol. II, 1792, passim.

43.

On this matter see Robert Bell, "Treatise on the Election Laws", p.29 et seq.

way: that where titles were ex facie good they must be sustained. A good conveyancer could nearly always secure these results.

Now, precisely, would he set about his task? We are speaking now of the nominal vote, correctly so termed, and not of the trust conveyance or purchased estate which, as we have indicated, were different in essence. The classical manner was by separating the superiority from the property. Suppose A to be infeft in property and superiority in an estate valued at £1200 Scots. The first step is to have this CUMULO divided by the Commissioners of Supply into three lots valued at £400 Scots each. One such lot will usually be retained in A's hands to preserve his own vote, assuming him to be a commoner. To a friend B he grants two separate feu-charters on the other two lots each valued at £400 Scots. This done A resigns the entire estate into the hands of the king, the <sup>S</sup>indispensable preliminary for a sale of lands under Scots law. His right to sell or dis-  
pone is recognised by the receipt of a Charter of Resignation, from which will be excepted, as he has required, the lot valued at £400 Scots on which his own vote is to be maintained. This done, A then disposes the lands of vote No. 1 to C, and similarly those of vote No. 2 to D. But in the clause of warrandice of each conveyance he excepts the feu-rights already granted to B. The latter reconveys the feu-rights to A who then takes a base infeftment on the property under C and D as his superiors. In other words, he has transferred the superiorities of 1 and 2 to



C and D whose vassals he now becomes. He has sacrificed nothing of real value, but he has placed C and D in a position to claim the vote. If the valuations are properly instructed and the titles are in order there is nothing to prevent these "parchment barons" from being enrolled on the strength of their "airy freeholds".<sup>44</sup> Nor need the dispositions to C and D be outright alienations. It was more usual for them to take the form of wadset rights redeemable for a slight sum within 5 or 7 years, or else liferent interests in the superiority with A standing as fiar.

For long the proper wadset on a naked superiority was one of the commonest means of conveying qualifications. It was undoubtedly an abuse of the Act 1631 and could not even shelter behind the fig-leaf that covered the complete conveyance of a superiority, as in Bell's hypothetical case. The proper wadset mentioned in 1631 was a definite business transaction, but, clearly, to advance money on a naked superiority of lands valued at £400 Scots, the casualties of superiority being elusory, and the wadset redeemable at a fixed date for a ridiculously small sum was not by any stretch of the imagination a normal business proposition. Yet when they first appeared the Court of Session was too paralysed to make a decided stand against these perverted

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44.

Bell, "Treatise on Election Laws", the authority on this subject, gives this example, p.74, with the conveyancing styles involved, Appendix, No.XI, pp.XVII-XIX. It could not be bettered, illustrating the process as it does perfectly. Numerous cases could be cited to bolster up this hypothetical example, but it would be superfluous labour. On this subject Bell, whose special study was conveyancing, reigns supreme. See, too, his work, "On Completion of Titles", ch.II, sect.III, 1., Of Constituting a Vote, pp.115-122.



wadsets and they long continued to flourish by no better warrant than some exceedingly dubious decisions. One of the earliest of these, Freeholders of Ross against Munro, set the tone for subsequent developments. It was objected that Munro's claim was not founded on a proper wadset, since there was no power given to the disponent to require the money to which he was allegedly entitled. The Lords overruled the objection and Munro was among the first of a considerable number of such freeholders to be upheld by the Court.<sup>45</sup>

The main trouble with wadsets of superiority, that they obviously only involved elusory sums, could be obviated in the case of liferent votes. These were every bit as nominal but the nominality was harder to prove in the Court of Session. Besides, liferent votes conferred certain tactical advantages. They were easily constructed by the proprietor simply conveying a liferent interest in his estate while either reserving the fee to himself or disposing it to a third party. The advantage of the proprietor standing as fiar was that, while creation of votes by other means often made chaos on an estate, in the case of liferents no such inconvenience would ensue. On the death of the liferenter all his rights would automatically retrocess to the fiar or the fiar's heir. The mess, in short, would clean itself



up in process of time. Again, from the purely political viewpoint such liferent votes conferred valuable advantages in that both the liferenter and the fiar on lands of requisite valuation could be enrolled, although the fiar could only vote in the absence of the liferenter. Even so, this was a valuable concession, since many freeholders were often unable to attend election meetings either through ill-health, business vocations or military service abroad. If the fiar were, so to speak, a fixture in the shire, and care was usually taken that he should be, then the vote was seldom wasted. Votes on liferent and fee were much favoured on these accounts, particularly by the nobles who could thus build up sizable interests.

Such were the main forms of nominal and fictitious votes, although within this general framework variety was infinite. A brief review of the history of the development of these votes, as illustrated by some of the leading cases, will perhaps best conclude all that need be said on this score. Again the earliest cases show all the diagnostic features that were to mark the development of nominal and fictitious votes. The case that arose from the rejected claims of three gentlemen at an election meeting held at Stirling in May 1754 set an unhappy precedent. For some years a fierce contest had been waged in that county in which both parties strove feverishly to gain control of the Roll of Electors, and matters came to a head at the election meeting held on 17th May 1754. The two rivals were James Campbell of



Ardkinglass, the last elected M.P., and Robert Haldane of Plean. For years the Campbells had been steadily infiltrating the county, while Haldane represented the independent freeholders in a bid to prevent any recurrence of the domination from which the shire had escaped after the forfeiture of the Earl of Mar in 1715. The contest was hot, objections were freely moved against voters attached to both sides and the proceedings of the election meeting take up 69 close written folio pages.<sup>46</sup> Among others, Forrester of Denovan objected to the enrolment of Andrew Fletcher of Salton, younger, as liar on parts of the lands and barony of Gargunnoch, valued at £437.13.8 Scots and on which lands Francis Fletcher was infeft as liferenter although he did not claim to be enrolled. Denovan charged that the title was nominal and fictitious since Andrew Fletcher was bound to redispone the lands to his author and the sums involved were elusory. Archibald Campbell answered for Fletcher by giving nay for Denovan's yea, and concluded triumphantly that the only proof the freeholders could use lay in the Cath sa of Trust and Possession which Fletcher was perfectly willing to take. So far as the freeholders were concerned the matter was resolved on a simple majority vote and the Campbell interest being in greater strength Fletcher was enrolled. Exactly the same procedure was

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46.

See Minutes of Freeholders of Stirlingshire, vol.III. Minutes of Election, 17 May 1754, especially pp.19-29.



followed in the case of Lieutenant Campbell and David Gcurly. Campbell of Ardkinglass carried the election by a majority of eight votes and the case subsequently brought by Denovan into the Court of Session was part of an attempt to upset Ardkinglass's return.

In the Court of Session the pleadings for Forrester of Denovan and others adduced some additional, and, one would have thought, sufficiently damning evidence of nominality. The lands on which the titles of Fletcher and others rested had been disposed to them by Sir James Livingstone and James Campbell of Ardkinglass. Further their charters and sasines contained the proviso that as soon as the dispenes were entered as immediate vassals of the Crown they should redispense the property of the lands to Sir James Livingstone in liferent and James Campbell in fee. The latter were to hold the lands from Fletcher and company for a small clusory feu-duty, and the casualties of superiority were likewise reduced to microscopic proportions. It was concluded for Denovan that "therefore it was evident their titles to the lands were nominal and fictitious, created only with a view to entitle to vote, contrary to Act 7 George I." That a right in bare superiority conferred a vote Denovan recognised, but on his part it was submitted that where superiorities were dispensed purely to create votes and not in the normal course of business the whole intention of the Act 1691 was overthrown. The case thus put for Denovan and others was not even answered,



counsel for Fletcher and others merely handing in a paper which asserted that since the bare superiority carried the vote that must be the case here. As to the casualties of superiority, it was within the power of the superior to waive these entirely should he so choose. The Lords, then in their most timid and unhappy period, agreed with Fletcher's advocate and the objections were repelled.<sup>47</sup> This was tantamount to giving vote makers a legal warrant and the bolder styles of conveyancing we have already outlined soon enjoyed boom conditions. In the '60s and '70s the creation of nominal votes proceeded apace, virtually unchecked and, as precedent piled on precedent, apparently uncheckable.

Two of these precedents require brief treatment. First, there was the case of Campbell of Shawfield in 1760, which among its other interesting features illustrates how the making of nominal and fictitious votes enabled noblemen to influence county elections in Scotland.<sup>48</sup> In 1757 the Earl of Glencairn disposed the superiority of certain of his lands in which Doyd Porterfield

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47.

Fac. Coll., vol.I, No.CXXIV, Thomas Forrester of Denovan, and other Freeholders of Stirlingshire, against Andrew Fletcher, younger of Salton, Lieutenant James Campbell, and David Gourlay of Kopdarroch, 9 Jan., 1755.

48.

Fac. Coll., vol.II, No.CCXII, Daniel Campbell of Shawfield, and William Graham of Gartmore, against William Muir of Caldwell, 5 Feb., 1760. Interlocutor sustained on appeal to House of Lords, 1 Dec., 1760. *ibid.*, p.504. Cases Appealed.



was base infoft <sup>as</sup> ~~te~~ the vassal. At once, and without taking infoftment on the charter, Porterfield dispensed the superiority of one part of the lands concerned to Campbell of Shawfield in life-rent and to Lord Glencairn and his heirs in fee. The other part was similarly treated, this time Graham younger of Gartmore coming in as liferenter. Campbell and Graham, once their titles were completed, applied to be enrolled at the Michaelmas Head Court held by the barons of Renfrewshire in 1759. Muir of Caldwell objected to the titles and the objections were sustained by a majority of the freeholders present, whereupon Campbell and Graham appealed to the Court of Session. There Muir repeated his objections - that the lands were part of the entailed estate of Glencairn and could not be disposed. Furthermore, the intention clearly was to create votes, else why did Porterfield dispose in liferent the superiorities to properties held by him, and why should these liferent interests fall so conveniently to two of the Earl's nephews? Further, Porterfield held his property under a strict entail and it was not competent for him to alienate or divide the superiority. Thirdly, the qualifications were stigmatised as obviously nominal and fictitious. On the first charge, breach of tailzie, the defenders could only plead jus tertii. As to Porterfield's acquisition of the superiority the Act 20 George II in no way specified what the vassal should do with the superiority once it was in his hands.<sup>49</sup> Finally, so far from

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<sup>49</sup> 20 George II, c.50, Tenures Abolition Act, section 16, whereby possessors of tailzied estates were empowered to sell the superiorities thereof.

being nominal and fictitious these were true and real estates on which no back bonds were held and they might be attached for debt. Counsel for the complainers, however, took good care not to enter into details over the precise monetary worth of these "true and real estates." Again the Lords were obliged to find that ex facie the titles were good and that they met the letter of the law. Campbell and Graham were thereupon ordered to be added to the Roll of the Freeholders.

Perhaps the most famous of these earlier cases, and the one which was most frequently cited in subsequent processes, was that of the Galloway voters as it was usually called.<sup>50</sup> Unlike most nominal and fictitious votes at this late date, 1760-1, these were founded on Old Extent. Seven claimants desired to be enrolled at Michaelmas 1760 at Wigtown, but, since all their titles were constructed on the same lines it will only be necessary to consider the case of Walter Stewart. All seven were manufactured by the Earl of Galloway on lands which he held direct of the Crown and which were assessed on the Old Extent. The freeholders refused to enrol the claimants who then appealed to the Court of Session. Stewart's situation was that he held a liferent on the superiority of the three merk land of Barnkirk which the Earl held in fee, while the actual property of the

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50.

Fac. Coll., vol. III, No. LI, Walter Stewart, Advocate and others, against David Dalrymple, Advocate, 23 July, 1761.



lands was disposed in feu to Lord Garlie's, the Earl's vassal. All the necessary documents, the radical titles and midcouples along with a retour dated 2 May 1633, were produced at the Head Court and recited in the Court of Session. The other six claimants were similarly placed. David Dalrymple, one of the freeholders, objected mainly on points of legal procedure, but the judges steadily overruled him point by point. For example, Dalrymple had taken exception to the retour on the grounds that the inquest was made up of only 12 jurors, but this the Lords repelled. Yet they found fault with the retour in that it failed properly to instruct the Old Extent of the lands. To this decision they adhered on considering a reclaiming petition on 2 February 1762, but on appeal to the House of Lords this judgment was reversed on 1 April 1762. The objection of nominality, on the score that no profit accrued to the claimants from their "estates", was repelled, although it was observed on the bench, "That this was the strongest instance that had ever occurred of a title purely nominal, and which conveyed no real interest in land; but it had been decided in other cases, that no regard was to be had to the VALUE of the estate, provided the claimant was really and truly vested in the right, such as it was." In the end the Galloway voters were enrolled. This was an interesting omnibus case which raised many of the most vexed questions in 18th century electoral law and procedure in Scotland.

In the first decade of the long reign of George III there

arose in both England and Scotland some unease at the increasingly blatant use of malpractices at elections. Corruption and malpractice were very definitely in the ascendant, a fact that cannot be blinked even though modern writers on the subject have shown that it is grossly inadequate to see the problem as a simple question of morality. Sir Lewis Namier and Professor Pares have shown that corruption was, in the nature of things, inevitable and that the old Whig view that it was the invention of the King's Friends, not at all well founded.<sup>51</sup> The use of influence had long been known before the accession of George III, but in the early part of that king's reign the first formation of a consistent opposition to it can be detected. This is a difficult subject and one on which it is quite impossible to generalise, but this much can be said with certainty - that before 1760 criticism of the electoral system in Scotland is nowhere evident, but that after that year it becomes perennial and a favourite topic in the magazines. Nor in England were the protests confined to the rhetorical utterances of Edmund Burke "On the Present Discontents". In 1767 William Penn's "Address to the Freeholders and electors of England upon the choice of a new parliament in 1679" was being published in the magazines. Some of its points were more applicable in 1767 than

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51.

L.E. Namier, "Structure of Politics at the Accession of George III"; R.Pares, "George III and the Politicians".



the year in which they were penned. "Honest gentlemen will think they give enough for the choice that pay their electors in a constant, painful, and chargeable attendance. But such as give money to be chosen, would get money by being chosen. They design not to serve you, but themselves of you. I intreat you to show your abhorrence of this infamous practice. It renders the very constitution contemptible, that any man should have room to say, he carried his election by debauching the morals of the people."<sup>52</sup> The cry was taken up by the small politically conscious class in Scotland - the landed gentry from whom the freeholders were mainly drawn. But in Scotland the murmurs of complaint and demands for reform rose from specific defects in the electoral system, not from a general attack on influence and corruption as such. Nor was it used so much as a propaganda weapon by those politicians excluded from ministerial favour and the good things that did so much to sweeten political life and preserve the glorious constitution. In short, it was largely an administrative and legal problem.

By this time it was becoming clear that the problem of nominal and fictitious votes was assuming dangerous proportions and that the powers then recognised to lie in the Head Courts

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52.

In "Scots Magazine", 1767, vol. XXIX, p. 512 et seq. In fact these excerpts are from Penn's tract "England's Great Interest in the Choice of this New Parliament: dedicated to all her Freeholders and Electors", in "Select Works of William Penn", 1771, p. 533 et seq.

and in the Court of Session were totally inadequate to hold them in check. As already noted the smallness of the county electorates was such that a relatively small number of fictitious votes could reduce elections to a mockery. This was bad enough, but it was also becoming painfully clear that the problem had wider implications and that some of these threatened to reduce the administration of Scotland to utter chaos. We have already touched on this subject as it affected the Supply. Vote making, however, also threatened to ruin the whole statutory procedure for the registration of lands. The frantic manufacture of nominal and fictitious votes in preparation for the General Election of 1768 brought the Court of Session face to face with both these unpleasant threats. Elsewhere we examine in some detail the cases from Cromarty which forced the Court of Session to abandon its timid attitude and come out with a bold solution to the problem of nominality.<sup>53</sup> In the course of these involved cases it was found that the Keepers of the Particular Registers of Sasines were caught up in the prevailing corruption and manipulating registrations to serve the particular interests to which they owed allegiance and sometimes office. The judges roundly condemned these procedures, but even so sasines continued to be tampered with to serve political ends. In Drummond against

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53.

Vide infra, chapters IV-VI.



Ramsay, in 1809, it was found that an erasure had been made in a date of registration and the name inserted in the Register under a date which did not correspond with that under which it had been entered in the Minute Book.<sup>54</sup>

The judges of the Court of Session, wearied of the time consuming bickerings of rival interests and the cavalier manner in which they trod upon the laws of the land, headed the movement for reform, not from any political motives but in an endeavour to preserve the administration of law. On the basis of their experiences in the involved, harrowing and in some ways frightening cases from Forfar and Cromarty the judges proposed that the freeholders in their courts should be allowed to put special interrogatories to claimants whom they had any reason to consider nominal and fictitious. Such questions as the following would be put: Who is your author? Who first broached the question of sale, you or your author? What price was paid for the estate? What profit accrues to the purchaser? Who paid for the conveyancing and completion of titles? This was altogether different from a simple taking of the Trust Oath, for these were searching questions that required concrete answers and, of course, lurking in the background was the serious possibility of a prosecution for perjury. Consequently, many who

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54.

Fac. Coll., vol. XV, No. CXXIII, John Drummond, Banker in London against Sir Alexander Ramsay and others, 24 June 1809.

would blithely take the Trust Oath were fearful of the interrogatories, as appeared in no uncertain fashion when the Court first employed them in the Forfar and Cremarty cases in 1767-8. This simple expedient would undoubtedly have imposed considerable restraint on the creation of nominal votes, but the House of Lords refused to sustain the procedure and nominal and fictitious votes continued to flourish and to multiply ever more openly.<sup>55</sup>

Nonetheless, the scandals attending the General Election of 1768 in Scotland were so gross as to arouse public protests. A writer in the "Scots Magazine", signing himself "A Real not a Fictitious Elector", led the way in a bitter denunciation of the abuses then prevalent.<sup>56</sup> He begins with a retrospect of several recent elections and concludes this introductory passage with the rhetorical question - "Does not the highest corruption, prostitution, and venality everywhere appear?" In Scotland, in the writer's opinion, the greatest evil was the increase in nominal voters and what evidently most hurt this genteel reformer these were often "people of low rank." This alarmed a gentleman of breeding who could only see as consequences increased corruption

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55.

On this entire subject, see Robert Bell, "Treatise on Election Laws", pp.274-336.

56.

"Scots Magazine", vol.XXX, 1768, p.176.



and venality. Snobbery apart, the author of this letter was perfectly correct, for it was from the bestowal of superiorities on agents, factors and such like that the practice of hawking them on the market later arose. Such people, as our reformer hinted, could not be trusted to do the honourable thing. His proposed remedy, disallow all votes on bare superiorities, would have been a perfectly feasible solution. Let no proprietor, however great his lands, hold more than one vote. Nor should he be allowed to split his valuation and so create votes. To counterbalance the drop in the number of electors the franchise qualification should be reduced to £200 Scots. Finally, parliament should be filled only by gentlemen of property, placemen should be rigorously excluded and really severe penalties brought in against bribery and corruption. For the first offence guilty persons should be transported for three years, and for the second for seven. Had this idea been adopted the New World and the Antipodes would have been densely peopled and the institutions of the new nations would surely have provided the student of politics with a never ending source of wonder. However, "Elector's" ideas were in the main sound and indeed this was the platform of reform from 1770 to 1832, apart from the shortlived enthusiasms of 1790-4.

The unfortunate decision of the House of Lords over the special interrogatories fanned the rising criticism of the system in the counties. From 1770 onwards voices raised in varying

degree of criticism were to be heard, but it is important to notice that until 1790 these criticisms had no revolutionary implications and indeed like those of the "Real Elector" proceeded mainly from actual freeholders who wished to see the system cleaned up, possibly in some instances for their own selfish ends but in the main purely to abolish conditions that were not only corrupt but personally degrading. In a fierce contest in the Scots counties all sorts of innocent people were often bullied and cajoled into committing perjury and falsifying documents. There is no point in trying to gloss over these unpleasant aspects of elections. The system was both corrupt and degrading and despite the thick-skinned cynicism of most of the professional politicians,<sup>57</sup> there were those who disdained to seek refuge in double morality or high sounding circumlocutions. This sometimes appeared in the matter of the Trust Oath, the one weak defence left to the freeholders after 1770 and one that had for many years past been hooted off the stage by unscrupulous parchment barons. But occasionally there were those whose scruples would not allow them to take the oath. This operated most interestingly in the Ayrshire election of 1774, where the rivals, Sir Adam Fergusson of Kilkerran and Kennedy were running neck and neck. Counting his nominals Kennedy had a majority of one, sufficient to enable

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57.

A typical example of this is Andrew Mitchell's letter to a friend re the election of 1747 in Aberdeenshire, quoted in Forritts, "Unreformed House of Commons", vol.II, p.8, 174-5.



him to control the election meeting from first step to last. George Fergusson, however, Sir Adam's brother, moved that the Trust Oath should be put to one of Kennedy's most notorious nominals. Kennedy, thinking his friends would not baulk at a trifling perjury, was unperturbed and demanded that all the freeholders should take the oath. Sir Adam actually had more nominals on his side than Kennedy had but Fergusson's friends all took the oath with not as much as a quiver of the eye-lid. Five of Kennedy's supporters, however, refused to swear, although their titles were as good or as bad (whichever way one looks at it) as those of Fergusson's nominals. Indeed one of Sir Adam's parchment voters was a minister, and he apparently swallowed the oath as easily as any, an oath which, as the account says "three captains of grenadiers were so scrupulous as to refuse." Sir Adam finally romped home with a majority of thirteen.<sup>58</sup> Not all ministers, however, were of this easy disposition as Sir Gilbert Elliot found when in 1780 the first contest took place for 20 years in Roxburghshire, and the baronet asked his friend Thomas Sommerville, Minister of Jedburgh, to accept a qualification. This, says Sommerville, "I declined without a moment's hesitation, as I had done a year before.....I was so sincerely attached to Sir Gilbert Elliot, that the means of serving him would have been a more cogent

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58.

"Scots Magazine", 1774, vol. XXXVI, p. 675.

motive for compliance with his desire than any prospect to myself. But the trust oath was an insurmountable obstacle to the gratification of my wishes."<sup>59</sup> It is a safe enough conclusion, however, that men like Sommerville and the three scrupulous captains of grenadiers were in a marked minority in 18th century Scotland, and perhaps in any society at any time.

Clamours for reform arose once more following the elections of 1774. In that year the freeholders of Aberdeenshire unanimously agreed to instruct their Member to support a bill for abolishing all wadset, liferent and redeemable qualifications.<sup>60</sup> Such sentiments were widespread and in the winter and spring of 1774-5 the draft of a proposed bill aimed at the destruction of nominal and fictitious votes was much discussed in Scotland. In May 1775 the Lord Advocate James Montgomery actually introduced a bill to prevent the creation of votes by the splitting of superiorities. This it proposed to do by repealing that provision of the Act 1681 which, however wrongly construed, seemed to sanction votes on proper wadsets and liferents of superiority.<sup>61</sup> It soon ran into heavy opposition, however, and the project seems

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59.

Thomas Sommerville, "My Own Life and Times, 1741-1814", 1861, pp.177-8.

60.

"Scots Magazine", 1774, vol.XXXVI, p.661.

61.

"Scots Magazine", 1775, vol.XXXVII, p.289.



to have been quietly shelved.<sup>62</sup> Even so, in some quarters the bill was criticised as too timid and restricted in its provisions. One critic asserted that cutting down the electorates would, so far from remedying abuses, merely multiply them. This particular observer believed that the clamour against nominal and fictitious votes arose from those who had safe control of certain counties and conceived that if nominal and fictitious qualifications were abolished their positions would then be unassailable. In some counties it may have been so, but in the present state of our knowledge it is impossible to dogmatise. Certainly, A.R. was a reformer for his suggested remedies were more radical than those contained in the bill he was criticising. As he saw it, the trouble lay in regarding the vote as being implicit in the superiority. Let it be bestowed on property, the value of which should not be too great, and let only those superiorities entitle to vote which yield a fixed annual income.<sup>63</sup> Fundamentally these were the ideas that dominated the minds of the authors of the Reform Act, Scotland, of 1832.

The arguments to which this abortive bill of 1775 gave rise, however, were of the greatest interest and particularly

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62.

Commons Journals, vol.35, 4 May 1775, p.347,351. No details of the bill or its fate are given.

63.

"Scots Magazine", 1775, vol.XXXVII, p.289.

revealing was the attitude of the freeholders of Midlothian. Their member, Henry Dundas, as Solicitor-General, had seconded the bill, and certainly on the matters it sought to remedy he was no mean authority, although at this stage in his career his knowledge, though deep, was mainly theoretical and derived from his practice as an advocate. Dundas presided over the meeting of the freeholders which discussed the bill, but unfortunately the report available does not give his opening address or opinions - which must be counted a great loss. Sir Alexander Dick was for the bill; he thought it of the first importance for the safeguarding of the constitution, the stock approach in the 18th century to all questions involving government or administration and often tenable by those of every conceivable opinion or shade of opinion. On the other hand Sir John Dalrymple absolutely disapproved of the proposed measures, which to him threatened to overthrow the constitution in that the smaller freeholders would secure political hegemony. But he had his liberal moments and agreed to support the bill if a clause would be added "allowing gentlemen to make as many votes, in their own persons, as they had qualifications on their estates." This he urged on the analogy of the East India Company's practice, where votes were allocated proportionally to stock held. It was an interesting comparison and the view that the constitution was like a peculiarly wide charter which governed a joint stock company was probably more honest than most of the vapourings on the glorious constitution. And so the debate went on, freeholder after freeholder



having his say, most concurring with the measure apart from individual caveats.<sup>64</sup>

There was no way of knowing it then but this type of reform was doomed to enjoy a brief vogue. Limited in its effects such a bill might have been but it would probably have been beneficial, without prejudice to further reform and amendment as required. The want of it was soon severely felt by the Court of Session which continued to be plagued by franchise cases in which the litigants grew bolder and bolder, frequently flaunting in the Court's very face its lack of power in these matters. The decision of the House of Lords on the special interrogatories was like giving the parchment barons a Charter of Novodamus and well they knew it. Nothing could be more clear than that Scots county elections were going to become more and more corrupt until such time as their Lordships were driven into adopting an attitude more consonant with reality and common sense. Indeed the freeholders of some counties were obliged to take some extraordinary measures to prevent politics from turning into one long litigious nightmare. In September 1780, for example, the Ayrshire freeholders published a notice in the Edinburgh newspapers, which the "Scots Magazine" approvingly reproduced.<sup>65</sup> Apparently certain

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<sup>64</sup> "Scots Magazine", 1775, vol. XXXVII, pp. 556-8. This is a fuller report than that in the Minutes of Freeholders of Midlothian, vol. 3, under date 12 Oct. 1775, with which it agrees.

<sup>65</sup> "Scots Magazine", 1780, vol. XLII, p. 555.

freeholders were making a racket out of the whole business and taking complaints into the Court of Session in the hope of winning costs or else achieving a profitable settlement out of court. In 1730 the two candidates, Sir Adam Fergusson and Major Montgomerie agreed that if any of the nominals on either side were attacked that for each one a real voter present in the interest of the opposite party would stand down. The Major, however, broke the compact and attacked some of Sir Adam's nominals which provoked some bitter strictures. A hot legal contest began, Sir Adam being supported by a subscription from his numerous friends, among them George Dempster who contributed £20.<sup>66</sup> Sir Adam protested against the Major's return,<sup>67</sup> and this gave rise to some curious not to say conical results. The Committee appointed to try the merits of the case pompously concluded that the Court of Session had no powers to rule on the validity or otherwise of votes and proceeded to investigate them on its own account. The Committee came to its own conclusions, which, curiously, were in exact accord with the decisions of the Court of Session.<sup>68</sup>

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66.

"Letters of George Dempster to Sir Adam Fergusson, 1756-1813", 1934, ed. James Fergusson, p.110.

67.

Commons Journals, vol.33, 7 Nov.1731, p.18 et seq. Determined in favour of Sir Adam Fergusson, *ibid.*, 2 April 1732, p.327.

68.

"Scots Magazine", , vol.XLIII, p.185.



Clearly, confusion was being piled upon confusion. The Court of Session was in the strait-jacket of 16 George II with each House of Parliament constricting the jacket tighter and over tighter. If the aim was to preserve corruption and venality then both the House of Peers and the House of Commons were doing yeoman service; if not, their obscurantism was unbelievable, so much so that it is difficult to conceive that it proceeded from anything so innocent as plain ignorance. There were those in Scotland who set the blame on Lord Mansfield, alleging that it was through his influence that the special interrogatories had been rejected.<sup>69</sup> Be this as it may, quite obviously some amendment had to be made, for between them the Houses of Parliament were reducing the electoral system in Scotland to a complete farce.

Agitation for reform in the Scots Counties came to the fore again partly as a result of the revolt in the burghs against the narrow oligarchies that controlled their finance, their administration and indeed their very being. Searching criticism in this sphere led naturally to criticism in others. Richard Price and other radical thinkers, were quick with help and advice. Christopher Wyvil's Yorkshire Freeholders Association was soon in touch

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69.

See the extraordinarily revealing disquisition on the whole subject of "parchment barons" in Ramsay of Ochtertyre's "Scotland and Scotsmen in the 18th century", ed. A. Allardyce, 1883, vol. I, pp. 340-2.



with the freeholders in the various Scottish counties but, it must be admitted, received a cold reception from most.<sup>70</sup> Soon the periodicals were running articles condemning fictitious votes.<sup>71</sup> Just before the General Election of 1784, which found the politicians back at their old pranks, Sir William Hamilton published an open letter to the nominal voters of Linlithgowshire. There were, he said, 57 upon the Roll of Freeholders of whom only 28 could be reckoned genuine freeholders. He goes on, "I see a spirit arising in the north," against the nominals. For his part he would require every voter in Linlithgowshire to take the oath of possession and if the nominals were ill advised enough to undergo the test he would personally libel each and every one of them for perjury in the High Court of Justiciary.<sup>72</sup> There is no record of Sir William carrying out his threat, although it need not thereby be concluded that he had struck mortal terror in the hearts of West Lothian's nominals. Trials for perjury were brought in Moray but proved signal failures.<sup>73</sup> Considering

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70.

For details of the reform agitations, see H.W. McKillop, "Scotland and the French Revolution", passim, but especially chapters I and II.

71.

See, for example, "Scots Magazine", 1784, vol. XLVI, pp. 115, 177. This volume contains many articles on the need for electoral reform.

72.

"Scots Magazine", 1784, vol. XLVI, pp. 221-2.

73.

R. Bell, "Treatise on Election Laws", p. 231, Fearne Cuming against Lawson.



the corruption that had marked the conduct of the American War of Independence, the dismal record of government, the way in which Henry Dundas had ruthlessly directed a block of Scots M.P.s. and the economic distress of the time, it is little wonder that in 1784 the weavers of Paisley should have rabbled the election dinner of the newly elected Member for Renfrewshire and that the services of a party of soldiers from Glasgow were needed to still the riot.<sup>74</sup>

Much of this unrest stemmed from the impotence of the Court of Session. Not to put too fine a point on it, not only were politics and the conduct of elections corrupt they were becoming openly and flauntingly corrupt. In the earlier 18th century, while corruption was still the keynote, affairs had been managed more quietly; by the 1780s it looked as if to circumvent and subvert the laws were more honourable than to uphold them. It was a dangerous time for such developments. The ideas already hatched in America and the related ideas then hatching in France would have forced some stringent criticism of British institutions in any case. The open and prevailing corruption in Scotland meant that criticism, when the storm broke, did not need to be of the officious, self-justifying, hypocritical kind. The whole structure, in counties and burghs alike, was rotten and wide open to criticism. In the meantime the Court of Session did what it

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<sup>74</sup>. "Scots Magazine", 1784, vol. XLVI, p. 222.



could. In 1737, for instance, it resumed the attack on nominal and fictitious votes and in four cases from Renfrewshire declared them invalid. On the other hand, so benumbed was the Court, that three similar cases from the same county occurred in which the objections moved were overruled.<sup>75</sup> Individual Head Courts also did their best to restrain these abuses by private compacts among the freeholders. For example, the Michaelmas Head Court at Perth in September 1789 agreed that for two years none of its members would create freehold qualifications either in liferent or wadset; that no claimants on suspect titles should in any circumstances be enrolled, unless by authority of the Court of Session; that every effort should be made to purge the Roll of those who stood on it on such titles; and that the freeholders should bear the cost of any litigation this might entail. A committee was then appointed to examine the Roll and take such steps as might be deemed necessary.<sup>76</sup> This procedure, in fact, had been operative in Stirlingshire, with very few intermissions, from 1743 onwards.<sup>77</sup> Yet it was not very satisfactory. It

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75.

See Fac. Coll., vol. IX, Nos. CCCXIII, CCCXIV, CCCXV, CCCXVI, all of date 20 Feb., 1737, where the objections were sustained; Nos. CCCXVII-CCCXIX, 20 Feb., 1737, where the objections were overruled.

76.

"Scots Magazine", vol. LI, 1789, p. 514.

77.

Minutes of Freeholders of Stirlingshire.



speaks much for the honour of the freeholders who concurred in these measures, their intentions were good and as far as one can make out disinterested, but in a crisis good intentions went to the winds and too often freeholders of this type were forced to meet stratagem with stratagem.

That the situation was getting out of hand even the House of Lords was forced to recognise. This arose from a series of cases which had plagued the Court of Session from 1784 onwards, among them those from Renfrewshire already mentioned. The cases which really forced the Peers to take stock of their position, however, came from Aberdeenshire. In 1784 the Duke of Gordon and Lord Fife had fought each other bitterly and despite the efforts of Henry Dundas to work out a peaceful compromise the struggle continued.<sup>78</sup> At the by-election of 1786 Fife triumphed and in reply the Duke began to create more nominals. Thus, <sup>at</sup>~~as~~ Michaelmas 1788, 26 claimants on rather "airy freeholds" derived from the Duke presented themselves for enrolment, the Duke's friends were in a majority and despite efforts by the Fife faction to put the special interrogatories formerly sanctioned by the Court of Session all 26 claimants were enrolled.<sup>79</sup> The situation in Aberdeenshire then was that the Duke could muster 44 votes, all more or less nominal, and Fife 31 of the like description. The total number on the Roll was 187 but no other single interest

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78.

For the background to the struggle, see Holden Furber, "Henry Dundas", pp.206-215.

79.

"Scots Magazine", 1788, vol.L, p.517.



could challenge those of the Gordons or the Duffs.<sup>80</sup> Fife's friends accordingly appealed to the Court of Session against the enrolment of the Duke's 26 new creations. The test case soon came to be that of Sir William Forbes against Sir John Macpherson,<sup>81</sup> that same Macpherson who had for 20 months succeeded Warren Hastings as Governor-General of Bengal, a nabob of the worst type who had risen from low estate to great opulence by the most corrupt and unsavoury practices. He was, in particular, deeply involved in that most lucrative of all rackets, the Nabob of Arcot's debt, and indeed Macpherson had won for his hard-working compatriots an ill name in India that they little deserved.<sup>82</sup> That Sir John Macpherson should have figured so prominently in these important cases was typical of the period, for in the last two decades of the 18th century wealth, whether derived from the East or West Indies, was steadily infiltrating the political field formerly engrossed by the landed gentry.

Sir William Forbes, then, objected to the Court of Session where it was decided that such interrogatories could not be put

80. Sir C.E. Adam, ed., "Political State of Scotland in 1783", S.V. Aberdeen.

81. Fac. Coll., vol.X, No. LXVII, Sir William Forbes against Sir John Macpherson, 6 March, 1789.

82. D.H.B.; P.E. Roberts, "British India, under the Company and under the Crown", p.221.



by the freeholders and the objections to Macpherson's title were repelled.<sup>83</sup> The case, however, was carried on appeal to the House of Lords, where probably it was decided more on political grounds than anything else. The Duke had been giving Dundas a hard time and in Henry's hey-day few did that with impunity. To reduce His Grace's power in Aberdeenshire was clearly one way of making him more responsive to ministerial commands. At anyrate, the Lord Chancellor Thurlow came out strongly against nominal and fictitious votes and his opinions prevailed. At long last he cleared up the problem of what was nominal and what was not. The definition was not a triumph of forensic skill; it was indeed nothing but a crude version of the homespun doctrines that Kames and later Erskine, both strong anti-nominals, had from time to time aired so pungently on the bench. It was the delivering of such doctrines at such a high level that invested Thurlow's words with importance. He declared: "It is said at the bar, that nominal and fictitious were terms undefined. I define it the not being really the man he describes himself to be..... He produces titles, which, on their face, import to convey an estate; but he has obtained them under circumstances, which, if disclosed, would

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83.

W.L. Mathieson, "Awakening of Scotland", p.101, errs in believing that the Court of Session "tentatively revived their old queries."



show that nothing like such a conveyance was in the contemplation of the granter or grantee."<sup>84</sup> Nominal voters were, as a result of this decision, expunged not only in Aberdeenshire but in other counties as well. A comparison of Adam's list for the shire of Aberdeen with that compiled by an anonymous writer in 1790 reveals striking changes in the Roll.<sup>85</sup> For one thing the number of freeholders is reduced from 173 to 153, and certainly many of the Duke's nominals of 1783 had by 1790 disappeared. Without close scrutiny of the Minutes of the Freeholders, though, one cannot speak with absolute certainty, for "Anonymous" merely gives lists of voters and does not, like Adam, group them under interests. All the same it seems clear that by the decision of the House of Lords in Forbes against Macpherson the Duke of Gordon had suffered a great fall, thereby rendering him more responsive to the blandishments of Henry Dundas.

Thereafter it was held to be legal for the freeholders to put the special interrogatories to freeholders or would-be freeholders and in some counties vigorous efforts were made to purge the Rolls. For example, a bold bid was made in Inverness-shire

84.

Robert Bell, "Treatise on Election Laws", for full report of Thurlow's speech, pp.235-7. Fac. Coll., vol.X, No.LXVII, Sir William Forbes against Sir John Macpherson, decision of House of Lords, 9 April 1790. Appendix.

85.

Anonymous, "A View of the Political State of Scotland", 1790, S.V. Aberdeenshire.



where of late years nominals had spawned freely. The Duke of Gordon, Lord Macdonald, the Duke of Argyll and a comparative newcomer to the great game, Norman Macleod of Macleod, had all created votes. Macleod, another nabob, was bent with the help of Dundas on securing the county for himself, the more so as early in 1790 he had at last succeeded in being returned as its member.<sup>86</sup> He now used the outcry against nominals to make a clean sweep of the Roll, including those he himself had made. To different persons Macleod gave differing accounts of his activities. To the Dukes of Gordon and of Argyll, for example, he represented himself as bowing before the wrath of the true, independent freeholders who were led by Forbes of Culloden.<sup>87</sup> But to a personal friend, William Macleod Bannatyne of Kames, he gave another and, one may reasonably suppose, more accurate version of the affair. "I came down here just in time for the head court; and I proposed a bold measure and carried it; to strike off the roll every nominal and fictitious voter. Our roll is now clear and has just twenty names, being shortened near one hundred."<sup>88</sup> Evidently objections were made to this arbitrary

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86. J. Foster, "Members of Parliament, Scotland", p.236.

87. H.M.C., Laing Mss., vol.II, Norman Macleod of Macleod to D. of Gordon, 6 Oct. 1790; Same to D. of Argyll, 10 Oct.1790; pp. 536-9.

88. H.M.C., Laing Mss., vol.II, Norman Macleod of Macleod to William Macleod Bannatyne of Kames, pp.539-40.



procedure but Macleod thought that, on reflection, the protesters would be reasonable. After all, he was magnanimous and willing to restore them to the Roll if they insisted. He would then lodge complaints against them in the Court of Session and have them formally expunged. What really took place in Inverness-shire must again wait upon an examination of the Minutes of the Freeholders. But it is plain that Macleod did not unduly exaggerate the extent of his coup, for in 1790, before his bold stroke, 103 stood on the Roll; but in 1811, when next figures are available, there were only 52.<sup>89</sup> The same process can be seen in other counties, but whether Dundas was using the outcry against nominals to confirm his hold on certain counties cannot at the moment be proved. Doubtless, the freeholders in the different counties acted on motives based upon local conditions, and these we know varied widely. In Stirlingshire, for example, only three nominals were expunged, but the freeholders of that county had always carefully regulated their Roll and the number of notoriously nominal voters on it was never large.<sup>90</sup>

One would have thought that the special interrogatories would have proved a serious check upon nominal and fictitious

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89.

Anonymous, "View of Political State of Scotland", 1790, s.v. Inverness-shire; Bridges, "Political State of Scotland, 1811," s.v. Inverness-shire.

90.

Minutes of Freeholders of Stirlingshire, vol. 181, pp. 1-10, Michaelmas Head Court, 5 Oct. 1790.



votes, but this did not prove the case. First of all, the freeholders were still allowed too much freedom and, in fact, the special interrogatories tended to make a useful weapon for dominant parties wishing to maintain their positions. Despite its enlarged powers, the Court of Session was still inadequately equipped properly to control franchise abuses. Besides, the conveyancers, ingenious as ever, soon came up with some tricky solutions that were difficult to restrain. The main answer was to eschew elusory sums and to make it appear that a definite source of revenue was invested in the claimant. Wadset and life interest based upon a superiority worth 10. Scots blench duty went very quickly out of fashion. The difficulty confronting the freeholders and the Court of Session now was that if, on the surface, conveyances made real estates which conferred definite profits of say £10 or £12 per annum it was, in the absence of some incriminating proof of nominality, hard if not impossible to distinguish the true from the false claimant.

Occasionally such proof was forthcoming and gave rise to revealing cases like those from Renfrewshire in 1817.<sup>91</sup> Each case rose from the same general circumstances but ran different courses. We will consider first that of Hugh Crawford against John Shaw Stewart. Crawford claimed to be enrolled at

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91. Fac. Coll., vol. XIX, No. CXXXIV, Hugh Crawford against John Shaw Stewart, 12 Nov. 1817; *ibid.*, No. CLX, William McKnight Crawford against John Shaw Stewart, and Robert Stewart, 7 March, 1818.



Michaelmas 1816 at Renfrew on lands disposed to him by the Earl of Eglinton, but to this Shaw Stewart moved the objection of nominal and fictitious. Despite Crawford's offer to take the Trust oath and to answer the special interrogatories his claim was rejected, and he thereupon appealed to the Court of Session. The Respondents applied for diligence to recover certain letters, which was granted, and as a consequence several letters between the Earl of Eglinton and Hugh Crawford were produced as evidence in Court. The first from Eglinton to Crawford ran - "I hope in a short time to have my dormant freeholds in your country brought forward, and will be happy that you should have one of them. I believe you understand the footing on which they are to be sold, for the life of the purchaser; and as to the sum to be paid, five pounds or fifty will make the freehold equally good. Will you have the goodness to write to me on the subject, and hope you will have the goodness to purchase one of them. Few men will be more agreeable to me, being grateful for the friendly support I have received from you. I remain etc.

Eglinton."

Crawford replied that same day, 25th January 1815 ---

"My Lord, I have had the honour of receiving your Lordship's polite letter of the 25th. I feel very much honoured and obliged by your Lordship's polite information, respecting the division of your Lordship's freeholds in this country; and I shall be most happy to become a purchaser of one of these life-



rents, so soon as your Lordship shall have made the arrangements and fixed a price."

Letters giving further details of the transaction and proving nominality up to the hilt were produced. The liferenter was to receive a feu-duty of £5 sterling yearly. Says Eglinton confidently, "These freeholds will be as free and independent votes, as any upon the roll of the county and unchallengeable." On 9th February, 1815, Crawford wrote to the Earl, closing the deal and at the same time mentioning that his friend McKnight Crawford of Cartsburn needed £180 Scots of valuation to qualify for the £400 Scots franchise. Could the Earl oblige in this respect? If not, Cartsburn would buy one of Eglinton's freeholds should one be available. On 20th February Eglinton wrote to the various purchasers that he had been advised by his lawyer that to overcome "the popular prejudice" the price should be stepped up and not confined to the precise value of the liferent interest in the feu-duty. On these documents the Respondent rested his case. The complainer replied that he had paid a fair price for the estate and that there was nothing in the correspondence produced to infer, let alone prove, nominality. He again offered to take the Trust Oath and any interrogatories the Court might care to put. The judges gave some extremely interesting comments in discussing this case.

Lord Hermand gave it as his view that liferent qualifications, where properly made, were as valid as any votes could be. Indeed, where legally constituted, he approved of them for, "I



should like to see the number of independent freeholders legally increased in this country; but I am afraid that we should not do much to increase the number of independent freeholders by sanctioning the proceedings which are divulged in the proceedings now before us." Normand decided that "the conclusion cannot be resisted that Lord Eglinton was conferring gratuitous rights of voting", and, went on the judge, "the cases of the Honourable William Elphinston and Sir John Macpherson have never been abandoned, and must be our rule in these cases."<sup>92</sup>

Lord Balguto was equally clear on the merits of the case. When, as he says, Lord Eglinton wrote, "I shall be happy to have two such respectable purchasers," He ought to have said, I shall be happy to have two such good voters.' Balgray concurred entirely, and gave a very revealing glimpse of the true situation. "It is perfectly possible," he held, "to make good and effectual different freehold qualifications, but these votes have been ill managed — too many letters have been written — the parties have let us into a knowledge of the views with which they entered into the transaction, and, in doing so, I apprehend they have made it our duty to refuse their admission on the roll of freeholders." The Lord President agreed. Succoth found the votes

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92.

The Hon. William Elphinston appealed against an interlocutor sustaining an objection to his enrolment for the shire of Renfrew. The appeal case was heard in the House of Lords on 27 and 30 April 1787 when Thurlow anticipated his verdict, in identical terms, in the more famous case of Forbes against Macpherson, 19 April 1790. For Elphinston's case see Fac.Coll., vol.IX, No.CCCXV, John Campbell and Archibald Tod, against Hon. Wm. Elphinstone, 20 Feb., 1787. Bell, "Treatise on Election Laws", pp.235-4; for Thurlow's speech, pp.288-295.



nominal and fictitious. Indeed, the bench was unanimous, which was rather a rare event in franchise cases, and the freeholders were sustained in their refusal to enrol.<sup>93</sup>

In the case of McKnight Crawford the respondents offered proof similar to that adduced in Hugh Crawford's case. Cartsburn, however, was not so directly implicated with Lord Eglinton as was Hugh Crawford who had acted as intermediary. He also scored heavily by stressing the fact that he was a genuine proprietor in Renfrewshire who had long desired to be an elector but who lacked the requisite valuation. Eglinton could not oblige with a superiority on lands valued at £180 Scots but wrote that he would be gratified if McKnight Crawford would purchase one of his liferents. Eventually Cartsburn purchased a freehold upon the Earl's estate of Eastwood. At first the Court sustained the freeholders in their refusal to enrol, but on advising a reclaiming petition and answers thereto the judges changed their minds. The Lord President summed up the feelings of the Court. He had, he said, felt that the interlocutor was right when made, but at the same time he had been uneasily aware that McKnight Crawford stood in a different position from the other complainers. He gave as his reason that, "In those other cases, the people had no idea of becoming freeholders in Renfrewshire for any other purpose than to support the interest of

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93.

Fac. Coll., vol. XIX, No. CXXXIV, Hugh Crawford against John Shaw Stewart, 12 Nov. 1817.



Lord Eglinton. This gentleman had not such a view. He had already in his own person great part of a qualification, and it was natural he should wish to complete it." Still the Lord President had his doubts. The vote, he felt, was confidential and this must destroy it. Since some of the judges were of the contrary persuasion, however, he proposed that the Court should put the special interrogatories to the complainer. This was done, to the Court's satisfaction, and the interlocutor was reversed. McKnight Crawford was enrolled, and this decision sustained on appeal to the House of Lords.<sup>94</sup>

These cases illustrate well the main lines of development in the treatment of nominal and fictitious votes after 1790. Thurlow had concentrated upon intention, arguing that it was the confidential vote that was bad. The Court of Session had always toyed with this idea and after 1790 it became the criterion of nominality. Yet this was, as we have seen, treacherous ground, resting entirely upon fortuitous evidence. Vote-makers would not always, as Balgray put it, "let us into a knowledge of the views with which they entered into the transaction." Besides, there was a bad precedent which left an awkward gap in the theory, and of which the politicians were not slow to avail themselves. In the case of the Freeholders of Kincardineshire against Burnet in 1745, it was found that a father might, purely

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94.

Fac. Coll., vol. XIX, No. CLX, William McKnight Crawford against John Shaw Stewart and Robert Stewart, 7 March 1818.



as a mark of parental esteem, confer a nominal estate upon a son with the express intention of enabling him to vote.<sup>95</sup> This decision was reinforced by others and led to a pretty traffic in nominal and fictitious votes. In a case from Banff in 1807 the pernicious doctrine was again upheld. The argument that the title in question was purely nominal and fictitious, as it undoubtedly was, was defeated on the plea that "it is just that the presumptive heir of a large estate should, when he attains his majority, be enabled to discharge the political duties of a citizen; and nothing can be more natural than for a father to place him in this respectable point of view."<sup>96</sup>

Thus in a way that was only slightly modified by the increased powers and vigilance of the Court of Session the old electoral system continued until the end came in 1832. The political agitations that gave rise to the Reform Bill are well enough known and need not detain us here. The latest writer on the subject, however, Professor Cash, has perhaps too readily accepted the views of the reform Whigs.<sup>97</sup> It has to be borne in

95.

Woodhouselee, "Decisions", s.v. Member of Parliament, p.417, Freeholders of Kincardine v Burnet, 30 July, 1745. The vote was defeated on other grounds, 19 June, 1746. On this whole subject Connoll, "Treatise on Election Laws", pp.184-5 is most illuminating.

96. Fac. Coll., vol.XIII, No.COLXXXVII, Duff against Gordon, 27 June, 1807.

97. Herman Cash, "Politics in the Age of Peel", ch.III, pp.35-50.



mind that Francis Jeffrey and Henry Cockburn carefully selected their material to bolster up their contentions. Jeffrey's favourite story concerned a Bute election where one freeholder compeared and solemnly went through all the forms of election, finally ending up by returning himself as the commissioner to the parliament. The story may or may not have been true, but even if bon trovato it was symptomatic only of the counties with very small electorates. At most, it could have happened only in the six paired counties and even then but rarely. Significantly, the Whigs said nothing of such shires as Stirling, Ayr and Renfrew which did strive to preserve free elections.

Yet it would be the labour of Sisyphus to defend the old system of elections in its last days. The truth is that the social and economic conditions that gave it life and vitality were rapidly passing away. It was purely feudal in conception - in the correct and no abusive sense of the term. New "interests" were emerging, and these differed markedly from the old interests. In the 18th century proper interests were merely group formations of the politically dominant landed gentry. In the early 19th century the term came increasingly to denote social and economic groupings. The Jargon now spoke of the "landed interest", "the agricultural interest", "the manufacturing interest", "the commercial interest", whether of East or West Indies. Not that the old ideas vanished overnight, or that the new were clearly demarcated entities. For a time politics reflected the confusion of the old and the new, but by 1832 the old system of elections, based



upon feudal franchises, had long outlived its milieu. There are no crocodile tears to shed in 1852, but in common justice one must recognise that the propaganda of the reformers, however justified it might have been politically, makes but a poor guide to history. The system of representation in the Scottish counties was not debased and venal from the very moment of its inception as Jeffrey, Cockburn and friends believed. That it became so in the course of the 18th century is due to certain definite factors which were, in the main, the unforeseen and unhealthy results of the Union. Even so one cannot be too quick with censure, not at least if justice is the aim. It would show real lack of understanding of the situation in the 18th century to wax moral about some of the transactions then common in politics and electioneering. The system was at fault and until it could be amended the politicians were forced to have recourse to nominal and fictitious votes allied to all manner of sharp practice at Head Court and election meetings, even those politicians who disapproved of these practices and wished for nothing more than their suppression. But when law is so loose and so vague as to invite rogues it is requiring too much of human nature that personal rectitude alone should win the day.

Yet the recognition of abuses does not infallibly lead to the remedying of them. Everyone who has written on this subject of reform has read, and approved, Henry Cockburn's complacent eulogium on his joint labours with Jeffrey and Kennedy of Dumfries.

The Reform Act, he noted happily in his "Journal", "is giving us a political constitution for the first time. The Revolution did not do as much for England."<sup>98</sup> Historically the contention is very strained; politically, in the obtaining circumstances, it may have been justified. Yet a curious fact emerges, and that is that the Reform Bill introduced as many evils as it cured. Cockburn in fact could have done with some modicum of the legal knowledge and acumen of the old style judges at whom he poked such fun in his "Memorials." It is safe to say that most writers who have gone into raptures over the Scottish Reform Bill have either read it as they ran or not read it<sup>at</sup> all. It is indeed the worst drafted Act dealing with the representation of Scotland, compared to which the Act of 1681 is a model of its kind.

Little need be said of the changes wrought in regional representation, which were, though slight, wholly justifiable. All it amounts to is that the system of pairing the small constituencies was abandoned in favour of fusion. Thus Cromarty was merged with Ross, Elgin with Nairn and Clackmannan with Kinross.<sup>99</sup> The greatest changes concerned the franchise. The old

<sup>98</sup>.

Lord Cockburn, "Journal", vol.1, p.13.

<sup>99</sup>.

For details, see Norman Gash, "Politics in the Age of Peel," pp.44-5.



franchises were abolished but existing freeholders were to be allowed to vote for the duration of their lives or so long as they should retain their qualifications.<sup>100</sup> Typically, this was a woolly piece of drafting and gave rise to quite a number of cases. In brief, the situation of such electors could in many instances only be judged under the old electoral law, as for example, in the case of John Bonar in Midlothian in 1836. Bonar had been transferred to the new Register from the old Roll of Freeholders on which he stood enrolled as a fiar. Later he dispoened in liferent part of the subject for which he stood enrolled, and objection was made to his continuing on the Register. Under the old law he would, to safeguard himself, have notified the freeholders of this alteration in circumstances and at the same time proved that he still held a sufficient qualification. Under the new law no such procedure was competent. The Appeal Court, however, held, "that as a privilege has been reserved to the old freeholders, it should not be construed so as to place them in a worse position than under the old law, and that as the voter still retained a sufficient qualification he should not be expunged."<sup>101</sup>

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100.

2 & 3 William IV, cap.65,vi. This statute is found most conveniently, with commentaries and references to cases, in John Cay, "An Analysis of the Scottish Reform Act with the Decisions of the Courts of Appeal", 1850. This is an invaluable work, written by an author who, as Sheriff of Linlithgowshire, was much experienced in the operation of the Act. Hereafter references will be to Cay's edition.

101.

Cay, op.cit., p.32.

If this were the only defect of the Act it would be pedantic to criticise, but unfortunately the rest of the statute is of a piece with this imprecise section. Take, for example, the case of the eldest sons of Scots peers. Under the old electoral laws they were unable either to elect or be elected for a Scots county. After the Union the justification for this no longer existed and the anomaly became the more glaring in that they might elect or be elected for English counties, if qualified to do so, and again in that the eldest sons of English or British peers were not disqualified from being electors or elected in the counties of Scotland. From 1789-92 Lord Daer had fought a hard but losing battle on this issue.<sup>102</sup> The reformers now proposed to remove the disability, but the manner in which it was done reveals the fact that the undoubted talents of Jeffrey and Cockburn did not lie in the legal field. Section XXVII says that: "From and after this present Parliament, the eldest sons of Scotch peers shall be entitled to be registered and to vote at all elections for members of Parliament for Scotland, and shall also be entitled, though not so registered, to be elected to serve as such members for any county, city, burgh, or town, or district of burghs in Scotland." This gave rise to quite a number of cases in which the eldest sons of peers claimed to be registered as voters by virtue of the above section of the Act although not otherwise qualified. On the whole, the sheriffs by a rather wide

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102.

Fac. Coll., vol.X, App.IV, Lord Daer against the Hon. Keith Stewart and others, Freeholders of Wigton, 24 Jan., 1792.



construction of the statute, rejected such claims, although in at least one case, that of Lord Elcho in Peebleshire in 1835, the claim was sustained. That the framers of the Act had blundered was admitted when in 1835 a bill was brought into the Commons "to explain and amend an act passed, &c. for amending the representation of the people in Scotland." One such amendment proposed was that the eldest sons of peers should in no circumstances be registered unless they held the usual franchise qualifications.<sup>103</sup>

Far more serious was the curious, slipshod drafting of the sections that defined the new franchise in the counties. The concept of superiority conveying the vote was deserted, and in the circumstances rightly so.<sup>104</sup> This point is incontrovertible. Later, once Cockburn had definitely accepted the task of drawing up a bill, he wrote to Kennedy listing certain points that it was essential to obtain. Of these one was "The ousting of all votes except on Dominium utile. Endless jobbing else."<sup>105</sup> But to

103.

Cay, "Analysis of Scottish Reform Act", pp.26-9.

104.

See Lord Cockburn's "Letters on the Affairs of Scotland", pp. 259-265, Memorandum of Proposed Reform in Scotland sent by Kennedy to Lord John Russell. It was mainly Cockburn's work. Again, *ibid.*, p.243, Cockburn to Kennedy, 5 Oct. 1830, "I would let the real proprietor infest for a year, vote whether he held by sub-infeudation or not."

105.

Cockburn, "Letters on Affairs of Scotland", p.293, Cockburn to Kennedy, 13 Feb. 1831.

define such a franchise was beyond the powers of the authors of the bill. Cockburn was a very indifferent lawyer; Jeffrey a good advocate, but almost exclusively in criminal cases. Both were shockingly ignorant of the feudal law of Scotland - which they affected to despise - of conveyancing (the statute is strong witness to this), and of the law of real property. The result appears most glaringly in VII, which seeks to define the rights in property valued at £10 which should confer the vote. Whoever had been owner (whether he had made up his titles, or been infeft or not) of any subject so valued for at least six months before the Registration Court should be entitled to be registered. The £10 had to be clear rent after feu-duties, ground annuals or other payments had been made. So far, not what one would expect of a lawyer trained in the law of Scotland, but perhaps capable of clarification on a wide construction. Cockburn, however, was determined to be upsidies with the English bill which went into details over possession. A Scottish feudalism would have seen the snare; Cockburn put his foot in it. Because "possession" occurred in the English bill he must needs import it into the Scots bill.<sup>106</sup> The result was complete confusion. The above provisions re £10 of valuation were to apply provided that he, the owner, "be, by himself, his tenants, vassals or others, in possession of the said subjects, and be either himself in the actual occupation or in

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106.

"Letters on Affairs of Scotland", p.322, Cockburn to Kennedy, 20 May 1831.



receipt of the profits and issues thereof to the extent above mentioned."<sup>107</sup> Not a reference, not a word, was devoted to the definition of "owner" and "possession", terms that have proved singularly intractable in Scots law and so continue to this day. In fact, so far as land subjects were concerned, the old feudal law of Scotland continued to operate after 1832 precisely as it had done before that year. "Ownership" and "possession" were terms alien to that system, and in the numerous cases that arose on this score naturally the decision went to whichever party could claim the sanction of the feudal law. An interesting case from Roxburghshire in 1836 illustrates the point admirably. Inglis claimed as co-proprietor, or joint-owner (in the words of the statute), in life-rent of lands, to which it was objected that he had previously feued out the property, retaining the feu-duties, and that therefore he could only claim as the owner of feu-duties under terms of schedules F and C of the Reform Act. But his claim was sustained,

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107.

This extraordinary clause recalls the case of Brown of Coalston, A.P.S., XI, 19 June, 1703, p.62. It was objected to Brown that he was only a singular successor in superiority and not in possession, to which he answered, "That being infeft as Superior his vassals possession ought in Law to be accounted his possession." The Committee for Contraverted Elections and the Parliament agreed with this view. Jeffrey and Cockburn wished to end rights on superiority and to substitute rights in property, but ignorance of feudal law led them, accidentally, into enunciating purest feudal doctrine.

"In respect the superior is in law accounted the dominus or owner of the lands, which, in the words of the statute, he possesses by his vassal."<sup>103</sup> In short, the work of Cockburn, Jeffrey and Kennedy would have been admirable, if first they had had a St. Bartholomew of feudalism.

As for other subjects, houses and heritables generally, the question of ownership and possession was almost as vexed. Here the interpretation of these terms depended upon the institutional writers of the 17th and 18th centuries, particularly Erskine. Erskine on real property became the sole guide to the Registration and Appeal Courts on these matters, but since the institutional writers are merely expositors of law and not makers of law this meant that no unanimity was achieved. Decisions in similar cases varied widely from Court to Court. In fact, in the counties we enter upon a new era of nominal votes bent upon keeping just within the loose terms of the amended election law. Liferent rights continued and, as hitherto, became a fertile source of abuses. A proprietor had only to portion up an estate into as many liferent interests as would yield each part £10 of annual value to create votes. Worse, all the old checks on nominal and fictitious that had been so laboriously evolved, including the touchstone of intention, were lost by the supersession of the old Acts and decisions. A new means of checking these abuses, which continued unabated in

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103.

John Cay, "Analysis of Scottish Reform Act", p.42.



the new dispensation, had to be slowly built up.

The old Melville interest, skilled in such matters, was quick off its mark here. In 1833 a "Memorandum for the private Consideration of those principally Concerned in maintaining the Conservative Interest in the County of Midlothian" was drawn up. It pointed out that many of the new voters had felt morally bound to bestow their first votes upon the Whigs, who could claim the credit of having won for them the franchise. This, however, would not last long and soon the Whigs would be measured by another yardstick. The compiler of the Memorandum warned the Tories that, while these general considerations were valid, immediate action was essential. In addition to redoubled efforts in putting over the Conservative case resolute endeavours should be made to create votes. It might have been penned by the great Henry himself, so unerringly did it fasten upon the loopholes in the Act. Everyone favourable to the Conservative interest who had a qualification was to be cajoled into registering. This was a common theme at the time, the fact that many persons now qualified to exercise the franchise were too Scotch to spend the 2/6d. required for registration, ignorant of their title to be registered or else plain indifferent to politics. But more important than the registration of such defaulters, "The acquisition of property, and the introduction of a friendly and respectable Class of Voters, is another very important object, which should be always kept in view, and acted upon where occasion may offer." Some strides had been made in this direction, but it was felt that much more might be done. In particular, properties

that might otherwise lead to the registration of hostile voters were to be snapped up, for "it appears evident that there is no way in which the landed proprietors can so surely, or so legitimately and fairly maintain their influence in the County as by purchasing Ten pound properties in the villages, and so getting them out of the hands of a class of men who cannot be depended upon at any time." Already in Dalkeith alone 16 votes had been made in this way, and many more could be made. The price of qualifications, (trust the Dundases to know the market), ranged from £210 to £230 "for the best purchases", although properties affording only one qualification might be had for £150. The Memorandum concludes, "There are also many other modes of making votes, but it is not necessary to enter into particulars here. All that is now submitted is, that some plan should be agreed upon and put in operation, for having the interests of the Party properly looked after and kept up. For, unless this is done, all the trouble and expence of the late content will have been thrown away, and it will be in vain to attempt another."<sup>109</sup>

Where the Dundases led others soon followed. In 1834-5 the Tory Duke of Buccleuch got his friends to buy properties in Selkirkshire of sufficient value to qualify for the vote, numbering

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109.

Melville Mss., N.L.S., No.2, ff.175-8, pp.1-7.



in all 92, no mean handful in that small electorate.<sup>110</sup> Elsewhere we discuss similar happenings in Ross-shire.<sup>111</sup> At first the Whigs, feeling themselves to be safely entrenched in the favour of the new voters, affected to despise these shabby practices, but when the reform ministry began to lose its popularity it was a different story and reformers of every shade of opinion were soon as busy in this field as Tories. That eloquent, but hard-headed, north countryman, Hugh Miller, in his obituary notice of Earl Grey went to the root of the matter. The vote, he held, was now vested in property and this "forms the basis of the whole corrupt machinery of fictitious votes, and these in turn, the support of not a little of the profligacy in public life that can indulge in the eye of day in its true colours, despising the wholesome restraints of general opinion, because altogether independent of them."<sup>112</sup> The indictment was a true one and indeed by the 1840s matters had reached a scandalous pitch in some of the counties. The case of Peebles-shire brought things to a head. In this small electorate of 700 it was estimated that 300 were registered on nominal different interests of £10. As a result of this case an Anti-Fictitious Vote Committee was formed which in particular complained bitterly

110.

Seaforth Papers, Reg. No., Box 33, lot 159, John Cunningham to Stewart Mackenzie, 31 Jan. 1835. T. Wilkie, "Representation of Scotland", p. 233, gives the electorate of Selkirkshire as 280 in 1832 and 430 in 1835. The increase would not be entirely due to the creation of votes, for, notoriously, many eligible voters were not registered in 1832. Still, the results are suggestive - in 1832 a "Liberal" majority of 9, in 1835 a Conservative majority of 31. The county remained a fairly safe Tory seat.

111. Vide infra, ch. X.

112. Hugh Miller, "Essays Historical and Critical", p. 63.

of the identity of the tenants politica "with those of the nobleman over whose properties they are constituted."<sup>113</sup> Not to put too fine a point on this whole subject of the Reform Act, the idea that it replaced an obsolete system based upon feudal tyranny, fraud and corruption by one that stood pure and unsullied under the law cannot survive the most cursory inspection of the Act either in itself or in its operation. To find otherwise is merely to assume that good intentions must inevitably give rise to good practices. History, in this instance, declares otherwise. The mere abolition of the old Court of the Freeholders, and the transfer of its non-electoral functions to the Commissioners of Supply, like the franchise reforms, did not work the revolution that was hoped for. Too many people invest that word "reform" with qualities of almost transcendental virtue. But it is perfectly possible to innovate with good intentions and yet neither wisely nor well. This, it is to be feared, is the case with the Reform Act. It was still possible to register voters on rather shady qualifications and to move all sorts of ingenious objections to claims or registrations. Indeed, all the tricks, all the stratagems of the old system were adapted to the new and the reformed electoral law was not proof against these wiles. The Court of Session lost its jurisdiction in franchise cases, no doubt to the relief of the judges, but possibly not to the advantage of free elections. The vesting of jurisdiction in Appeal Courts

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113.

L.C. Wright, "Scottish Chartism", p.168, citing "The Scotsman", 15 Dec., 1847.



composed of Sheriffs and Substitutes was not an adequate replacement for the highest civil court. Too much discretion was left to the Sheriffs and this appears strongly in the lack of uniformity in their decisions. Thus, partly as a result of bad drafting and partly as a result of the ineffective machinery set up by the Act, franchise abuses continued after 1832.

Most vicious perhaps of all the results of the Reform Act was the effect upon the tenants. Tenants on a life lease or on one of not less than 57 years of property not less than £10 per annum, or on leases of not less than 19 years on property of annual value of £50, or, irrespective of lease, where a grassum of not less than £300 had been paid, were entitled to vote. Again poor drafting murdered sense and gave rise to numerous cases. What, for example, would happen in the case of a sub-tack? If usufruct were to be the criterion then some sub-tenants might easily qualify for the vote and indeed many such claimed. It was uniformly decided, however, that the assignee to a sub-lease, whatever the worth of the property whose fruits he enjoyed, could not be registered as an elector. In fact, the clauses dealing with the tenants were as woolly as those dealing with "owners" and show the same curious ignorance of the Scottish agrarian system.<sup>114</sup> Far worse than all this, however, was the power which the Act inevitably placed in the hands of the great landed proprietors. The framers of the Act cannot be blamed for

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114.

John Cay, "Analysis of Scottish Reform Act", ch.VII, Qualification of Tenants, pp.230-256.

this, for the one remedy that might have obviated it, the secret ballot, was not a serious proposition in 1832. Indeed, Cockburn predicted that "the restraint practised by landlords over tenants in their votes will induce the ballot."<sup>115</sup> All the same the adoption of the English system of open nomination and polls soon led to the development of election techniques long familiar in some English counties. Soon the grandees were mustering their cohorts and voting was very much by estates. The tenant who would go his own way at elections was subjected to all manner of abuse, culminating on the expiry of the lease with peremptory eviction. Further, in counties where contests were close the tenants were forced willy-nilly to bring co-tenants into their leases. There were soon many complaints and murmurings on this score; the Reform Act was often stigmatised not as a charter of enfranchisement but of slavery.<sup>116</sup> It is also an interesting question to what extent the clauses of the Act relating to tenants contributed to evictions in the Highlands, and certainly there is evidence that such practices were considered in Ross-shire.<sup>117</sup>

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115. Cockburn, "Journal", vol.I, p.35. Later, writing to Kennedy about the election of 1832 in Midlothian, Cockburn says, "Lord what they are doing in the County! Were it known, the Ballot would be triumphant." "Letters on Affairs of Scotland", p.437, Cockburn to Kennedy, 19 Dec. 1832.

116. On such developments in Ross-shire, vide infra, ch.X.

117. Vide infra, ch.X



On the whole, it must be concluded that, while reform was clearly needed in 1832, and while the Whigs did try to work on equitable if somewhat cautious principles, the actual measures as set forth in the statute were not happy and indeed helped to preserve the rule of old corruption. For this the principal blame must be assigned to Jeffrey and Cockburn who were, naturally, regarded as the legal experts on Scotland. Nor can the difficulties of the political situation be urged as an effective defence, for once the franchise qualifications had been decided upon they had a relatively clear field in which to work. Nor can the plea of lack of time for adequate preparation carry much weight. The principles on which franchise reform in Scotland would necessarily have to be undertaken had been discussed for over fifty years and indeed Cockburn and Kennedy of Dunure had been in correspondence on the subject as far back as 1820.<sup>118</sup> Anyway, the defects of the Reform Act derive, not just from trifling omissions, but from actual ignorance of the law of Scotland. Its principal authors were, indeed, talented men of letters and political theorists rather than practising lawyers. In the sphere of law both were mainly interested on the criminal side and particularly the need to reform this lax but essentially authoritarian system. On the subject of juries in criminal trials both could speak learnedly

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118.

"Letters on the Affairs of Scotland", p.9., Cockburn to Kennedy, 20 April, 1820; they were in constant correspondence on this subject from 1830 to 1832.

and well. But as far as the Reform Act was concerned talent in this direction served no purpose whatever. Their contempt for feudal law was particularly disastrous and it was this mainly that made the Act so confused and so confusing. Nor was the position remedied by the defining act of 5 and 6 William IV, c.78, which merely gave the sheriff more control over the polls.



# CROMARTY ELECTIONS

## Chapter III

Political History of a Small Scots County  
in the 18th century - Cromarty.

### 1. Introductory

### Chapter III

#### Political History of a Small Scots County in the 18th century - Cromarty.

##### 1. Introductory.

The shire of Cromarty has had a curious history and certain aspects of this had a marked bearing on its politics in the 18th century. Indeed it serves to remind us that the Union of 1707 was not so much a dead end and a new beginning as a turning point whereby much that had developed in the old kingdom of Scotland was channelled into the new kingdom of Great Britain. There is, therefore, every justification for a brief examination of some of these salient features in the shire's history that were to play a part in post-Union politics. In particular its exact bounds and the history of its component parts furnished many points of dispute. These were difficulties not unknown in other shires but in the case of Cromarty aggravated by special circumstances. From the moment of its origin at some indeterminate point in the 13th century this tiny sheriffdom has raised many questions. Its area, for example, was small although hard to estimate with any precision. According to the best authority it was the smallest in Scotland, not more than 10 miles in length or 1½ miles in breadth.<sup>1</sup> Indeed there is no

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<sup>1</sup> Nimmo's survey in "Third Report of the Commissioners for Roads and Bridges in the Highlands of Scotland", 1807. I have not been able to trace this work, but Nimmo's part is reprinted in Sir George Steuart Mackenzie of Coul's "View of the Agriculture of Ross and Cromarty", 1810, Intro. pp.1-21. Sir William Fraser, "Earls of Cromartie", vol.II, p.458, and Dr. Mackay Mackenzie, "The Old Sheriffdom of Cromarty", p.13, add nothing to Nimmo's work.



reason to suppose that it ever included more than the north-eastern tip of the Black Isle, comprising the parish of Cromarty and parts of the parishes of Kirkmichael and Cullicudden. In its southern reaches the old sheriffdom lost itself in the Mulbuie or common moor of the Black Isle. Most probably the reason for setting up such a tiny unit of government was the need felt by the kings of Scots in the 12th and 13th centuries to reduce the turbulent province of Moray. The sheriffdom of Cromarty played a large part here by safeguarding the important ferry-route to the north. It is, in fact, the tip of that wedge of lowland culture which, firmly based upon Aberdeenshire, has for centuries been driven into the north east Highlands. This determining factor in the origin and history of the sheriffdom has never been better or more cogently expressed than by Hugh Miller, himself one of its most distinguished sons. "Cromarty owed little to its Highland neighbourhood; the inhabitants were lowland Scots; and it seems to have constituted one of the battle-fields on which needy barbarism and the imperfectly formed vanguard of a slowly advancing civilization contended for the mastery."<sup>2</sup>

At first the sheriffdom was held by the Anglo-Norman family of de Mohaut, rendered in Latin as "de Monte Alto" and now familiarised as Mowat. In 1264-6 William de Mohaut was definitely sheriff of Cromarty and by 1305, as we learn from the "Ordonnance"

of Edward I, a William de Mohaut held the sheriffdom IN HEREDITATE.<sup>3</sup> The displacement of the Mowats by the Urquharts, who held sway in Cromarty for over three centuries, is not at all clear. This is not the place to discuss the details of this particular problem and here it must suffice to say that William de Mohaut, pace Lord Hailes and Miss Henrietta Tayler, was not an Urquhart.<sup>4</sup> These writers seem to have been misled by the genealogical romancing of the famous 17th century knight of Cromarty, Sir Thomas Urquhart of Rabelaisian fame. The truth is that Robert I, in pursuance of his policy of winning over the magnates, conferred the sheriffdom upon his brother-in-law Hugh de Ross, heir to William Earl of Ross.<sup>5</sup> The Mohauts, however, were not in disfavour and continued in the anomalous position of hereditary under-sheriff. In 1358 the position was regularised when David II confirmed the grant of the sheriffdom and sheriffship in fee to Adam Urquhart, a grant that had been made shortly before by William Earl of Ross with the concurrence

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3. W. Mackay Mackenzie, "Old Sheriffdom of Cromarty", p.14, citing "Exchequer Rolls", I, p.19. He gives as deriving from the same source the sheriff's compotus but for the latter the reference should be "Exchequer Rolls", I, p.26. That the sheriffdom was held heritably in 1305, see A.P.S., vol.I, p.121.

4. Hailes, "Annals of Scotland", ed.1776, vol.I, p.285, f.n.\*, thought that in the Ordonnance of 1305 the transcriber had erred and that Mohaut ought to have read Urquhart. Miss Tayler, "The Family of Urquhart", p.16, seems to found on this palpable error, as does Nimmo in his report.

5. Fraser, "Earls of Cromartie", vol.II, pp.446-7, charter dated at Arbroath, 5 Dec. 1315.



of Richard Mohaut, a clerk, who resigned all rights to the same.<sup>6</sup> For the next three centuries the Urquharts were the principal, if not the only landed family in Cromarty. Numerous charters bear witness to this, the most important of which granted the Urquharts in 1470 the right to build a castle on the Moothill.<sup>7</sup> It remained part of their heritable property until 1685.

Neither the sheriffdom or its hereditary sheriffs, however, played any but a very minor rôle in the general history of the kingdom and thus references to them in the national records are few and short. The only important item before 1600 occurs in the "Act Anent the Register of Seasines and Reversions of 1599." In practice the Register of Sasines dates from 1617, and the Particular Register kept at Inverness for the Sheriffdoms of Inverness and Cromarty had an important bearing upon elections from 1681.<sup>8</sup> As for the Act of 1537 it did not immediately secure the results aimed at and not until 1600 is a commissioner for Cromarty recorded. In

6.

Reg.Mag.Sig., vol.I, App.2, p.597. This mentions the charter and no more, saying nothing of Mohaut's part in the transaction. An abridged version of the charter, based upon the original in the charter chest at Meldrum, is printed in "Antiquities of Aberdeen and Banff", vol.III, pp.530-1. This apparently escaped the notice of Dr. Mackay Mackenzie, else he could hardly have spoken of the Howats as having disappeared without trace by 1364, the date to which he assigns this charter. "Old Sheriffdom of Cromarty", p.19.

7.

Macfarlane's "Genealogical Collections", vol.II, No.15, pp.359-60; also in Fraser, "Earls of Cromartie", vol.I, p.xiv.

8.

A.P.B., II, p.257.

view of the circumstances, the smallness of the shire and the pre-eminence of the Urquharts, it is no surprise to find the representation virtually vested in that family. The number of freeholders can never have been large and the earliest extant Roll, for the years 1702-03,<sup>9</sup> which puts it at five, gives most likely a figure that exceeds any attained in the 17th century. Indeed, so long as the head of the Urquhart family held the greater part of the land IN CAPITE Cromarty was probably a one-man electorate. There is no direct evidence for this but the indications certainly point that way. At anyrate, the electorate was exceedingly small and very manageable. Fountainhall, in discussing the result of strict adherence to that provision of the Act of 1587 which required six signatures to make the commissioner's return valid, delivers himself of the opinion that "this number they will not get in Clackmannan and some shires, as Cromarty."<sup>10</sup> A century later the following argument was advanced in an election case fought in the Court of Session - "The County of Cromarty is perhaps one of the smallest in this Part of the United Kingdom, and, till of late, that the multiplying Freehold-qualifications by splitting cumulo-Valuations, and other such Devices, has become so universal, the Number of Freeholders standing upon the Roll of that County has

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9.

Cromarty Sheriff Court Records, Box 40 (Reg.No.), Minutes of Freeholders 1702, 1703.

10.

R.S. Rait, "Parliaments of Scotland", p.229, f.n.8, citing Fountainhall's "Historical Observes".



seldom exceeded three or four."<sup>11</sup> The substance of these arguments was sound, and it may safely be concluded that in the earlier 17th century the family of Urquhart had it in its power to control the representation of the shire. This they did. The first recorded commissioner was John Urquhart, Tutor of Cromarty, in 1600.<sup>12</sup> The next was Sir Thomas Urquhart, laird and hereditary sheriff of Cromarty, father of the well known genealogist, eccentric, and writer.<sup>13</sup>

The ruin of the Urquharts was an important landmark in the history of the shire, since among other things it led to considerable increase of its area by their successors the Mackenzies of Tarbat. The process is an interesting one but too involved and tortuous to be considered in detail. Suffice it to say that the Sir Thomas Urquhart already referred to initiated the disastrous course of events that led to the judicial sale of 1685. He was hopelessly improvident and the family was besides unlucky enough to espouse the royalist cause in the troubles. It was,

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11.

Session Papers, vol. 634:2, Answers for Sir John Gordon of Invergordon, Bart., 21 Jan., 1766, p.2. The argument was frequently employed in these processes and crops up again and again, for instance in Session Papers, 139:16, Petition and Complaint of Sir John Gordon, 29 Nov., 1766, p.1.

12.

A.P.S., IV, p.194.

13.

A.P.S., IV, p.525 (1617); V, p.9 (1633). J.Foster "Members of Parliament, Scotland", p.346, errs in confusing him with John the Tutor.

however, the improvidence and not the civil wars that ruined the Urquharts. In 1637, before the outbreak of the wars. Sir Thomas senior was obliged to appeal to the king for a letter of protection from his creditors and this was granted for one year. Leslie of Findrassie and the other "usurious cormorants", as Sir Thomas younger indignantly termed them, were not just sour Presbyterians; they were long-suffering and exasperated creditors. Old Sir Thomas died early in 1642, leaving to his eldest son Thomas little but a load of debt and a numerous family to care for. Young Thomas did his best to economise but this particular science was not his forte. Reluctantly, too, he was dragged into the civil turmoils. He seems to have stood aloof from the first civil war but was captured at Worcester. His charming eccentricities gained him friends on every side, including Roger Williams, founder of Rhode Island, who interceded for him with Cromwell. The Lord Protector, who contrary to the generally accepted character of him had a keen, almost boyish sense of humour, could not resist the peacock posturings of Sir Thomas and the latter was released. He died in Holland on the eve of the Restoration.<sup>14</sup>

The Cromarty estates in the meantime were bandied about from creditor to creditor. In 1655 the Protector granted a

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14.

This condenses information from the following sources; J. Willcock, "Sir Thomas Urquhart"; H. Taylor, "Family of Urquhart"; Reg. Privy Council; Cal. State Papers (dom.)



charter to Sir Robert Farquhar of Mounie conveying to him the lands and barony of Cromarty.<sup>15</sup> From this it appears that the assignee was a principal creditor who had acquired the interests in the estate held by lesser creditors. This was the culmination of a series of apprisings and a perfectly normal transaction. Then emerge some curious and obscure operations. Alexander Urquhart, second son of old Sir Thomas, received a charter from Oliver in August 1653 which Miss Tayler takes to be a complete conveyance of the lands and barony of Cromarty. In fact, it is clear from the charter that all that Alexander had secured was the apprising made on the estates in 1636 by James Sutherland, Tutor of Duffus.<sup>16</sup> The reversion to the entire estate was bought from Sir Robert Farquhar, the principal creditor, by Alexander's cousin, John Urquhart of Craigston.<sup>17</sup> Sir Alexander Urquhart made over his interest to his cousin, to help doubtless in redeeming his own lands of Dunlugas. In 1661 the barony and sheriffship of Cromarty were ratified to Sir John.<sup>18</sup>

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15.

R.M.S., vol.X, No.400.

16.

R.M.S., vol.X, No.665.

17.

H.Tayler, "History of Family of Urquhart", p.56; R.M.S., vol.XI, No.281.

18.

A.P.S., VII, p.70.

It is really from the Restoration that Cromarty began to be represented in parliament with anything like consistency, and that for the same general reasons that held true of all the Scots counties. Parliaments and Conventions, despite the Act Rescissory, were no longer content to be passive agents in the hands of the executive and as a consequence politics in the counties took on a new urgency. Something of this perhaps appears in 1661 when Sir John Urquhart of Cromarty protested that the absence from parliament of a commissioner for the shire should not prejudice its right to representation.<sup>19</sup> As we have seen Sir John had in that year the barony and sheriffship ratified to him but he was returned as commissioner for Inverness-shire and for whatever reason Cromarty went unrepresented.<sup>20</sup> Such protests were common-form, although this one has the distinction of being the first such plea for a county electorate. It may represent a fear on the part of the Cromarty electorate, and if Sir John's affairs prospered he would be almost literally that, lest the representation of the shire might be endangered by the Cromwellian precedent of merging it with Ross and Sutherland. We do not know why the shire failed to elect a commissioner in 1661 but it is unlikely that the freeholders seriously feared a merger

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<sup>19</sup>.A.P.S., VII, p.6.

<sup>20</sup>.A.P.S., VII, p.4, 447. Sir John represented Inverness from 1661 to 1663.



with one of the larger counties. Sir John was merely providing against the remotest contingencies that might arise, and this was characteristic of electoral procedure in a country so dominated by legal concepts. As a matter of fact Scots electoral law and procedure were firm on the side of representation by shoriffdom and stewartry. Oliver's reforms, though they earned a grudging meed of praise from Clarendon himself, were totally at variance with the Scottish idea of representation. Yet, significantly, on the demise of the Scots Parliament a variant of Cromwell's expedient was forced upon Cromarty along with five other shires with very small electorates even by Scottish standards.

Sir John of Craigston, however, did not prosper. He was Sir Thomas senior all over again, suffering from chronic financial embarrassment and for lengthy periods unable to venture to Edinburgh except under letters of protection from the Council. The fact that he never represented the shire in parliament can by no means be attributed to indifference to politics, for he tried hard to gain control of the burgh of Cromarty.<sup>21</sup> The answer seems to be that his financial difficulties, the main stages of which can be traced, did not enable him to dominate the shire or even, at least in his last years, to bear the expenses of a commissioner. As early as 1665 George Dallas had gained on the lands of St. Martins, Easter Culbo and Drumcuddin.<sup>22</sup> The

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<sup>21</sup> R.P.C., 3d. ser., vol. III, Hume Brown, intro - p.xl, and text, pp.106-111.

<sup>22</sup> For full discussion of this see James Dallas, "History of the Family of Dallas", 1912, ch. on Dallas of St. Martins, pp.321-356. This is a well documented work, drawing its evidence from the best sources.



dismemberment of the proud inheritance of the Urquharts had begun. Between 1665 and 1686 Dallas, author of the famous "System of Stiles", was dominant in the shire and consistently represented it in Parliament. Indeed, by 1672 he had so far established himself that Sir John Urquhart as heritable sheriff took the extraordinary step of making George Dallas and his heirs heritable deputies so far as concerned the lands of Easter St. Martins and parts of Wester St. Martins.<sup>23</sup> That Sir John Urquhart was in low water, however, appears most forcibly from the fact that he owed Dallas more than £1800 Scots for commission fees. Overwhelmed by these and other economic disasters Sir John finally committed suicide in 1678, to the horror of his pious friend the covenanting diarist Alexander Brodie.<sup>24</sup>

One of Sir John's principal creditors, Sir George Mackenzie of Roschaugh, the Lord Advocate, grew nervous about the property he hoped to enjoy and applied to the Privy Council for an inventory of Sir John's charter chest.<sup>25</sup> This was granted. Jonathan Urquhart was as incapable as his father and in 1682 Sir George

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<sup>23</sup> Dallas, *op.cit.*, p.325. For further complications in jurisdiction arising from this and later extraordinary developments, see W. Mackay Mackenzie, "Old Sheriffdom of Cromarty", pp.26-30.

<sup>24</sup> "Diaries of the Lairds of Brodie", Spalding Club, 1843, p.399.

<sup>25</sup> R.P.C., 3d.ser., vol.V, pp.28-9.



Mackenzie of Tarbat apprised from him the lands of Cromarty.<sup>26</sup>

The affairs of the Urquharts continued to deteriorate and in 1634 their lands were brought to a judicious sale, at which this same Sir George, soon to be created Viscount Tarbat, "was preferred as having offered most therfor."<sup>27</sup> This opened up a new chapter in the landed and electoral history of the shire. Some developments that took place subsequent to the ruin of the Urquharts were of the first importance and not rightly to be understood except by a brief consideration of the events that led to the judicial sale. In particular with the acquisition of the barony and sheriffdom of Cromarty, Viscount Tarbat who was then quarrelling with the Earl of Seaforth, availed himself in 1635 of the ancient expedient of having his lands in Ross covered from that sheriffdom and annexed to that of Cromarty.<sup>28</sup> Tarbat overreached himself, however, and seems to have included certain lands over which he had no clearly defined rights.

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26.

A.P.S., VIII, p.514.

27.

For decret of sale, A.P.S., VIII, pp.513-16.

28.

A.P.S., VIII, p.484. That it was an ancient expedient, see W.Croft Dickinson, "Sheriff Court Book of Fife", intro. pp. lxxxiv-v; W.Mackay Mackenzie, "The Medieval Castle in Scotland," p.23.

Seaforth seized this opportunity to have the Act, along with one conferring a similar boon upon Sir George Mackenzie of Rosehaugh, rescinded in the following year.<sup>29</sup> Tarbat, though, far excelled Seaforth as a trimmer and after the Revolution he achieved his purpose.<sup>30</sup> It is to these operations that Cromarty owed its peculiarly scattered appearance, like "a number of fragments of different shapes and sizes scattered over the county of Ross as if by an explosion."<sup>31</sup>

The details of the lands thus annexed to Cromarty are harrowing. For one thing the relevant Acts furnish no more than long recitations of names which, whilst perhaps clear enough at the time, are by no means easy to place now, nor, and this is the important point, were they easy to identify with absolute certainty 70 years after the Act of 1690. Nimmo carried out the task in 1807 and there is no reason to suspect the essential accuracy of his work.<sup>32</sup> There are just three items that call for particular comment. First of all, there is the question

29. H.M.C., Rept.XV, 1897, Buccleuch, p.141. See too preamble to A.P.S., IX (1690), c.47, p.194.

30. A.P.S., IX, c.47, p.194.

31. W.Mackay Mackenzie, "Old Sherifdom of Cromarty", p.3.

32. Reprinted in Fraser, "Earls of Cromartie", vol.II, pp.459-461.



whether or not the lands of Cadboll came within the scope of the Act of 1690. These lands lay in the shoriffdom of Ross and were held by the Sinclairs of Moy until they fell to Lord Tarbat by judicial sale in 1693. No specific Act of parliament was passed to annex them to the shoriffdom of Cromarty, although for purposes of valuation and supply they seem to have been treated with the annexed lands. As to the Act of 1690, while Tarbat may have stood infeft in those lands a liferent interest was retained by his mother-in-law, Lady Sinclair.<sup>33</sup> The rights and wrongs of the situation are now hard to separate, and this very obscurity was to play an important part in 18th century elections. The second point to notice is that the lands of Wester St. Martins, Easter Dalblair and the Ferry, then held by George Dallas, were included in the Act of 1635 and perhaps by implication in that of 1690. Certainly they were thereafter so regarded until in the course of a savage election contest in Cromarty between 1765 and 1768 their exact status was questioned. Dallas sold his lands in 1696 in order to buy an estate in Stirlingshire that would be within easier reach of Edinburgh.<sup>34</sup> The purchaser was Sir Adam Gordon of Dalpholly in Sutherland, grandfather of that

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33.

See Session Papers, vol. 139:10, numerous papers, but particularly, Petition and Complaint of Sir John Gordon, 29 Nov., 1766, pp.5-6, and *ibid.*, Answers for Alexander Fraser of Culduthill to above, 17 Feb., 1767, p.5. Vide infra, ch.V.

34.

James Dallas, "History of the Family of Dallas", pp.331-2.

Sir John Gordon of Invergordon who dominated Cromarty between 1742 and 1765. The problem here turned upon the precise identity of the lands of Erac in the barony of St. Martins. Thirdly, and finally, the same problem arose over the lands of Wester Gruinard in the barony of Tarbat. In all these cases the valuation roll of 1698 is of no help since for the most part valuations are in cumulo.<sup>35</sup>

The immediate consequence of these transactions was that after 1685 the representation of the shire of Cromarty was virtually vested with these estates in Viscount Tarbat and his family. Of that family little need be said here. Under Sir George Mackenzie of Tarbat (1630-1714) this hitherto obscure branch of the line of Kintail prospered and rose to prominence, not only in its native Ross but in the affairs of the kingdom at large.<sup>36</sup> After the Restoration Tarbat was a leading figure and despite the spinning of fortune's wheel contrived to remain so until his death, chiefly by dint of adroit, and at times, none too scrupulous manoeuvring. He fell foul of Lauderdale over the notorious Billeting Act in 1662 and was deprived of his

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35.

Transcript of same in George Chalmers' "Miscellaneous Memoranda". N.L.S. 35.6.4, vol.I, pp.35-45.

36.

See D.H.B., and more fully Sir William Fraser, "Earls of Cromartie", vol.I, pp.lxvii-cxciv, "Memoir of the First Earl of Cromartie", an excellent account. There is no full scale biography of this important and interesting statesman.



place on the judicial bench. He represented Ross-shire in parliament until in 1673, thanks to the intercession of Archbishop Sharp with the Duchess of Lauderdale, he was appointed Lord Justice General. In 1681 he became Lord Clerk Register and after Lauderdale's death in the following year Mackenzie took a leading part in the administration of Scotland. Two months after the accession of James VII, he was created Viscount Tarbat but he was too sincere an Episcopalian to serve James' purposes and he soon fell from grace. At the Revolution he played the part of trimmer to perfection and was soon high in favour with William. Nonetheless, like so many of the bemused politicians of the time he tried to keep a foot in both camps, and was said, though not on the best of authority, to have taken part in the plot of the Compounders or Protestant Jacobites in the winter of 1690-1.<sup>37</sup> Under Anne he continued in favour, was created Earl of Cromartie in 1703 and served as Secretary for Scotland. He was a brilliant scholar, an ardent believer in the royal prerogative (but not of the unyielding sort, like his namesake, the so-called "Bloody Advocate") and above all a great opportunist. He lived in times when political consistency was almost impossible and it is hardly fair to make too much of his shifts. The plain truth is that he who could not trim was apt

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37.

George Hilton Jones, "The Main Stream of Jacobitism", 1954, pp.20-21.

to end up an irretrievable ship-wreck. Cromartie had too many active parts and too much robust common sense to suffer such a fate. It is, indeed, a pity that he did not survive for another year or two, for, although a high Tory and at heart Jacobite, the head was the organ that governed his acts and his strong grasp of reality might have served Scotland well in 1715.

To turn now to a consideration of the representation of the shire, we find that in 1685 and 1686 Cromarty was represented by Dallas of St. Martins,<sup>38</sup> but thereafter until the Union Cromartie's second son, Sir Kenneth Mackenzie who was infeft in the barony of Cromarty, usually represented the shire. In 1700 he sat with his uncle Roderick Mackenzie of Prestonhall, and from 1703 until 1707 with one of the Earl of Cromartie's nominees, Aeneas Macleod of Cadboll.<sup>39</sup> Incidentally, the return of two commissioners which occurred for the first time in 1700 is an interesting illustration of the heightened interest in Parliament at this time. Little can be added to this bare summary of returns. Competition there seems to have been none and the

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38.

A.P.S., VIII, p.452, p.577.

39.

For 1695, A.P.S., X, p.343, Laird of Cromarty; 1698, ib., X, p.114 as Kenneth Mackenzie; 1700, X, p.197, Kenneth Mackenzie of Cromarty and Roderick Mackenzie of Prestonhall; 1702, XI, p.4, Kenneth Mackenzie; 1703, 1704, 1705, 1706, XI, p.30, 114, 207, 301, Kenneth Mackenzie and Aeneas Macleod of Cadboll.



Michaelmas Head Court probably did not meet annually or even regularly. Consequently no minutes of the freeholders meetings exist or, as one may strongly suspect, ever did exist. Apart from the very brief note referring to the roll of freeholders for 1702-03 there is nothing. This is probably testimony to the complete sway exercised by the Cromartie family from 1636 until the Union, and beyond. A word concerning Macleod of Cadboll, who materially helped the Cromartie family to secure their hegemony may not be out of place. He belonged to a cadet branch of the family of Assynt, took up law as a profession and purchased the office of Town Clerk of Edinburgh for 19,000 marks. In 1695 the City of Edinburgh petitioned parliament against Aeneas craving that certain of their own acts whereby the Town Clerk was not removable might be rescinded. It was alleged that Macleod had been careless in keeping the records and guilty of several acts of malversation. He replied that he was the victim of a cabal. The outcome of the petition is not clear. By 1703 Aeneas Macleod completed the purchase of the lands of Cadboll from the Earl of Cromartie. The family thus established in Ross played a leading part in its affairs.<sup>40</sup>

There can be no doubt that the Act of Union wrought many

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40.

Alexander Mackenzie, "History of the Macleods", pp.427-8; A.P.S. IX, p.367, Petition of City of Edinburgh against Aeneas Macleod, Town Clerk of said City; Yester Collection, N.L.S., 6.282 (65), Petition of Sir Robert Chiosly, Lord Provost of Edinburgh against Aeneas Macleod; *ibid.* 6.232 (84) Answers for Aeneas Macleod, Town Clerk of Edinburgh; *ibid.*, 6.232 (85) Information for Aeneas Macleod, Town Clerk of Edinburgh.

changes in the conduct of politics in Cromarty, more so perhaps than in most of the Scottish counties. Not only did the shire feel the effect of the drastic reduction in the number of constituencies but the "pairing" of Cromarty with Inverness tended to loosen the tight hold of the Mackenzies. It really amounted to this, that if Sir Kenneth did not wish to be excluded from every other parliament he and his family would be forced to enter into compacts with other great landowners in the north who might, for a consideration, help to make good the blank parliament. Thus in 1703 Sir James Mackenzie of Royston, third son of the Earl of Cromartie, sought to maintain the family interest by carrying the Wick burghs but in this he failed. Royston petitioned against the return of William Lord Strathnaver on the grounds that he was the eldest son of a peer and, therefore, incapable of being returned. Writing optimistically to his father on these matters Sir James concluded by desiring the Earl "to pray keep Sir James Dunbar to my interest in case of a new election."<sup>41</sup> Nothing, however, came of this move. They were equally unsuccessful in Ross-shire where in 1703 they had supported Hugh Rose younger of Kilravock against George Master of Ross. Cromartie hated Ross's father and his high-

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41.

Fraser, "Earls of Cromartie", vol. II, No. 310, pp. 78-9, Sir James Mackenzie of Royston to Earl of Cromartie, 30 Nov. 1703.



flying pretensions to the ancient earldom of that name. With the help of the Mackenzies Kilravock was returned but George Ross successfully presented a petition to the House of Commons alleging malpractice on the part of Kilravock senior as returning officer, and a new writ was issued.<sup>42</sup> The Master of Ross, however, following the judgment on the ineligibility of the eldest sons of Scots peers, could not stand, and his place was taken by his uncle Lieutenant General Charles Ross. Seaforth could not be stirred to action, despite repeated admonitions, and young Rose of Kilravock joined forces with Charles Ross. John Forbes of Culloeden had also hoped to sit for Ross but his scheme was wrecked by the Mackenzies they "not haveing made so much as one new Barron, so that General Ross will undoubtedly be the returned member."<sup>43</sup> Another observer, George Mackenzie, later of Rosehaugh, had already expressed the same opinion. Writing to the Earl of Cromartie he bitterly laments: "How necessary it was to have as many freeholders as we could, particularly young Scatwell and Bellmaduthy. But all this would not do without Seaforth's concurrence." Rosehaugh concludes, "If they do not at this juncture bestirr themselves, I am apt to believe your Lordship

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42.

Commons Journals, vol.XVI, Petition of George Ross, 16 Nov. 1709, p.2126; warrant for new writ, 27 Jan.1710, p.287.

43.

"More Culloeden Papers", ed. D. Warrand, vol.II, p.24, John Forbes of Culloeden to Grant of Grant, younger, no date, but shortly after 31 Jan. 1709/10.

will meddle no more with them, but confine your concern to your own shyre."<sup>44</sup> These fears were justified. General Ross was returned for the county of that name and though his unsuccessful rival on this occasion, Sir James Mackenzie of Royston, petitioned the Commons against the return parliament was dissolved in September 1710 before any stock could be taken of it.<sup>45</sup> Ross was again returned and survived a further petition presented by Sir Kenneth Mackenzie of Cromartie.<sup>46</sup> The General, indeed, sat for Ross with very few intermissions until his death in 1732.<sup>47</sup> The point to note here is that any opposition he met in Ross came not from the Seaforth but from the Cromartie Mackenzies. It was not very effective opposition and quite clearly the new electoral conditions overtaxed the strength of the Cromartie family.

In Cromarty, however, they continued strongly entrenched and Sir Kenneth usually represented the shire.<sup>48</sup> In the

44.

Fraser, "Earls of Cromartie", vol.II, No.326, pp.101-2, George Mackenzie later of Rosshaugh to Earl of Cromartie, 5 Nov. 1709.

45.

Commons Journals, vol.XVI, 29 March 1710, p.339b.

46.

Commons Journals, vol.XVI, 5 Dec. 1710, p.418b.

47.

J.Foster, "Members of Parliament, Scotland", p.299, for precise dates.

48.

J.Foster, "Members of Parliament, Scotland", p.231.



excitement following the death of Queen Anne the family sided with the high Tories. In September 1714 Alexander Erskine, the Lord Lyon, wrote to Lord Macleod, eldest son of the Earl of Cromartie, urging on him greater exertions to secure the return of "honest men", for "if wee fall in the Whigs' mercy, what will come of uss. I hope you will mend your hand in your north country, and send us a better representation than we hav now."<sup>49</sup> The ensuing elections were fierce. The rivals for Cromarty were young Kilravock and Captain Alexander Urquhart of Newhall, the latter of whom had been recommended to John second Earl of Cromartie by Lord Elibank.<sup>50</sup> Urquhart, a descendant of the old house of Cromarty,<sup>51</sup> was returned, apparently unopposed, Kilravock probably not bothering to contest the election meeting when he saw that he was clearly outvoted.<sup>52</sup> Newhall sat for the shire until 1722, to be succeeded by Sir Kenneth Mackenzie of Cromarty in 1727. Again no details can be added to these bare facts and for

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49.

Fraser, "Earls of Cromartie", vol.II, No.365, pp.153-4, Lord Lyon to Lord Macleod, 22 Sept.1714.

50.

Fraser, op.cit., vol.II, No.370, pp.158-9, Lord Elibank to Lord Cromartie, 24 Jan. 1715.

51.

Henrietta Tayler, "History of the Family of Urquhart", pp. 247-251. He lost money in the South Sea speculation and died bankrupt and intestate in 1727.

52.

"More Culloden Papers", vol.II, p.64, John Forbes of Culloden to Duncan Forbes, 18 Feb. 1715.

the same reason as before: failure of the freeholders' records.

The Mackenzie interest, however, early began to decline. The death of the first Earl in 1714 removed the genius of the house. Thereafter the story is one of slow but steady decay. Even the founder had suffered from financial worries, as is evidenced by his constant dunning of government for alleged arrears in salary.<sup>53</sup> He also left the estate heavily burdened with debt.<sup>54</sup> His heir, John Lord Macleod, was not the man to arrest such a process. All that is known of his career suggests weakness, not to say viciousness. As a youth he was in 1691 arraigned with several others for the murder of a Huguenot refugee, Elias Poirot, Sieur de la Roche, in a drunken brawl in the Kirk-gate of Leith, but acquitted on a plea of self-defence.<sup>55</sup> Equally hapless was his first venture at marriage. Macleod's affairs were straitened by the extravagance of his wife, one of the famous Gordon beauties, Elizabeth only daughter of Lord Aboyne, whom he was only too glad to divorce on the grounds of infidelity in 1698.<sup>56</sup>

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53. Fraser, "Earls of Cromartie", vol.I, pp.clixiv-clxv.

54. Ibid., vol.II, p.174, Alexander Lord Elbank to Lord Tarbat, 26 July, 1722.

55. Fraser, op.cit., vol.I, pp.cxcvii-cc1.

56. Ibid., vol.I, pp.cciv-v.



In 1724 the estate was so heavily laden with debt that it was sequestrated. In a desperate effort to stay the process Lord Cromartie in that year married his son, Lord Tarbat, to the daughter of a wealthy London banker, Sir William Gordon who had already a standing in Cromarty as the heir of Sir Adam Gordon of Dalpholly, who had purchased the lands of Dallas of St. Martins. The bride's techer of 20,000 merks was meagre enough but in conjunction with a promise of full support from Sir William it was welcomed.<sup>57</sup> Whether Lord Cromartie was aware of it or not this marked the beginning of the end of the Mackenzies' political hegemony in Cromarty. The evidence, meagre though it is, suggests that the second Earl was not much interested in politics and inclined to let his brother, Sir Kenneth Mackenzie of Grandvale and Cromarty, make what he could of the shire. Sir William Gordon, on the other hand, was politically ambitious and had already sat for Sutherland for many years.<sup>58</sup> By this time, too, he had acquired the estate of Inverbreakie in Ross-shire which, true to the Gordon type, he renamed Invergordon. He soon set about strengthening his position in Cromarty, although the idea

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57.

Fraser, op.cit., vol.I, p.cci11. See too vol.II, No.384, Sir William Gordon to John Earl of Cromartie, 25 June, 1724, promising to assist Cromartie in his difficulties.

58.

J.Foster, "Members of Parliament, Scotland", p.154. Sir William represented Sutherland until 1727.

of dominating the county and representing it in parliament may not have been his prime intent as later the enemies of the Gordons insisted. At anyrate, in 1733 he purchased from Rose of Kilravock the reversion of the lands of Meikle and Little Braes, Cullcudden and Woodhead, Craighouse and Tapperhorn. These lands, which were at the time wadset to different persons, were valued in the cess-book at £573 Scots.<sup>59</sup> Concerning them two points must be made. First, they were said to be parts of the lands annexed to the shire of Cromarty in 1690. Secondly, Sir William, since he had determined to build up his interest, conveniently found a retour of the lands of Brae valued at £8. 8. 2d. of Old Extent. This was capable of yielding four freehold qualifications since as yet there was no statutory provision against dividing a retour. For this purpose Sir William executed a charter upon Kilravock's procuratory of resignation and conveyed the superiority and right of reversion of the lands of Meikle and Little Braes to Charles and George Gordon, two of his sons. Freehold qualifications from the same lands were also bestowed upon Leonard Urquhart, Sir William's son-in-law, and Adam Gordon younger of Ardoch, Sir William's nephew. All these sasines were recorded in the particular register in April 1739. Yet neither

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<sup>59</sup> Session Papers, vol. 133:21, Answers for Hugh Rose of Aitnoch and others, 13 Jan. 1767, p. 3; same paper in Session Papers, 139:16. For progress of these lands see 133:21, Condescendance for Freeholders of Cromarty, 11 Dec. 1766, passim. They were originally appraised from Sir Thomas Urquhart by Sir James Fraser of Brae, along with other pertinents, in 1641. By a series of appraisings they came into the hands of Hugh Rose of Kilravock in 1693.

<sup>60</sup> Session Papers, vol. 133:21 (or 139:16), Answers for Hugh Rose of Aitnoch, 13 Jan. 1767, pp. 3-4. No attempt was made to rebut these statements and they seem to be accurate.



Sir William or his successor redeemed the existing wadsets.

Something should be said of the Cromarty electorate at this point. In the late 1730s it never exceeded eight. The Michaelmas Head Court did not trouble to meet annually and the Roll had stood untouched for many years. Unfortunately whatever minutes may have existed do not seem to have survived but from numerous references in later processes it is certain that before 9th October 1739 the Roll read as follows:-

Sir James Mackenzie of Royston (sometimes called by his judicial title of Lord Royston)<sup>61</sup>; Rose of Kilravock elder; Rose of Kilravock younger; Sir William Gordon of Invergordon; Roderick Macleod of Cadboll, Colonel Alexander Urquhart of Newhall; Sir Kenneth Mackenzie of Grandvale and Cromarty; and Sir George Mackenzie son of the foregoing.<sup>62</sup>

The failure of the complacent Mackenzies to hold regular Head Courts played into Sir William's hands. On 9th October 1739 he constituted a Michaelmas meeting by himself at Milton of New Tarbat, a conveniently out of the way spot. Cromarty was the usual place of meeting but considering the work Sir William had in mind Milton of New Tarbat had obvious merits. There, alone

61.

Third son of the first Earl of Cromartie; for details of his career see Fraser, "Earls of Cromartie", vol.II, pp.420-4.

62.

Session Papers, vol.133:21, Answers for Hugh Rose of Aitnoch and others, 13 Jan.1767, p.4.

and unopposed, he carried out a revolution. Not only did he enrol his new creations but his eldest son John and Gordon of Ardoch elder as well. To clinch the issue he struck off the roll old Kilravock, Colonel Urquhart and Sir Kenneth Mackenzie.<sup>63</sup> The grounds for this action, provided the legality of the Head Court were not challenged, were unassailable. These gentlemen were irrefutably and beyond all dispute dead. As to a challenge to the validity of the Head Court it was not a serious possibility. The Act of 1631 had said, quite emphatically, that there should be annual Head Courts but regarding summons of these and their procedure it said nothing. As Connell puts it, "There is no quorum of freeholders fixed by law to constitute a regular meeting. One freeholder may hold either a Michaelmas or election meeting."<sup>64</sup> Nor, before the Act 16 George II, were claimants for enrolment required to observe strict rules of procedure. For these reasons Sir William's little exploit was not called in question.

In this way Sir William won his majority. The Roll now contained four possible opponents and seven certain supporters of

63.

*Ibid.*, p.4. Minutes of Freeholders, 15 Oct.1765, pp.5-6, which recite the case of Adam Gordon of Ardoch, fully confirm the account given in the Session Papers cited above.

64.

Arthur Connell, "Treatise on Election Laws", p.22, citing decision in Mackay and others against Reddoch, 1762. See, too, for some interesting comments, Bell "Election Laws", p.360, s.v. "Quorum of Freeholders".



the brand new Gordon interest. Sir William Gordon then came forward as a candidate for the shire at the election of 1741. Macleod of Cadboll was so little interested in politics that writing to his legal agent in Edinburgh, John Mackenzie of Delvine, he found it necessary to ask: "If you know anything of the Politicks of the Shyres of Ross, Cromarty, Inverness, and Sutherland, acquaint and who are to be the reall Candidates, we being kept in the Mist as to these, except Milraveck, Grant, Sir William and the Brigadier."<sup>65</sup> On 23 May Cadboll could inform Delvine of the elections in Ross and Cromarty. "Sir William is returned for Cromarty owing to Roystoun's neglect in not advertising his friends timeously and the Roystoun has the Justice of the Election yet he neglected to make the proper & Relevant objections on which he might have had redress but all these were forgot and those made are noways to the purpose, a fact which surprises me considering his Lops knowledge if he know anything of the Constitution and Situation of the Shyre."<sup>66</sup> The whole tenor of Cadboll's voluminous correspondence with Delvine on estate business and legal points arising therefrom shows that Macleod was something of a barrack-room lawyer. His judgment in this case, however, was sound enough. Royston's son, George

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65.

Delvine Papers, N.L.S, 1379, f.122, Cadboll to Delvine, 16 April 1741.

66.

Delvine Papers, 1379, f.127, Cadboll to Delvine, 23 May, 1741.



Mackenzie of Farnese, had proposed to stand for the shire in opposition to Sir William Gordon, but as he was not already on the Roll of Electors his fate was easily sealed. The Gordon voters were out in force and simply rejected his claim to be enrolled. Despite protests from Royston against the voters enrolled by Sir William in October 1739 the Gordons carried the day. The tenor of Sir James' protests must be given, though, for, as will appear, they ran like a refrain through the whole history of the Gordon interest.<sup>67</sup>

First of all, claimed Sir James, the rights <sup>on which</sup> ~~that~~ the Gordon voters based their claims for enrolment (on the lands of Meikle and Little Pracs) were redeemable but not proper wadsets which alone carried the right to elect. Secondly, the retour was not properly instructed - an almost inevitable objection this to claims on Old Extent. Sir William had produced a retour into chancery in favour of Walter Urquhart, son of Alexander Urquhart Sheriff of Cromarty, which was dated 11th April 1564. But averred Sir James Mackenzie "it appears, by an extract of said retour produced, that the said lands of Pracs, which are now divided into four quarters, in favours of Mr. Charles Gordon and the other three gentlemen, do lie and are situate infra vicecomitatum de Inverness; and consequently, as they lie in another county,

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67.

Session Papers, vol.133:21, Answers for Hugh Rose of Aitnoch, 13 Jan.1767, p.5 et seq. For procedure at the election, see Commons Journals, vol.XXIV, pp.25-26, Petition of George Mackenzie, 16 Dec. 1741.



cannot intitle the possessors to vote in the shire of Cromarty."<sup>68</sup>  
<sup>For</sup>~~the~~ the first time we meet this vexed question of the identity of lands.

The answers made to these objections were that the contracts were proper wadsets since the wadsetter had no recourse against the reverser, and secondly, "That these lands were by the book of old extent lying in the Exchequer, said to be in Cromarty-shire, and severally valued and extended as lying therein. That, by the valuation-book of the said shire of Cromarty, they do and did for many years past memory of man, pay cess in the said shire of Cromarty." It was further ~~argued~~<sup>argued</sup> that the objector had confused the lands of Froy with the lands of Moiklo and Little Braes. Of the lands of Froy Charles Gordon, advocate for the Gordons, disclaimed all knowledge except that they "lie intra dominium de Ardmannock, now lying in the shire of Ross."<sup>69</sup> To this the objector replied that no proof or evidence of the Old Extent claimed had been produced. The Gordons, however, were in a majority and before 1743 the majority could do no wrong. For the time the matter rested as follows: St. Martins was formerly called Braes and as such was included by the Commissioners of Supply in 1630 under Ross-shire, but in 1690 the lands and barony

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68.

Session Papers, vol.133:21, Answers for Hugh Rose of Aitnech, 13 Jan.1767, p.5.

69.

Ibid., p.6.

of St. Martins were disjoined from the shire of Ross and annexed to that of Cromarty. Here one point should be strongly emphasised, and that is that the Gordons at this time hold that the retour on which they founded did not refer to the lands of Eroy but to the lands of Meikle and Little Braes.

What was the truth of the matter? Macfarlane has an abstract of the very retour upon which the Gordons founded. This was the retour of service of Walter Urquhart as heir to Alexander Urquhart, his father, "In the five Corgang lands of Eroy lying within the Sherrifdom of Inverness and Lordship of Ardmannochio. The new extent whereof is £20 Scots and the old extent £3. 8. 2d. Holding in Cheif of her Majesty by Service of Ward and Reloif dated the 11th April 1564."<sup>70</sup> That this refers to the lands of Brae then held by the Urquharts is rendered doubly certain by the fact that from two other extents, one including and one excluding the lands of Brae, the difference is near £3. 8. 2d. (£3. 17. 9d.) It appears, then, that both sides were a bit hazy as to the retour and the lands to which it applied. The retour described the lands of Brae in 1564 as lying within the sherrifdom of Inverness and Lordship of Ardmannoch. Charles Gordon had no answer to this. Yet a satisfactory answer was available. That part of the sherrifdom of Inverness was split off to form part of Ross-shire, and some parts of the lands of Brae (although which

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70.

W. Macfarlane, "Genealogical Collections", S.H.S., (1900), vol. II, p. 362.



precisely is open to question) were held to be transferred to Cromarty in 1690. Now as Cadboll saw, Royston was ignorant of the "constitution" of the shire and made the mistake of not touching upon those important developments. He <sup>need</sup>/not have questioned the authenticity of the retour at all. It was enough that the Gordons had failed to demonstrate the identity of Moiklo and Little Braes with "the five Oygang lands of Eroy", and, of course, in cases of Old Extent precise identification was essential.<sup>71</sup> In short, the retour did not bear that Moiklo and Little Braes were valued at £8. 8. 2d. of Old Extent and the Gordons did not prove that Moiklo and Little Braes were precisely the five Oygang lands of Eroy of the retour. Not that proof of this kind would have weighed a great deal in a meeting so well rigged as that of the barons of Cromarty in May 1741.

No more did a petition presented to the House of Commons by George Mackenzie on 16 December 1741 produce results.<sup>72</sup> Sir William Gordon did not long enjoy his triumph, however, for he died before the Michaelmas of 1742. His son Charles, writing to the Earl of Cromartie on 24. January 1742, gives a melancholy account of the old man's last days. A strong supporter of Sir

71.

This was the form in which the retour was later attacked. See Session Papers, vol. 133: 20-22, Sir John Gordon against Freeholders of Cromarty, Nov. 1766.

72.

Commons Journals, XXIV, pp. 25-6.



Robert Walpole, who was then fighting desperately to maintain his position, Sir William was one of the invalids who was actually wheeled into the House of Commons to vote on the Westminster election issue.<sup>73</sup> His interest, however, did not perish with him for his eldest son John was fully determined to maintain his father's work. At Michaelmas 1742 he was enrolled as apparent heir. Another useful feature of this meeting to the Gordons was that Sir George Mackenzie of Grandvale and Cromarty was expunged from the Roll on the ground that by the sale of his estate of Cromarty to William Urquhart of Koldrum in 1741 he had denuded himself of his qualification.<sup>74</sup> Thus, owing to a peculiar inhibition of Cadboll's whereby he never attended Head Courts, Sir John found himself with the same serviceable, if not handsome, majority created by his father. And so it was that in December 1742 he realized his ambition and was returned to parliament for Cromarty. Thus was consummated what he was later inordinately fond of referring to as his "great naturall interest in the County of Cromarty."

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73.

Fraser, "Earls of Cromartie", vol.II, pp.182-3, No.390, Charles Gordon to Earl of Cromartie, 2 Jan. 1741/2. Horace Walpole, "Letters", vol.I, p.120.

74.

Fraser, op.cit., vol.II, p.415.



## Chapter IV

### Cromarty II.

Chapter IV.Cromarty II.

The way to maintain the new interest was to guard the roll of electors and to this end the Mackenzie habit of not calling Head-Courts was a good one, provided that the dominant faction did not fall asleep. Sir John Gordon of Invergordon accordingly availed himself of the practice but in his hands it was a stratagem not mere remissness. The one danger to threaten this blissful state of affairs was removed in the course of nature. As we have seen, the only member of the Cromartie family to stir himself against the interlopers was Sir James Mackenzie, known as Lord Royston. It may be that, as the Gordons later put it, Royston's own title was open to objection and he was merely trying to get his blow in first. It is just as likely that old Sir James felt the slight to the family pride and resented the third Earl's flabby acceptance of the intrusion. At anyrate by 1741 he was on bad terms with his nephew and offering Macleod of Cadboll a tack on the Earl of Cromartie's debts.<sup>1</sup> Whatever his exact motives may have been in 1743 Royston and Mackenzie of Highfield lodged a Petition and Complaint with the Court of Session against those Gordon voters against whom Royston had already vainly objected in the Court of the Freeholders. The complaint was couched in terms

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<sup>1</sup>. Delvino Papers, 1379, f.131, Cadboll to Delvino, 26 June, 1741.



of the recent act of 16 George II and based on a general statement of the grounds already indicated.<sup>2</sup> This is an interesting document mainly because its brevity and general inadequacy were typical of the earliest petitions brought in terms of the new act. The politicians and their legal advisers were apparently feeling their way and for some time did not understand the Act and the possibilities it opened up.

The case dragged slowly and before it could be brought to a hearing the main petitioner, Royston, died. Highfield does not seem to have been very serious about the matter, none of the other Mackenzies felt strongly enough about politics to carry on the cause and so, in technical jargon, it slept. Sir John went on his triumphal way and no Head Courts were held.<sup>3</sup> Election meetings took place as required but these presented little danger of undesirable amendment to the Roll. Indeed, nothing came amiss to the Gordon interest at this time and the rebellion of 1745 set the seal on its triumph. Sir John and his friends were noted Hanoverians but the part played in the rebellion by Sir John's brother-in-law, George, third Earl of Cromartie, led to his

2.

Session Papers, vol.15:59, Petition and Complaint of Sir James Mackenzie of Royston and John Mackenzie of Highfield, 28 June, 1743.

3.

As we learn from Session Papers, vol.133:21, Answers for Hugh Rose of Aitnoch, 13 Jan.1767, pp.7-8. See, too, George Chalmers' "Collections relative to Scotland", H.L.S., MSS.35.6.4, Sir John Gordon's Memorial to Mr. Craigie, 6 Aug. 1753, p.393.

forfeiture. Cromartie was ruined long before the rebellion broke out and in fact in 1745 one of the principal creditors, Macleod of Cadboll, was forcing on a judicial sale.<sup>4</sup> Joining the Chevalier seems to have been a last desperate gamble on Cromartie's part to stave off ruin. Sir John sincerely regretted all this, tried hard to prevent the Earl's mad action and later pestered the life out of officials seeking clemency for Earl George and his hapless 18 year old son, John, Lord Macleod.<sup>5</sup> This was eventually granted. All the same, these events secured Sir John Gordon's political hegemony in the county. In brief, the forfeiture of the Cromartie estates to the Crown obviated the possibility that a challenge might be made to the Gordons based on the superiority of these lands.

Indeed, such was the absence of opposition that Sir John was able to survive a delicate situation. By the time of Sir William Gordon's death in 1742 his fortunes had declined and he was on the verge of bankruptcy. Sir John was not served heir and despite every endeavour made to meet his father's debts these

4.

See Dolvine Papers, 1379-80, passim, where much of the correspondence between Cadboll and Dolvine is taken up with this subject.

5.

Fraser, "Earls of Cromartie", vol. II, pp. 214-15. See, too, Chalmers' "Collections", vol. II, pp. 276-309, Correspondence of Sir John Gordon during the Rebellion. These are printed from Chalmers' transcripts in "Correspondence of Sir John Gordon of Invergordon, Bart., on occasion of the Rebellion of 1745, Edinburgh, 1835.



in 1751 stood at £24,544-6-3d Sterling. There seems to have been some difficulty over the ranking of creditors, which was then very common, and in that year a collusive judicial sale of the patrimony took place.<sup>6</sup> The important point is that Sir John, at whose instance the sale was brought, found it advisable to include in the sale the interests on the lands on which he originally stood enrolled, that is to say the wadset rights to the lands of Rosolis, Wester Dalblair and sundry lesser items. There was an element of sharp practice here for these wadsots formed no part of the patrimony in 1742. What exactly his purpose was it is not easy to see, but if, as Sir John's opponents later pointed out, he was proper wadsetter of these lands at his father's death then it was not competent to include them in the judicial sale of the patrimony.<sup>7</sup> The whole business was a family matter for the estate was purchased by Thomas Dolsches of Greenyards, a Stirlingshire lawyer and personal friend of Sir John's, who conveyed much of the property to Sir John's brother, Charles

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6.

For sum of debt, see "Pocket-Book of Sir John Gordon", N.L.S., MSS.103, p.346; in 1734, it was £23,000, *ibid.*, p.76. For details of the sale see, Session Papers, vol.133:16, Petition and Complaint of William Gordon of Howhall, 29 Nov., 1766; 133:17, Answers for William Fraser of Ardoch to above, 13 Jan., 1767; 133:18, Replies for William Gordon, 29 Jan. 1767; 133:19, Duplies for William Fraser of Ardoch, 7 Feb., 1767; 133:21, Answers for Hugh Rose of Aitnoch, January 13, 1767.

7.

Session Papers, vol.133:19, Duplies for William Fraser of Ardoch, 7 Feb., 1767, p.9.

Hamilton-Gordon of Nowhall, and most, if not all of the superiorities to Sir John.<sup>8</sup> This included the superiority of the lands of Brae, thereby destroying the titles of those enrolled on wadsots of this superiority. For some reason Charles <sup>Gordon</sup> ~~Gordon~~ was dissatisfied with the settlement and despite a decret arbitral by their brother-in-law, the Lord President Dundas, the Gordon brothers were at variance for several years.<sup>9</sup> The most important point to notice about the judicial sale of 1751, however, is that for various reasons each and every one of the Gordon voters were divested of their titles to remain upon the Roll of the Freeholders. This was common knowledge at the time and yet they continued to stand upon the Roll in virtue of their old titles and were not effectively challenged on this issue until more than 15 years had passed.

It is time now to examine the odd position of Macleod of Cadboll, which, without any exaggeration, can be described as the key to the politics of the county from the death of Sir James Mackenzie of Royston in 1743 until 1765. Happily the mystery is easily solved. Cadboll was enrolled on the apparenacy in 1719 at a time when the Jacobite Mackenzies were still in control of

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8.

Chalmers', "Collections", vol. I, Sir John Gordon's Memorial to Mr. Craigie, 6 Aug. 1753, p. 394 et seq.

9.

See Dalvine Papers, 1381, f. 154, Macleod of Cadboll to Dalvine, 4 Oct. 1753.



the county. Frederick Macleod was himself a fervent non-juror and once the Hanoverian Gordons took over this was enough to keep him out of the Michaelmas Head Court. In no circumstances would he risk having the hated oaths to government put to him. Quite apart from this he had no interest in politics, which he regarded as useless, time-consuming, troublesome and expensive.<sup>10</sup> His time, energy and money was taken up with numerous law-suits concerning his estates and personal enemies of which he seems to have had a full share and of which his cousin, Macleod of Canies, was the chief. He was also a scholar and antiquarian of no mean ability and something of a valetudinarian and recluse. Perambulating Bishops found him a peculiarly fascinating host.<sup>11</sup> He was kind-hearted but stubborn and choleric with a suggestion of a persecution complex. Kemp, Bishop Pococke's editor, was right in recognising him as a Jacobite but wrong in stating that he was implicated in the rebellion of 1745 and thereafter forced

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10.

This brief sketch is based mainly on Macleod's correspondence with Mackenzie of Delvino; H.L.S., Delvino Papers, Ms., Nos. 1379-1383.

11.

Bishop Pococke visited Cadboll in 1760, "Tours", p.172 et seq.; Bishop Forbes in 1762, Craven, "Visitation Journals of Bishop Forbes", p.173. The latter gives an amusing little sketch of Cadboll. He confirms Pococke's observations as to his antiquarian zeal, but gives some interesting details of his political views. Forbes used the English Book of Common Prayer (1 Aug. 1762), the first time it had ever been used in Cadboll's house, "he being so keen a Scotsman, that he would have nothing to do with England at all; inasmuch that he is for disuniting the two Kingdoms altogether in every Respect, and for having a King over Scotland alone independent of England, and let the English have a King for themselves."



to tarry abroad for a while. Cadboll's correspondence with his legal agent, Mackenzie of Delvine, proves that Macleod wisely stayed at home suffering from an illness, real or imaginary, when Charles Edward made his bid for the three kingdoms. Once normal communications were resumed Cadboll continued to correspond with Delvine, thus making nonsense of the story that he had to flee abroad. Not one word in that correspondence gives colour to ~~Macleod's~~<sup>Kemp's</sup> assertion and to clinch matters the letters from Macleod are addressed either from Edertown - the house on his estate of Cambuscurry - or Cadboll itself.<sup>12</sup> Mr. Kemp, then, must have saddled Cadboll with the fate of some other Frederick Macleod, an easy enough error to fall into in a land where names tended to duplicate themselves so readily. Cadboll, in fact, was one of those Jacobites who well knew the difference between drinking and fighting, and wisely confined his loyalty to King James to the former. Yet to the end of his days he would never swear the oaths to government or abjure his religion and as far as the politics of the county were concerned these were the most significant facts about Frederick Macleod of Cadboll.

This, then, was the odd situation. Macleod cared nothing for politics, but even if he was lured into taking part he dared not appear at Head Court or election meeting because of his

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12.

See, for example, Delvine 1330, f.97, Cadboll to Delvine, 27 June, 1746, when the correspondence resumes after being interrupted from 9 August 1745.



scruples. Yet so long as his circumstances remained unaltered the Gordons could not remove him from the Roll of Electors. Only if he came to a meeting of the freeholders, was formally tendered the oaths and refused to swear could he be expunged. It was a perfect stalemate, with the immediate advantage lying with the Gordons. In fact, they might almost be said to have won the game, though not quite. The lurking danger was that Cadboll might be induced by certain interested parties to act in his capacity as a freeholder. If this were to happen it would open up dire possibilities for Sir John Gordon. The plain fact was that Macleod was the only independent freeholder left upon a roll which had undergone further pruning and then stood:-

Sir John Gordon; Charles Hamilton-Gordon; Leonard Urquhart; Adam Gordon of Ardoch; and Roderick Macleod of Cadboll.<sup>13</sup> quite clearly if the political hegemony of Sir John Gordon was to be challenged, then Cadboll, and he alone, was in a strong position to do it. Only a freeholder could ensure the meeting of a Head Court, and only a freeholder could legally object to the titles of others standing upon the Roll. Not until 1753 did Sir John have to contend with these dangers.

The contingency rose in this manner. Sir John Gordon was also a freeholder in Ross and there supported Stuart

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13.

Cession Papers, vol.14:22; Petition of Thomas Mackenzie and Roderick Macleod, 19 Nov., 1753.



Mackenzie of Rosshaugh, brother of Gordon's patron Lord Duto, against Kenneth Mackenzie of Seaforth, known locally as Lord Fortrose. A brisk contest took place in which Sir John as usual took a prominent part. John Mackenzie of Delvine was at this time actively promoting Fortrose's interest, and it must have occurred either to him or Fortrose that an obvious riposte to Sir John was to attack him not only in Ross but in his "peckot-county" of Cromarty as well. This latter was the more promising in that Cadboll was under considerable obligation to Delvine who had advanced him large sums of money. The scheme was for Cadboll to force on a Head Court, lodge objections against the Gordon voters, and ensure the enrolment of Thomas Mackenzie of Highfield, who was to claim as apparent heir to his grandfather on the lands of Morkle Tarrell. Young Highfield had long since fallen in with Delvine's plan.<sup>14</sup> Cadboll was reluctant to lend himself to the scheme, fearing that not only would he incur the displeasure of the Gordons but worse, far worse to one of his litigious temperament, that of "a great man upon the Bench who you may guess."<sup>15</sup> This was the Lord Presi-

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14.

Delvine Papers, 1344, f.117, William Mackenzie of Strathgarve to Delvine, May 1752. This letter does not specify the matter on which Highfield would be "proud of any opportunity to serve you (Delvine)", but, from its context, it can only refer to the political contest in the shires of Cromarty and Ross in 1753-54. Vide infra.

15.

Delvine Papers, 1381, f.146, Cadboll to Delvine, 20 July, 1753.



dent Robert Dundas whose second wife was Anne Gordon, Sir John's sister.<sup>16</sup> Finally, however, Cadboll professed himself willing to serve Delvine - up to a point. That point was actual attendance at the Michaelmas meeting. For the rest he set to work methodically. On 2d. August 1753 he wrote to Delvine acquainting him that he had signed the objections to Sir John Gordon, Charles Hamilton-Gordon and Leonard Urquhart on the grounds of alteration of circumstances arising from the judicial sale of 1751.<sup>17</sup> He then arranged for them to be handed to the Sheriff Clerk, which presented some difficulties for no permanent Clerk existed. The Sheriff merely nominated an individual to act in that capacity as required. Cadboll suspected that the then Clerk pro tem., William Davidson, was a creature of Sir John Gordon's. Eventually by skilful plying with drink and money Davidson was induced to receive the documents, although Cadboll was unable to secure receipts for them.<sup>18</sup> Cadboll's fears about Davidson were but too well founded, however, for on the 16th. August the Clerk wrote to his patron's factor, John Gorry,

16.

G.W.T. Omond, "Arniston Memoirs", p.87.

17.

Chalmers', "Collections", vol.I, p.386, for notarial copy of Macleod's objections.

18.

Delvine Papers, 1331, f.143, Cadboll to Delvine, 2 August 1753, and *ibid.*, f.151, same to same, 17 Aug., 1753.



informing him of these developments.<sup>19</sup>

Sir John Gordon was worried and the more so as at this time he was on bad terms with his brother Charles and Cousin Adam of Ardoch.<sup>20</sup> Already on 6th August he had drawn up a long "Memorial" for the consideration of Robert Craigie, then a leading counsel. In this Sir John took a very honest view of the matters at issue, and openly admitted that only Macleod of Cadboll had an unexceptionable title to be on the Roll of Freeholders.<sup>21</sup> How to safeguard himself for the future was Sir John's main concern. True Belsches had disposed sufficient superiorities to Sir John to constitute a good title and if the worst came to the worst he might crave enrolment on the Old Extent of the lands of Braes. But this was to be done only if matters went to extremes, for it was, after all, preferable to be on the Roll on no good title rather than to be a claimant with the very best of titles. Highfield was a case in point, for Sir John fully recognised that his claim was just. And so the "Memorial" went on, exploring every possibility. Could Sir John control the meeting by his casting vote as parliamentary preses; could he put the oath of trust and possession before the election of preses and clerk; could he similarly put the oaths to

19.

Chalmers' "Collections", vol.I, p.384, William Davidson to John Gorry, 16 Aug., 1753.

20.

"Pocket-Book of Sir John Gordon", p.220.

21.

Chalmers', "Collections", vol.I, p.393.



government, thus ridding himself of Cadboll before any damage was done; were the freeholders compelled to meet as a Michaelmas Head Court? Every possibility was put up for Craigie's consideration. As to brother Charles and cousin Adam they could look for no mercy. Early in October Sir John called upon Cadboll and tried to reach an accommodation with him. Macleod was desired to withdraw his objection to Sir John and either not attend the Head Court or else attend and support Sir John who had himself lodged objections against his brother and cousin. "He then," wrote Cadboll, "insisted for my Interest and told if he would not Carry it himself he would Joyn me." Cadboll refused.<sup>22</sup>

Delvine, conscious of the weak part in his scheme, had already primed Macleod against attacks likely to be made on him, particularly respecting his failure to take the oaths. He need not have worried, for Macleod was an accomplished amateur lawyer. Cadboll had already given it as his considered opinion, that, "As I conceive the Matter, whether one had complied with that Law or not, he has power to act what I did; and I apprehend such acting is effectual, even for one that has not previously complied with the Law, or yt. should neglect to do it thereafter."<sup>23</sup> All seemed to be ready. In fact, there were latent flaws in Delvine's scheme, due largely

22. Delvine Papers, 1381, f.157, Cadboll to Delvine, 4 Oct., 1753.

23. Delvine Papers, 1381, f.153, Cadboll to Delvine, 7 Sept., 1753.

to the wrongheaded objections to the Gordons lodged by Mackenzie of Highfield in July 1753. Such complaints were incompetent to any but a freeholder, which Mackenzie assuredly was not.

Davidson intimated in writing to Cadboll and Highfield that the Head Court would be held at Cromarty on 16th October 1753. Faced with this awkward situation Sir John Gordon decided to gamble upon Macleod's conscience asserting itself. Cadboll was, of course, the principal danger. If he appeared at the Head Court he could, following well-known precedents, form a quorum of one and proceed to some drastic revision of the Roll of Electors. Highfield without Cadboll was no danger at all. Sir John decided to accept the opinion put forward by one of his lawyers, Boswell, that there was no statutory compulsion on the freeholders to meet annually at the Michaelmas Head Court.<sup>24</sup> He prevailed upon William Davidson not to open the meeting or to read any of the formal minutes that might be in his possession. Most of these were still in the hands of Thomas Gair, another of Sir John's henchmen, who had held the Earl of Cromartie's commission as Sheriff Clerk from 1734 until 1747. Gair assured Sir John that in no circumstances would these minutes be available to the Head Court.<sup>25</sup> From Sir John's point of view matters shaped hopefully - no Clerk, no minutes, no freeholders must

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24.

Chalmers', "Collections", vol.I, Memorial for Sir John Gordon from Mr. Boswell, 20th August 1753, p.428, et seq.

25.

Chalmers', "Collections", vol.I, Sir John Gordon's Memorial for Mr. Craigie, 6 Aug., 1753, pp.406-407.



surely add up to no Head Court. That all depended upon Cadboll.

The gamble succeeded. Macleod, said to be suffering from an indisposition (which was certainly his old fear of the oaths to government) failed to appear. Mackenzie, armed with a mandate from Cadboll, spent a frustrating day trying to move William Davidson to call the meeting. Thwarted here he then tried Sir John Gordon as last elected commissioner, who in such cases had power to open the meeting. Again he had no success. He tried Leonard Urquhart who was said to be the new Sheriff-Clerk. Urquhart denied the report and refused to act.<sup>26</sup> "And, in Fact, no Meeting of Freeholders was held that Day, nor any other Day in this Year,"<sup>27</sup> Mackenzie was left to seek what redress he could in the Court of Session. On the face of it, his case seemed invincible. He had unquestionably gone through the procedure required of a claimant by statute, the machinery had failed to move and, presumably, someone at some point must be held culpable. The case was an interesting one on several counts, but notably as revealing certain deficiencies in the statutes, both Scots and British, and demonstrating the fatal weakness

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26.

But he was undoubtedly commissioned Sheriff Clerk of Cromarty in September 1753. "Pocket-Book of Sir John Gordon", p.243.

27.

Session Papers, vol:14:22, Petition and Complaint of Mackenzie of Highfield and MacLeod of Cadboll, 19 Nov., 1753. The above account is based on this paper. See Appendix , where the pleadings in this case are transcribed in full. They are:-

I Session Papers, vol.45:56, Petition of Mackenzie and MacLeod, 19 Nov. 1753. (Same in vol.14:22).

II Session Papers, vol.14:22, Answers for Sir John Gordon et al. to above, 15 Dec. 1753.

of the Court of Session in election cases at this time. A brief consideration of the leading facts of the case will provide justification enough for these strictures.

For Mackenzie and <sup>M</sup>Yacloed it was argued that annual Head Courts were obligatory under the terms of the Act of 1681. And indeed whatever ambiguities can be discovered in that Act they can hardly be said to relate to the subject of Head Courts. It is vague as to the procedure for summoning and constituting these meetings but that there shall be annual Head Courts the Act is emphatic.<sup>28</sup> The consequences of any other view of the matter were graphically, but without undue exaggeration, described in the petition. "Should this remedy be refused, it would in many Counties, be in the Power of a Few Freeholders of one way of Thinking to keep themselves upon the Roll for ever, tho' without being intitled to such Privilege, and to debar all others, tho' possessed of the Clearest Right. It would at once unhinge and overturn the whole System of the Laws so anxiously contrived to prevent Abuses in Matters of Election."<sup>29</sup>

In all reason it is, and was then, difficult to see that any other construction could be upheld. And so, at first sight, the Lords seem to have thought. Warrant was granted to hurry on a

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28.

See A.P.S., vol.VIII, p.354.

29.

Session Papers, vol.14:22, op.cit., p.4.



hearing in presence. Unfortunately, however, while Andrew Pringle's main argument for the petitioners was sound the address of the petition was open to exception. Mackenzie and Macleod were described as "Freeholders", Mackenzie's complaints against the freeholders already named were asserted and the concluding prayer was that the Lords should enrol Mackenzie and expunge those against whom complaints had been lodged. The tactics were bad. The case for the petitioners would have been strengthened if they had petitioned separately, Macleod urging the complaints against the Gordons and Mackenzie contenting himself with a prayer for redress of grievance. If the Court so pleased these two processes might then have been joined ob contingentiam without prejudice to the petitioners. In this way the real issue would have been forced fairly and squarely upon the Court's attention, namely whether or not annual Head Courts were statutory. The oversight is almost certainly due to that arch-schemer but indifferent lawyer, Mackenzie of Delvine.

At this period the Court of Session was still wary of asserting itself in election cases. Its powers were vague and appeals to the House of Lords might have unfortunate results since the powers enjoyed by that body were as wide as its acquaintance with Scots law was slight. But when every allowance is made the Court of Session played a feeble part. In fine, it allowed itself to be cozened by what can only be described as a piece of legal coxcombry. Alexander Lockhart's "Answers" for Sir John Gordon and others was a tissue of irrelevance and petty sophistry. To begin with he dexterously



shifted the point at issue from the Act 1681 to the Act 1743, alleging that it was under the latter that the petition had been brought in. That this is not so, even a glance at Pringle's pleading will reveal. That paper was based firmly upon the Act 1681, which he quotes. The Act 16 George II opens Pringle's petition only because he began with a recital of Sir James Mackenzie of Royston's process against the Gordon party which, as we have seen, was based upon 16 George II. Such argument was then common, for, when it suited their purposes, the lawyers and their clients liked to pretend that 16 George II had abrogated the Act of 1681. It did nothing of the sort; it merely amended procedure and on matters on which it made no specific amendments, such as the franchises and Head Courts, clearly these were still regulated by the provisions laid down in former statutes.

In effect, Lockhart answered Pringle's argument for an annual Head Court under statute by a simple nay. At one point (p.5) he seems to admit that under the Act 1681 annual Head Courts were compulsory, "although these Michaelmas Meetings were calculated for the Ease and Conveniency of the Freeholders." This Act, he goes on, was not uniformly observed, and to rectify this the Act 16 George II ordered the Sheriff in every sheriffdom and stewartry to name a date for holding the Head Court in 1743, which date would be observed in years to come. In Cromarty no such date was ever intimated by the then Sheriff, and so the freeholders could



not legally meet as a Head Court.<sup>30</sup> Such was the fantastic grape-shot fired by Lockhart. If one ball failed to knock the Lords senseless, there was always a chance that another might. As well as this the pleading was loaded with petty sophistries. Apart from the remissness of the petition, already mentioned, which naturally was fastened upon, Lockhart's "Answers" are a farrago of nonsense, and indeed of impudent nonsense. It was typical of its time when the judges still timidly confined themselves to the narrow and ill defined limits of 16 George II. Later in the century, once they had essayed and expanded their powers, the bench would have given short shrift to this insolent pleading. "These Michaelmas Meetings were meant for the Conveniency and Accommodation of the Freeholders themselves, and to facilitate Matters upon the Day of Election. If they chuse to hold their Meetings, good and well; if not, there is no Compulsature, nor any Penalty; consequently no Ground for summary Complaint. If one Freeholder may impune be absent, so may all. And here lyes the cardinal Mistake in the Petitioner's whole Argument, that they suppose the Freeholder to be laid under an absolute Necessity of holding these Michaelmas Meetings."<sup>31</sup>

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<sup>30</sup>. That this statement is palpably false is proved by Sir John Gordon's Memorial to Mr. Craigie, Chalmers', "Collections", vol. I, p. 393, where Sir John states expressly that in 1743, "Lord Cromartie as Sheriff Princ. fixt the third Tuesday of October for the annual day of keeping the Michaelmas Head Courts for the Shire of Cromarty."

<sup>31</sup>. Session Papers, vol. 14:22, Answers for Sir John Gordon et al., pp. 8-9.

The issue was decided on the basis of the views put forward in Lockhart's pleading, namely that there was nothing in the statute of 1681, or any subsequent statute, to compel the freeholders to meet as a Head Court. Although the Court of Session by no means invariably adopted this timid attitude it often happened in electoral cases in the 18th century that when law and reason were at the least variance the most tortured and tortuous construction of the former triumphed. In election matters the Court of Session never sank lower than in this case. As to Cadboll's fear of antagonising the Lord President it played no part in the decision. Dundas died on 26th August 1753, so he can hardly have contributed to the interlocutor of 20th December 1753 whereby: "The Lords having advised this Complt. .... & heard Parties in their own Presence, They dismiss ye Complaint, 1<sup>mo</sup> Because it is not any of ye matters regulated by the Act 16 of K Geo, and therefore no Warrant for bringing the Partys into the Field. 2d. Suppose ye Party were regularly sisted, It is a case yt. can but rarely happen, and not provided for by the Law."<sup>32</sup>

That this decision was suspect there can be no stronger testimony than the fact that it never was invoked in any subsequent case. Diligent search of the records has failed to uncover one use of it. This may be due to the fact that exactly similar

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32.

Marginal note on Session Papers, vol.45:6. See A.Wight, "Rise and Progress of Parliament", ed.1806, vol.I, p.157; A.Connell, "Treatise on the Election Laws", 1827, p.21.



circumstances did not again arise, as their Lordships noted in the second part of their interlocutor. There was, however, a widespread feeling that it was a bad decision. Lord Kames, who had a passion for law and a deep hatred for those who flouted it, gave a characteristically pungent opinion on the matter. "This is a wrong for which no remedy is provided by law; and yet our judges, confining themselves within their ordinary jurisdiction, refused to interpose in behalf of a freeholder who had suffered this wrong, and dismissed the complaint as incompetent before them. Considering this case attentively, it may be justly doubted, whether such confined notions with respect to the powers of a supreme court, be not too scrupulous... [here] we have one instance where the court would not venture beyond their ordinary limits; though thereby a palpable wrong was left without a remedy."<sup>33</sup> The other commentators have little to say on this case and consequently it has not had the prominence it deserves. True, Wight, who, as will later appear, had every reason to be steeped in the electoral history of Cromarty, saw its significance. For him it summarised the unhappy position of the Court of Session. "Their Lordships, indeed, had no power to judge of the claim (i.e. Mackenzie's) in the first instance, having no original jurisdiction in matters of enrolment, and they had as little authority to order the freeholders to assemble for the purpose of

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33.

Lord Kames, "Historical Law Tracts", 4th ed., 1792, Tract VII, "On Courts", pp.228-9. See, too, Kames' report of this case in his "Select Decisions".

taking the claim under their consideration."<sup>34</sup> This is quite true but it does not invalidate Kames' points. However this may be, by bold use of the loopholes in the statutes and the aid of a "palpable wrong" Sir John Gordon managed to maintain his grip on Cromarty.

Nor was it only in the shire of Cromarty that he was carrying things with a high hand. In the neighbouring, or to speak more precisely the surrounding, county of Ross his influence was just as mischievous if not quite as potent. Delvine had tried to get him expunged from the Roll of Freeholders at Michaelmas 1753 but the objection to his title was not lodged the two statutory calendar months before the meeting.<sup>35</sup> Thus when on 2d. May 1754 17 freeholders compeared at Fortrose for the purpose of electing a Member of Parliament Sir John Gordon was of their number.<sup>36</sup> The meeting went through the usual formalities, except in one important respect, and the sheriff withdrew as soon as the meeting was opened. Kenneth Mackenzie, styled Lord Fortrose,<sup>37</sup> the heir of Seaforth, as last elected member took over as preses until a preses and clerk could be

34. A. Wight, "Rise and Progress of Parliament", vol.I, p.157.

35. Delvine Papers, 1391, f.157, Macleod of Cadboll to Delvine, 4 Oct. 1753.

36. Delvine Papers, 1496, ff.77-82, Extract Minutes of Meeting of the Freeholders of Ross-shire, 2 May 1754. These Minutes are paginated.

37. For Kenneth Mackenzie, Lord Fortrose, see "Complete Peerage", vol.XI, p.586.



voted into office. Hugh Rose of Kilravock was elected preses, the only dissenting vote being his own, which he conferred upon Mackenzie of Fairburn. Sir John Gordon did not vote, and for reasons that were typical of him. When asked for his vote he replied, "Go on, For he did not think this a legal meeting, the writ not being produced." At the election of the clerk, he returned the same helpful answer.<sup>38</sup> The meeting then proceeded to its main business, the adjustment of the Roll and the election of a member. That Sir John's objection to Mackenzie of Highfield was confined to the necessity of guarding his own preserve in Cromarty is clear from the fact that he did not oppose Highfield's claim to be enrolled at this meeting.<sup>39</sup> This done, the meeting "unanimously" elected the Honourable Kenneth Mackenzie of Seaforth "to represent the whole Community of this Shire in the sd. Parliament." Unanimously, the Minutes has it, but that was not quite the case. Sir John Gordon was playing a subtle game. The absence of the writ enabled him to force another election meeting on 9th May at Tain <sup>at</sup> and which his friend, James Stuart Mackenzie of Rosehaugh, contested the seat with Fortrose.<sup>40</sup> Significantly, the

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38. Delvine Papers, 1496 Extract Minutes, 2 May 1754, pp.2-3.

39. Ibid., pp.6-7.

40. Delvine Papers, 1496, ff.93-102, Extract Minutes of Election for Shyre of Ross, 9 May 1754.

votes cast on this occasion were 18 for Fortrose and 14 for Stuart Mackenzie. In addition, Sir John's friends at this meeting showed little scruple in attempting to disfranchise some of Fortrose's voters. Sir Harry Munro of Fowlis, for example, moved that the oath 19 George II against non-jurors should be put to several gentlemen who were not usually seen at worship in the established Church, but who, since they must presumably worship in some fashion, "may be justly suspected of joining with non-jurants, who are known to live among them." Only Mackenzie of Allangrange refused to take the oath and was thereby disqualified from taking part in the election.

The most interesting problem of all was the fate of the writ for election. The failure to produce the writ on 2d May undoubtedly enabled Sir John Gordon to win another, and more favourable, opportunity for his friend Rosehaugh. In fact, Sir John attended the first meeting purely for filibustering purposes and his contention that failure to produce the writ made the meeting illegal secured the desired end. Fortrose was furious and virtually accused Sir John Gordon of obtaining the writ by stealth and then deliberately withholding it. Kenneth Mackenzie was a most unpleasant person but in this instance his suspicions seem to have been well founded. The fact was that the writ had been sent up from Edinburgh in the care of Alexander Gray, one of the Deputy Clerks of Session. He had set out for Ross on 13th. or 14th. April, had been in the county for over a fortnight, but still no writ appeared.



The preses delivered himself of the opinion that Gray either kept it, or gave it "to the objector or some other person Contrary to the Express Directions of the statute of 16 of his present Majesty." Further, he "believed that the Writ is now in the Hands of some person in Court," and proposed that the freeholders present should swear on oath whether they had it or not or knew who had it. Oaths, however, seldom troubled 18th century politicians. The writ failed to materialise.

It would be unwise to dogmatise on the available evidence, but it is hard to see what Fortrose's party had to gain from suppressing the writ, since the Sheriff-Principal had already fixed the day of election. Clearly, too, from comparison of the proceedings of the two election meetings Rosehaugh's party badly needed a respite. That Sir John Gordon should, by some means or other, obtain the writ and suppress it is not inconsistent with his character. The tricky streak in that character was going to keep Cromarty in a litigious turmoil for years on end. All that we know of Sir John confirms the suspicions of the preses on 4th May, and if a guess would be in order the writ was in Court but safe in Sir John's pocket. Furthermore, if the opposition had been ill-advised enough to concoct a facsimile of the same he would have taken the greatest delight in just happening by some accident to have the original on his person, and whipping it out to the confusion of all and sundry.

At this point one might pause to ask an important question -

namely, what made Sir John Gordon such an indefatigable politician? In part it was the desire to increase his income, as witness the sinecure post of Secretary to the Principality Lands which he secured in May 1745.<sup>41</sup> This he received as a reward for faithful service to the Prince's Party. As he wrote in May 1752 to his friend Thomas Belsches of Greenyards, "Both in Town and out of Town you know we are in Houses of the Princesses and We feel other substantial Effects of Her Goodness. Prospects are good were they but more immediate, but God's Time must be our Time. It will not always be a Crime to have been the friend of Cato."<sup>42</sup> The frantic manner in which Sir John tried to carry the Wick district of burghs in 1761 also attests his economic dependence upon a seat in the House of Commons.<sup>43</sup> But the economic aspect of the business was not the whole story. The secret to his political activities lay in his own character. In short, Sir John Gordon was a born politician if ever there was one. He believed nothing could be well done unless he supervised the doing of it, and, as his

41.

"Pocket-Book of Sir John Gordon", p.318. On his first appointment the salary was £300, but was later doubled. In 1753 he obtained a new commission with £400 of salary "out of the Scotch Civil List." From numerous entries in the "Pocket-Book" it is clear that Sir John was some £6,000 in debt (c.1754-7) and often hard pushed for money. See, for example, pp.61-5 for an estimate of debts in 1754.

42.

Chalmers' "Collections", vol.II, p.670, No.97, Sir John Gordon to Mr. Belsches, London, 5 May, 1752.

43.

Vide infra, chapter VIII , and references given there.



"Pocket-Book" makes clear, this covered everything from the best means of laundering white shirts to the introduction of bills in the Legislature. He was of a touchy, peacock nature, very conscious of his own dignity and the many responsibilities and obligations thrust upon him by his "great naturall interest in the county of Cromarty." He was also a born intriguer, and as has been happily said of his favourite poet (whose numbers he parodied with no great felicity) he could not take his tea without a stratagem. Like the Duke of Newcastle he was fascinated by factual details, however trivial, which he duly recorded in his meticulously written memoranda books. In short, he was possessed of a small mind in which cunning displaced intelligence, possessed too of "a guid conceit o' himsel'," and an obstinate tenacity of purpose. In his day he was a well defined political type and but for some finer strands in his nature he might be bracketted with that other well known figure at Leicester House, Bubb Dodington. But when not engaged in political warfare and otherwise uncrossed Sir John had a kind heart and his vanity was of a more appealing type than that of the selfish Dodington who amuses only because his blatant hypocrisy was as obscure to him as it is transparent to us. Sir John had in some measure the gift to see himself as others saw him and he could treat with good humour the vision thus afforded, as in a verse epistle to John Medina, the portrait painter.

— "Draw me a little lively Knight,  
 And place the figure full in sight,  
 With animated Look and Air,  
 To please the Great & catch the Pair,  
 Make him a Wreath of Turneep tops,  
 With Maddar interwove and Hops,  
 Lucerne & St. Foin here and there  
 Among the Foliage must appear  
 Then add Potatoes White and Red  
 A Garland for our Heroes Head.  
 His Coat be of Election Laws  
 Lin'd with the Patriot's good old Cause.  
 . . . . .  
 . . . . .  
 Thus hand in hand We'll mount on high  
 And shine joint Tenants of the Sky."<sup>44</sup>

It was probably a better portrait than Medina's mediocre talent could have produced, faithful to the last detail and bringing out the baronet's all absorbing interest in politics, law suits and improved agriculture.

Apart from an election meeting in May 1754, which not unnaturally returned Sir John Gordon to Westminster,<sup>45</sup> the freeholders

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44.

"Pocket-Book of Sir John Gordon", p.109.

45.

Gromarty Sheriff Court Records, Box 40 (Reg.Ho.), Double Minutes Barron Court at Gromarty, 4th May, 1754.



of Cromarty did not meet until the Michaelmas of 1765. In the spring of that year Roderick Macleod of Cadboll agreed to act in concert with a newcomer on the scene, William Johnstone.<sup>46</sup> This was the culmination of a series of events that began on 19th. September 1763 when Urquhart of Cromarty was forced to put his estate up for public roup. It will be remembered that Urquhart had purchased the estate from Sir George Mackenzie in 1741 and that as a Roman Catholic he had found it advisable to take no part in politics. Just before the sale in September 1763 advertisements in the newspapers pointed out that as well as its real estate value possession of the estate would enable its proprietor "to command the Election of the whole County."<sup>47</sup> It was purchased for £24,200 Sterling by an Edinburgh merchant Robert Malcolm, who, however, was acting on behalf of Patrick Lord Elibank. He, in turn, was acting on behalf of his nephew, William Johnstone.<sup>48</sup> The idea, of course, was to lull Sir John's suspicions as long as possible. In the meantime

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46. Born 1729, died 1805, third son of Sir James Johnstone, third baronet of Westerhall; in 1767 married Frances Pulteney, niece and heiress of Earl of Bath; on his wife succeeding to the vast Bath fortune, Johnstone assumed the name of Pulteney and in 1794 succeeded his brother Sir James as fifth baronet of Westerhall. Trained as an advocate he does not seem to have practised. His brother George - known as Governor Johnstone - was also a well known politician. He died in 1787. Pulteney was a keen agriculturist and founded the Chair of Agriculture at Edinburgh University in 1791. Almost miserly with himself Pulteney was generous to others. See Sir James Fergusson, ed., "Letters of George Dempster to Sir Adam Fergusson", pp.67-8.

47. Session Papers, vol.684:2, Answers for Sir John Gordon to the Petition of Patrick Lord Elibank, 21 Jan., 1766, p.2.

48. Session Papers, vol.140:16, Petition of William Pulteney, 8 Feb., 1768, p.1.



Elibank pressed on with the scheme. The first requirement was a revaluation of the Cromarty estate and the division of the cumulo into a number of freehold lots. For this control of the Commissioners of Supply was essential.

Like the Head Courts the Commissioners of Supply had not met regularly for years, although undoubtedly required to do so on the 30th. April of each year under terms of the Act of Supply. In fact, there had "hardly been a meeting of the commissioners of the county from the year 1758," although business had, of course, been transacted.<sup>49</sup> Failure to levy the cess would not have been so calmly received in high places as failure to hold Head Courts. Lord Elchies summarised the attitude of the Court of Session in these matters when in 1751 an attempt was made to prove that a meeting of Commissioners of Supply in Sutherland was illegal. "To this none of us had any regard - necessity has no law - the case frequently happens - and the consequence would be, that no cess could be levied that year."<sup>50</sup> In Cromarty circumstances beyond the control of Sir John Gordon now dictated that the Commissioners of Supply should play an important part in the impending election struggle and so Sir John proposed to avail himself of the advantage he enjoyed in

49.

Session Papers, vol.133:10, Answers for Captain John Forbes of New, 29 Jan., 1766, p.4. Captain Forbes was one of the Commissioners of Supply. Vide infra.

50.

Robert Bell, "Treatise on Election Law", pp.216-7.



this matter in that as a Member of Parliament he had nominated most of the Commissioners. The danger was the more pressing in that Macleod of Cadboll, who was no friend to the Gordon interest, soon allied himself with Johnstone. Later Sir John hinted darkly that "by what Means he was prevailed upon to accede thereto is no Secret."<sup>51</sup> No record of bribery remains, nor indeed is necessary to make sense of the transaction. Macleod was merely once more entering the lists against his old adversary. Besides, as a Member Sir John was poorly connected and not a good provider. Twice in 1758 Cadboll had dunned the baronet for commissions for two young Macleods, neither of which seem to have materialised.<sup>52</sup> It was certainly nothing to Pulteney's disadvantage that he could claim ministerial favour.

Faced with a demand for a revaluation from Lord Elibank and the likelihood of one from Cadboll Sir John deemed it prudent to summon a meeting of the Commissioners of Supply for 30th. April 1765. He knew that Elibank had already expedited a charter in 1764 and had granted feu-rights to William Fraser of Balnain, W.S. Wadsets of superiority were then conferred upon Hugh Rose, factor on the estate

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51.

Session Papers, vol.684:39, Memorial for Sir John Gordon, 24 Sept., 1768, p.4. Also Session Papers, vol.139:8, Petition of Sir John Gordon, 13 Jan., 1766, p.2. "Macleod of Cadboll was next applied to, and by means of certain forcible arguments, was persuaded to join his interest, and to split his estate, in the view of creating more nominal freehold qualifications."

52.

"Pocket-Book of Sir John Gordon", pp.265-7.



of Cromarty, William Fraser, procurator at Inverness and James Crawford, Pulteney's clerk. But before valid claims for enrolment could be made on these titles it was necessary to secure a revaluation and division of CUMULO. The Commissioners, six in all, met on 30th. April 1765. It was a quiet session, apart from Sir John's factor, John Gorry, objecting to William Forsyth acting as a Commissioner. A few days later Forsyth wrote to Gorry, assuring him that he had no intention of harming Sir John Gordon's interest and that he had been coerced by Johnstone (later Pulteney) into qualifying as a Commissioner. As he put it, pathetically, "You know well enough how I stand with the other side, as to the conveniency of my farm, and the use of my storehouse for my business, with other obliging indulgences."<sup>53</sup> Nothing else of note happened, save that IN ABSENTIA Sir John Gordon was elected Convener of Supply. Captain John Forbes of New - factor on the annexed estate of Cromartie - was unanimously voted preses. The meeting was deferred until 22nd. May, on which day the same persons met. This was a stormy session, Sir John's factor, Gorry, objecting to the presence of Captain Forbes, William Anderson and William Forsyth. These gentlemen, Gorry contended, were not heritors of property in the shire valued at £100 Scots as law required. Forbes replied

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For a general description of this meeting, see Session Papers, vol.133:10, Answers for Captain John Forbes of New, 29 Jan., 1766, p.5. Forsyth's letter to Gorry is in Session Papers, vol.139:6, Petition of Sir John Gordon, 22 Nov., 1765, pp.4-5.



with a "tu quoque". Also present at this meeting was Henry Davidson of Tulloch, a solicitor brought up from London to speed on Johnstone's project. Despite protests from Sir John's friends a committee was appointed to take a proof of rental of the estate of Cromarty and to split the CUMULO. At the same time a similar committee was appointed to deal with a like petition from Macleod of Cadboll. Each committee consisted of the same persons, that is to say all who were present at the meeting except John <sup>Gorry</sup>~~Gordon~~ and William Gordon of Newhall, Sir John's nephew.<sup>54</sup> They belonged to the Gordon interest and naturally protested against those proceedings, insisting that nothing should be done until the new Act of Supply, which had just received the royal assent, should arrive. Sir John had supplied the nominations for that Act and would take care to exclude any of whom he felt the least bit doubtful.

The two committees set to with a will, the one ratifying the work of the other. "The consequence of this was, that they were at liberty to act in the manner most agreeable to themselves, and to frame the Divisions of the CUMULO valuations of the Estates of Cromarty and Cadboll, so as to render them most serviceable to Mr. Johnstone's views."<sup>55</sup> On the 23d. May the division of CUMULO of

54.

For an account of this meeting, see Session Papers, vol.133:9, Petition of Sir John Gordon, 13 Jan., 1766, which is accurate as to fact although partial in its conclusions.

55.

Session Papers, vol.684:10, Petition of Sir John Gordon, 7 Aug., 1767, p.3.

the first of these estates was completed, and that of the other on the 25th. To complete the coup on 20th. June 1765 Sir John Gordon was ousted from his convenership on the plea of non-residence.<sup>56</sup> It was alleged that he lived in London, was rarely in the county, and hence could not act as convener. Charles Urquhart of Braelangwell was voted convener in his stead, and in July Sir John was ordered by decreet of the Court of Session to deliver up the records of the Supply to William Forsyth, the Clerk of the Commissioners, or at least of one set of Commissioners. This he did not obey, and that reluctantly and with every degree of awkwardness, until October 1765.

In the meantime Sir John, believing that the convenership was all important, was fighting back. On 2d. July 1765 he obtained a Bill of Suspension on his dismissal from that office. He denied residence in London, asserting that at the time he was voted out of office he was in Edinburgh. In addition, he contended that the fact that some of those who acted as Commissioners were not qualified in law told against the validity of this particular act, as indeed of all their acts.<sup>57</sup> Acting on these beliefs Sir John

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56.

Session Papers, vol.684:11, Information for William Pulteney and Alexander Fraser of Culduthill, 24 Sept., 1767, p.6. Also, vol. 139:14, Petition and Complaint of Robert Blair and James Hay, 29 Nov., 1766, p.4.

57.

Index to Processes (Reg.No.), Cromarty, Group II, 14:418, Notarial Copy of Sir John Gordon's Bill of Suspension, 1765. For exact date of this, see Session Papers, vol.139: , Petition and Complaint of Sir John Gordon, 29 Nov., 1766, p.



called a meeting of the Commissioners of Supply for 12th. September 1765 and set about dividing his own CUMULO valuation. As it was later put for him in the Court of Session, "It was obvious to foresee, that your Petitioner, whose interest as a real and substantial freeholder in the county was thus invaded, and meant to be overpowered, would be under a necessity to defend himself, by splitting his CUMULO valuations, and giving so many freehold qualifications to certain of his friends."<sup>58</sup> As a result of this manoeuvre, and a similar one relating to the estate of Gordon of Newhall, there were nine new Gordon claimants at the Head Court of 1766.

Here, then, was one of the main points at issue in the long series of legal battles that followed. Which set of Commissioners of Supply was to be regarded as legal, and which, in the language of both parties, was to be considered a "mere junto"? Which decreets of division were to be regarded as valid, which to be set aside as of no account? And the point to which all tended, which set of claimants on newly created qualifications stood a chance of being added to the Roll of Freeholders, either by the barons themselves or decret of the Lords of Session, and which was to be summarily rejected? The ramifications were wide, the prospects for the advocates good, for the Lords of Council and Session dire. Nor were the prospects for the candidates really much more pleasing

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58.

Session Papers, vol.139:16, Petition and Complaint of Sir John Gordon, 29 Nov., 1766, p.5.

than those for the judges. William Johnstone saw his easy victory, as it must have looked in 1763, growing more and more difficult. As was usual in such situations he tried to buy off the opposition. Early in 1765 he had offered through Henry Davidson to purchase Sir John's estates for £15,000 Sterling.<sup>59</sup> The offer was refused, but in September, seeing the way things were tending, Johnstone again took the matter up. In a letter to a friend, Ross of Inverchassley, which was to be shown to Sir John, Johnstone says openly: "I have come to this Country, in order to bring to Maturity the Scheme of securing my Election for the County of Cromarty. The situation it now stands in is this: Sir John Gordon is able to make eight Votes, and I shall have ten ineft before this Michaelmas. If [Munro of] Pointzfield joins me, which I think certain, I shall have eleven; if he joins Sir John, I shall still carry it; notwithstanding this, I foresee that I may be involved in much Trouble and Expence by an obstinate Litigation. I do not doubt that it must cost each of the Parties £2,000 or perhaps £3,000 to discuss all the Questions and Appeals that are likely to arise; for this reason, and to avoid Litigation, I am inclined to make the Purchase of Sir John's Estate, against which you and all my friends have hitherto advised." He then proceeds to make his offer, £14,000 "and £1,000 more to Lady Gordon for a Gown." Sir John in return was to convey all rights to the



estate to Johnstone and "all his new created Voters to reconvey, so far as they have Right to any part of the estate." Sir John was also to undertake to enrol Johnstone's three voters (Rose, Fraser and Crawford) at Michaelmas 1765, to expunge Leonard Urquhart and Gordon of Ardoch, "and to come under an absolute Engagement, that he will support me with all his interest in my Election, and vote for me if necessary." Should he refuse, "He will in the end lose the Election; he will lose the expense of the contest, and he will lose the additional price I offer, which I reckon is £1,500 above the value."<sup>60</sup>

Sir John kept the letter for three days, refusing to give an undertaking not to make use of it thereafter. On 30th. September he penned a long letter breathing defiance and outraged virtue. Johnstone's vaunts were the merest "Pussings of a Candidate, deceiving himself, or desirous to be thought secure of Success." Let him brag; Sir John hoped, whatever the outcome, to make a good fight of it, "possibly proving myself non plurim<sup>b</sup>us impar." He would stick by his "patrimoniall Interest" to the death and as for the inducements held out by Johnstone, "I will neither bribe, nor be bribed, nor think to distinguish away, what, in reality, would be a bribe."<sup>61</sup>

It was a declaration of war, and from the hostilities thus

60.

Session Papers, vol.684:16, Appendix, op. cit., pp.2-4

61.

Session Papers, vol.684:16, Appendix, pp.5-10.

joined came more than three years of bitter recrimination and exhausting struggle. In fact, between June 1765 and February 1767 no less than forty Petitions and Complaints dealing with the politics of this insignificant little northern shire were read before weary and bemused judges. To these Answers, Replies, Duplies, sometimes even Triplies, were appointed to be given in. Then came lengthy Informations, Memorials and Reclaiming Petitions. Lastly came Appeals to the House of Lords followed by counter appeals. Every move, every minute episode in the involved operations of either party was seized upon. All conceivable, and some inconceivable, objections were advanced. The thing became vast, labyrinthine and, towards the end, grotesquely unreal even to the judges. The volume is staggering, and so far as the present writer can estimate, furnishes by far the greatest bulk of any series of cases arising out of the old system of elections. In sheer bulk it probably ranks second only to the famous Douglas Cause, and in fact these two endless and involved processes for a time occupied the same sessions. Pelted by the Douglas litigants the poor judges were apt to find that the next task was yet another of the Cromarty papers. From 30th. April 1765 the course of events becomes involved and difficult to reconstruct, largely because, as their Lordships found, the facts of the situation were bandied about in so many Petitions and Answers. Well might the harassed Lord Monboddo exclaim - "There have been extraordinary doings in this country, owing to the madness of elections; votes



have been created, commissioners of supply have been created."<sup>62</sup>

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62.

Arthur Connell, "Treatise on Election Laws", p.120, in Pulteney against Gordon, 24 Dec., 1767. Connell derives this information from Lord Hailes' session notes which can no longer be traced.

Chapter V

Cromarty III



Chapter V.Cromarty 111.

Sir John Gordon, ever ready to go to law and, so far as the "Cromarty politicks" were concerned, hitherto remarkably successful in that sphere, opened the struggle with a Petition and Complaint dated 29th June 1765.<sup>1</sup> This introduces a new and fascinating aspect of the legal contest, namely the high quality of the advocates employed, and Sir John's opening petition reflects this for it was drawn up by his nephew who was none other than Henry Dundas. Dundas was busy learning the art of gerrymandering at the best finishing school then available, the Parliament House. His paper was an able production, setting forth Sir John's grievances briefly but forcefully - which was ever Henry's way. The chief ground of complaint was that under statute 5 George III Commissioners of Supply were required to be infert in superiority or property valued at £100 Scots in the shire or stewartry in which they undertook to act. Sir John complained that four persons who had served as Commissioners in the recent proceedings in Cromarty were not so qualified - namely, Henry Davidson of Tulloch, Dr. William Anderson of Udall, Captain John Forbes of New and

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1.

Session Papers, vol.139:1, Petition and Complaint of Sir John Gordon, 29 June, 1765. This long drawn out process re qualifications of Commissioners of Supply can be studied in numerous papers in the above volume and in volume 133.

William Forsyth. The penalty for each transgression was £20 sterling and the occasions on which they had transgressed were<sup>2</sup> carefully listed.

Islay Campbell, who led for the respondents, began by making the interesting point that Sir John Gordon had himself put forward the names of most of these gentlemen when he last represented the county in parliament and this the pursuer was quite unable to rebut.<sup>3</sup> Then getting down to particulars Campbell defended the qualifications of his clients and did very well with a poor case. He argued that Davidson and Anderson were qualified as superior and proprietor of the lands of Udal which were valued at £140 Scots. The feudal transactions involved were complicated but the sum of them was that Davidson was base infest. It was claimed that Anderson had been subject-superior of these lands but that in 1761 as a military surgeon off to the wars he made disposition of his interest in these lands to Davidson, who was his brother-in-law. All this took place before the least likelihood of an election struggle could be discerned. Davidson later retrocessed Anderson's rights to Udal. As counsel

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2.

Session Papers, vol.139:1, Petition of Sir John Gordon, 29 June, 1765, pp.2-5.

3.

Session Papers, vol.139:1, Answers for Henry Davidson et al., 19 July, 1765, pp.1-2. The point was admitted by Sir John's counsel, Alex. Lockhart, in 139:5, Answers for Sir John Gordon to the Petition of Captain John Forbes of New, 4 Dec., 1765, pp.19-20



for Anderson later in the process forcefully put it: "The respondent had no kind of connection with the party he is said to have served; and yet his whole estate on which a numerous family is presently subsisted would not have been near equal in value to the penalties he is said to have incurred; so that if he had been found liable he must have depended on the generosity of Sir John Gordon in remitting his forfeiture."<sup>4</sup> Happily for the doctor no strain was put on Sir John's generosity. The whole argument in Anderson's case turned upon the meaning of "superior" in the Supply Act. Sir John argued that it meant a tenant-in-chief and if this interpretation were upheld Anderson would be found liable to the penalties demanded for it was proved beyond all doubt that he never had been subject-superior of the lands. For Anderson it was held that the act meant simply any superior even if he in turn were a vassal, and so, somewhat anomalously, the Court found. As Wight acutely remarked, "If this decision be well founded, it is hard to say where to stop. It would seem, that as many act in respect of one parcel of land of £100 valuation as there may be sub-feus of it granted."<sup>5</sup> This decision of

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4. Session Papers, vol.133:4, Answers for William Anderson of Udal, 19 Feb., 1766, p.2.

5. Alexander Wight, "Rise and Progress of Parliament", ed.1784, pp.193-4. For the decision of 21 Jan.1766, see "Folio Dictionary", vol.III, p.409.



21st January 1766 confirmed an earlier one of 7th. August 1765 whereby Davidson was assoilzied.<sup>6</sup>

Rather more difficult were the cases of Forsyth and Forbes. The former was held to be qualified by a disposition in his favour of the lands of Davidstoun which had formed part of the estate of Cromarty purchased by Lord Elibank. Elibank had disposed Davidstoun among other lands to Fraser of Balnain who in turn disposed Davidstoun to Forsyth. Documentary evidence to instruct this charge was brought into Court, but the respondent's friends, feeling the case to be shaky, had already taken other steps to protect Forsyth. If it were found that he had acted illegally on 30th. April 1765 before the registration of his sasine on these lands then he would be dealt with in a process already brought before the Sheriff-Depute of Cromarty at the instance of William Fraser of Ardoch. This, as the pursuers were quick to point out, was a collusive action designed to screen Forsyth from the statutory penalty that could be exacted in the Court of Session. After much argument and counter argument Forsyth escaped the penalties demanded.<sup>7</sup> Forsyth, indeed, was the merest

6.

Decision of 7 Aug., 1765, recited in Session Papers, vol.139:5, Petition of Captain Forbes, 15 Nov., 1765, p.1.

7.

For all this see Session Papers, vol.139:1, Answers for William Anderson of Udal et al., 19 July, 1765; ibid., Replies for Sir John Gordon, 30 July, 1765.



cats-paw and his expenses, like those incurred by all who acted in Johnstone's interest, were borne by the candidate.

Captain Forbes was unlucky. He had actually been nominated for the Supply by Sir John Gordon in 1755 and was then described as "factor upon the estate which belonged to George late Earl of Cromarty." As a matter of convenience factors on forfeited estates regularly served on the Supply, whether otherwise qualified or not, since they could readily produce evidence not accessible to others. Thus Forbes had acted as a Commissioner for many years in Cromarty and Inverness (he was also factor on the forfeited estate of Lovat) without once being questioned as to his right to do so. Besides, John Gorry was in precisely the same position, he having frequently represented Sir John Gordon at meetings of the Commissioners. Why, then, had Sir John, lately so zealous for rectitude in public affairs, failed to object to Gorry? The inference was clear enough. Gorry toed the Gordon line, whereas Forbes was misguided enough to participate in work that undoubtedly fell within the province of the Commissioners of Supply. The Captain, in fact, was the first victim of the political warfare that had blazed up in the county. Sir John was quite unscrupulous throughout. Whoever was not for him, and that in the active sense, was against him. Despite numerous appeals Forbes was found liable to Sir John Gordon in £80 sterling. The latter was discontented with this result and protracted the process in an attempt to extract £180, but the Court refused to consider the



five adjournments of the Commissioners as separate meetings.<sup>8</sup>

Sir John Gordon, however, really failed to secure any advantage from these exchanges. He had hoped to demonstrate that certain of the Commissioners who had divided Elibank's and Caddell's CUMULO valuations in May 1765 were not qualified to act and therefore that these divisions were null and void. If he could have carried this point it would have been a masterly stroke, but the very looseness of the land-tax act which had enabled him to trap the unfortunate Captain Forbes told against him. As was the case with the freeholders, no quorum was fixed by law. Nor could the plea avail that the decreets were vitiated by reason of Forbes' disqualification.<sup>9</sup> The classical example of Eubarius Philippus was put forward by Johnstone's advocates to offset this prayer, and the decreets of division were sustained. Sir John, however, like the seasoned campaigner he was, knew better than to stake his all on one plea and consequently in November 1765 he urged other reasons against the

8.

This brief account is condensed from information contained in numerous pleadings in Session Papers, vols. 133 and 139. The main arguments are to be found in the following:-

vol.139:1, Petition of Sir John Gordon, 29 June, 1765; Answers for Davidson et al., 19 July, 1765; Replies for Sir John Gordon, 30 July 1765;

vol.133, papers numbered 8-15.

See Arthur Connell, "Election Law", p.119, f.n.1, who gives the effective decision as 12 Feb., 1766, but Robert Bell, "Election Law", p.213 is right to cite 12 July 1766, as res judicata.

9.

A. Wight, "Rise and Progress of Parliament", ed.1806, vol.I, pp.193-4.



decreets of division of Cromarty and Cadboll.<sup>10</sup> Against the division of the Cromarty CUMULO four main objections were brought forward. Firstly: that proof of the real rent of part of the lands had not been taken, that the feu-duties payable by the vassals had been accepted instead and that this was contrary to the Act of Convention of 1643 which defined the subjects to be valued.<sup>11</sup> Secondly: that before 1694 Viscount Tarbat granted seven feus on parts of his estate and these were included in his CUMULO; they were deducted at the valuation of 1694 but no allowance made for them by the Commissioners in 1765, thus keeping the valuation as high as possible.<sup>12</sup> Thirdly: that an oxgate of the lands of Navity was omitted in the division; in 1673 Sir John Urquhart gave it up as a pledge for payments to the parish kirk of Cromarty but it still remained part of the estate and

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10.

For a review of this process, see Session Papers, vol.634:1, Petition of Intrick, Lord Elbank et al., 10 Jan., 1767, and ibid. Answers for Sir John Gordon, 21 Jan., 1766. In this volume the papers are not arranged in chronological order and the earlier papers in the process are missing.

11.

Session Papers, vol.634:10, Petition of Sir John Gordon, 7 Aug., 1767, p.9. For Act of Convention of 1643, see A.P.S., VI, pp.26-36; Connell, "Election Law", p.116 et seq.; Bell, "Election Law", p.192 et seq., "Of Valued Rent", is excellent on this topic.

12.

Session Papers, vol.634:10, Petition of Sir John Gordon, 7 Aug., 1767, p.13.



should have been valued with it.<sup>13</sup> Fourthly: that the lands of Peddiestoun, Little Farneso and Davidstoun had separate valuations, the two former in 1710 and the latter in 1635. In the valuation roll of 1743, which Sir John here found it convenient to categorise as neither official nor accurate, albeit himself its prime author, these lands were lumped together "upon no other Authority than the private Agreement of Parties."<sup>14</sup>

This was a cunning discharge of artillery. In the first place it was a plea against the freehold qualifications of Hugh Rose, Fraser and Crawford who presented themselves for enrolment at Michaelmas 1765, with what result will shortly be seen. Secondly, it was an attack upon the validity of the divisions of 23rd. and 25th. May, 1765. Could Sir John but secure one or other of these ends, no matter by what means, the game was his. The objections given in to the decret of division reflect the same calculating cunning. It will be remarked that the four objections we have briefly summarised do not form one logical case. Legal practice creates its own logic, and Sir John and his advocates were cleverly availing themselves of every conceivable objection, even should one be at complete variance with another. Note, for example, the apparent inconsistency if we

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13.  
Ibid., p.27.

14.  
Ibid., p.37.



group together objections 1 and 3, and objections 2 and 4. Academic logic would no doubt smile at this puerile exhibition. In point of fact, whereas in the first group Sir John argues that the valuation is too small and in the second that it is too large, there is here no inconsistency whatever. The great end was to prove that in some respect, and it mattered not in what respect, the decret was bad in form and therefore, in the legal jargon of the time, "funditus null and void." This method of attack holds true not only of this process, not only of Sir John Gordon and his interest, but of the deeds of William Johnston alias Pultenoy as well, and is indeed one of the capital facts of electoral procedure in 18th century Scotland. The whole business was dominated, in the last resort, by strictly legal considerations. All through that century the cry could be, and very often was, "quaestio est quid juris?" On occasion everything could turn upon the answer given to that jocular piece of Chaucerian Latin.

In that same lengthy paper the objections made to the division of Cadboll's CUMULO were recapitulated. Sir John charged that these lands were in the hands of Sinclair of Moy at the time of the annexation of Lord Tarbat's lands to Cromarty in 1690. It was a convincing case and skilfully argued. In 1690 and after the cess rolls of the two shires of Ross and Cromarty remained precisely as they had been hitherto. In 1693 Tarbat imposed on the Privy Council, whilst seeking a new



valuation on the ground that he was overvalued, by including among his lands those of Cadboll. The latter undoubtedly passed into his hands in 1694 but, it was submitted, could not possibly fall under the provisions of the Act of 1690.<sup>15</sup> The long indictment ended on a note of delicious irony. "Nor can the Defenders qualify any possible Prejudice, by your Lordships now finding these lands to remain as they originally were in the County of Ross, the Freehold qualification, if other-ways just and legal, will be equally beneficial in the one County as the other." This leads on naturally to another important consideration, which is that Fulteney and his friends were not the only ones who could manufacture votes. As already noticed, Sir John Gordon had recourse to the same device in protection of his "great Naturall Interest in the County of Cromarty." It then became a vital part of Fulteney's strategy to nullify the decreets of division on which Sir John's nominals and those of his nephew, Gordon of Newhall, founded their "airy freeholds", but the details of this process, which arose later in the contest, in November 1766, are best left over.<sup>16</sup> These processes over the Commissioners of Supply dragged on interminably, though happily the details of

15.

Session Papers, vol. 634:10, Petition of Sir John Gordon, 7 Aug., 1767, pp. 40-64.

16.

This process is reviewed in Session Papers, vol. 634:11, Information for William Fulteney formerly Johnston and Alexander Fraser of Culduthill, 24 Sept., 1767.



the arguments and counter-arguments employed can well be omitted. But it will be necessary to review some of the nodal points from time to time and demonstrate their bearing upon the election contest as a whole. The truth is that from first blow to last the disputes over the divisions remained central to the entire struggle. To suit changing circumstances the grounds of argument shifted from time to time, and often indeed the pleadings were nothing more than displays of forensic skill. But always the fundamental issue remained - to strike out the newly created freeholds on the other side. This invariably brought the discussions back to the decrees of division in some form or other.

On 15th October 1765, while the original process against Forbes and others of the Commissioners was still being heard, a Michaelmas Head-Court met in Cromarty, the first for many years.<sup>17</sup> Sir John could hardly hope to repeat the brazen stratagem of 17<sup>5</sup>/<sub>3</sub>, for quite clearly Johnstone meant business. He was well to do and well connected. The Head Court had to meet and it was better for Sir John to recognise that fact and take whatever advantage of it he could. That was still not inconsiderable, for he and two of his friends were on the Roll of Freeholders, whereas Johnstone and his friends (Cadboll excepted) had still to attain that eminence.

At the outset the Head Court experienced difficulty over

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17.

As we learn from the Minutes of the Freeholders of Cromarty which are available from this point onwards. See Cromarty Sheriff Court Records, Reg.No., File/L/18, Box 40, Minutes of the Michaelmas Head Court of the County of Cromarty, 15 Oct., 1765.



the absence of the minutes of former meetings. George Croig, Sheriff Clerk Depute, swore that he had done all in his power to obtain these by writing to the Principal Sheriff Clerk and badgering the widow of William Davidson who last exercised the office. All was to no purpose. Sir John would accept no excuses and took out formal protests against Croig and Alexander Mackenzie, Principal Sheriff Clerk.<sup>18</sup> Only two freeholders were present at this meeting, Sir John and his ally Leonard Urquhart. Charles Hamilton-Gordon was dead and Adam Gordon of Ardoch wrote informing the freeholders that he no longer held the wadset rights to Little Braes on which he had been enrolled in 1739. He was, accordingly, expunged from the Roll.<sup>19</sup> That left Sir John, who had been elected preses, and Leonard Urquhart. Cadboll as usual did not appear but whether through fear of the oaths or not his absence in this instance was well advised. Thus at liberty Sir John launched his attack upon his enemies. First, he objected that Roderick Macleod of Cadboll had, in the course of his vote making, denuded himself of his qualification and that he should, therefore, be expunged from the Roll. William Fraser of Balnain who was present as procurator for

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18.

Minutes of Michaelmas Head Court, 15 Oct., 1765, pp.1-4.

19.

Ibid., p.7. Also in Box 40, Adam Gordon to the Freeholders of Cromarty, 15 Oct., 1765.



Cadboll denied the charge, but Sir John was not to be gainsaid. He produced a certificate from John Fowles, Keeper of the General Register of Sasines, dated 9th October which listed the sasines granted on Cadboll's estate following the division of his CUMULO. From this and other documents furnished by Alexander Baillie, Deputy Keeper of the Particular Register at Inverness, it was clear, Sir John contended, that Cadboll was denuded in favour of David Ross of Inverchassley, David Ross Commissary Clerk of Ross, Roderick Macleod Writer in Edinburgh, and Captain Alexander Fraser of Culduthill. To all this Balnain protested, but Sir John was not to be denied. He seems to have thought it sufficient answer to Balnain that he, Sir John, "does not pretend to understand Law words." But his coat, after all, in his droll little self-portrait to Medina was not made of Election Laws for nothing. Whatever the rights or the wrongs of the matter he was determined to expunge Cadboll. The question was put to the meeting, that is to Sir John and Leonard Urquhart, "Whereupon Sir John Gordon Voted to expunge Cadboll from the Roll of Freeholders within the County of Cromarty, Mr. Urquhart having declined to vote in this question and thereupon he was expunged accordingly."<sup>20</sup>

Balnain then objected to Leonard Urquhart continuing on the Roll, pointing out that Urquhart had been enrolled on the

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20.

Minutes of Michaelmas Road Court, 15 Oct., 1765, p.11.



Old Extent of part of the lands of Erze and that because of the sale of 1751 his circumstances were bound to be altered. The objection was repelled on the ground that it had not been lodged with the Sheriff Clerk the statutory/<sup>two</sup>clear months before the Head Court met.<sup>21</sup> Sir John had carried himself well so far and was now strongly placed to tackle the vital business at this meeting. This was the consideration of the claims for enrolment lodged by Hugh Rose of Aitnoeh, James Crawford and William Fraser of Ardochy. These claims rested on wadsets of superiority granted on parts of the estate of Cromarty by Patrick, Lord Elibank. All were refused on the same grounds - namely, that because of the litigation over the acts of the Commissioners of Supply the freeholders "supercede for the present coming to any Determination upon the validity or invalidity of the Claimants titles to be inrolled."<sup>22</sup> The usual protests were made and instruments drawn up but there, so far as the Michaelmas meeting of 1765 was concerned, the matter had to rest.

Next, the claim for enrolment lodged by William Gordon of Newhall was considered. Sir John's nephew claimed to be enrolled as the apparent heir of Charles Hamilton-Gordon, but, as Balnain pointed out, William was a minor and besides Charles

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21.

Minutes of Michaelmas Head Court, 15 Oct., 1765, p.12.

22.

Ibid., pp.13-19.



Gordon's title had also suffered from the judicial sale of 1751. All this Sir John brushed aside. There was, he argued, no law forbidding the enrolment of a minor, and so William Gordon was enrolled with the proviso that he would not vote until he was 21.<sup>23</sup> Since he lacked but a few months of his majority this was cold comfort to Johnstone and his allies. The meeting concluded by making up the Roll of Freeholders of the shire of Cromarty. This was brief and from Sir John's point of view eminently satisfactory. It read:-

Sir John Gordon of Invergordon,

Leonard Urquhart, W.S.,

William Gordon of Newhall.

The procedure was typical of the means whereby "the great Naturall Interest" had been built and maintained. This time, however, the opposition was not so feeble as formerly. Johnstone was just as keen to sit in Parliament as Sir John. On this subject Henry Davidson of Tulloch, Johnstone's solicitor, wrote a very figurative but, in its allusive way, oddly pointed letter to Mackenzie of Delvine.

-----"With respect to the Aeolian Knight, he has made a formidable figure - but all thro' the Influence and Fascination of his favourite Deity. His Operations, while this Influence remains, appear great and surprizing, But when touch'd by



Ithuriel's spear, the sacred Test of Truth, in the form of a Court of Justice, the Film will be taken off our Eyes, and they sink to their original Nothingness. I hope at Michaelmas next to ~~applye~~<sup>apply</sup> the Beati possessores, t'other way."<sup>24</sup> Cadboll and Johnstone's rejected claimants, therefore, rested their hopes on Ithuriel's spear.

Rose, Crawford and Fraser petitioned the Court of Session to reverse the decision of the freeholders respecting their claims for enrolment. In this instance Sir John had been too clever and returned a verdict unknown to the law. Either the claimants' titles were good or they were not and it was not competent for the freeholders to qualify in any respect. Thus by decreets of the Lords of Session dated 17th. December 1765 Hugh Rose younger of Aitnoch, William Fraser of Ardochy and James Crawford were added to the Roll of Freeholders.<sup>25</sup> On 9th November 1765 Macleod of Cadboll had also presented a Petition and Complaint to the Court of Session in which he argued that Sir John Gordon had not properly instructed his charge and that therefore the freeholders

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24.  
Delvine Papers, 1253, f.179, Henry Davidson to Delvine, 23 Oct., 1765.

25.  
Session Papers, vol.139:4, Petition of James Crawford, 11 Nov., 1765. The others pleaded in the same form. The decision is given in A.Wight, "Rise and Progress of Parliament", ed.1806, vol.I, pp.134-5. The House of Lords upheld the decision of the Court of Session in March 1766. The freeholders were added to the Roll by decret of the Lords of Session, 17 Dec.1765. Extract Minutes of Freeholders of Cromarty, 15 Oct.1765, Addendum.



did wrong to expunge the petitioner.<sup>26</sup> Their Lordships agreed and by a decret of the Court of Session Roderick Macleod was on 30th. April 1766 admitted to his old place on the Roll.<sup>27</sup> For the first time Sir John Gordon's authority in Cromarty had been not only questioned but overthrown, and worse was yet to follow. Macleod of Cadboll also petitioned the Court against the enrolment of William Gordon of Newhall on the grounds that enrolment of minors was forbidden by statute. Despite the fact that William Gordon had in the meantime attained his majority the Court found the objection good and it was ordered that he should be struck off the Roll.<sup>28</sup> The plea that it was incompetent for Macleod to make such a complaint, he being no longer a freeholder at the time his petition was handed in, was of no avail. This was extremely important, as we shall see, for it meant that the freeholders were no longer as omnipotent as they had once been. The Court of Session was decidedly taking a stronger line in election

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26.

Session Papers, vol.139:2, Petition and Complaint of Roderick Macleod of Cadboll, 9 Nov., 1765; ibid., Answers for Sir John Gordon to above, 12 Dec., 1765.

27.

Extract Minutes of Freeholders of Cromarty, 15 Oct., 1765, Addendum. A.Wight, "Rise and Progress of Parliament", vol.I, pp.283-4.

28.

Session Papers, vol.139:3, Petition and Complaint of Roderick Macleod of Cadboll, 11 Nov., 1765; ibid., Answers for William Gordon of Newhall, 10 Dec., 1765. See A.Wight, "Rise and Progress of Parliament", vol.I, pp.267-8.

cases and the pusillanimity so marked in the case of Mackenzie of Highfield in 1753 no longer evident.

At this point most candidates for parliament in Sir John's situation would have thrown up the struggle and made what terms they could with their antagonists. But that was never the way of the "Aeolian Knight", as Henry Davidson happily dubbed him, and this threat to the treasured "Naturall Interest" merely roused him to greater exertions. Henry Davidson, a keen if rather satirical observer, noted this. In January 1766 he wrote to Delvine, "I really pity the unhappy ill advised Ent. - so many heavy and decisive Blows following one another must have been hard on a Man of more Temper than he is bless'd with. He has found himself foil'd in all his Attempts for Ministerial Protection; He has seen public Countenance and Protection given to his Antagonist from that Quarter, and he has fail'd in all his legal Devices for gaining Time. However his Spirit is still uniform, nothing can depress it in a Legal Field, as an Instance of which He has already entered 3 Appeals, & I expect two more in a few days."<sup>29</sup> Indeed, we have a revealing glimpse of the "little lively knight" haranguing his lawyers, demanding detailed accounts of their consultations and the courses they intend to follow. On the whole, one gathers that Sir John's lawyers were made to earn their



money. Answers were to be made to the reclaiming bills, shot to be met with shot. In particular, the advocates were to insist in the process against the Commissioners of Supply "and strengthen the Argument agt. inrolling Persons to be next Michs. expunged."<sup>30</sup> The person to whom these choleric remarks were addressed, Robert Mackintosh, replied good-humouredly, pointing out that lawyers' consultations, like those of physicians, were for the most part pretentious shams designed to convince the client that he was getting value for his money. Mackintosh also reminded Sir John that mere ranting against Rose of Aitnoeh, Fraser of Ardochy and Crawford was not sufficient evidence to expunge them from the Roll. As he wrote with wry humour, "If you can shew a good objection to the qualification claimed upon, I apprehend it will be heard by the Lords, as it would have been by the Freeholders."<sup>31</sup>

Such communications were frequent with Sir John directing operations from London. When a decision went against him he had to know what the individual judges had thought and what his advocates had said or done amiss. On 20 January 1766 he was anxious to find out how well served he had been by his favourite nephew "Harry" - Dundas of course. In this same letter he showed that he could profit by experience for he wrote that

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<sup>30</sup>. Letters of David Ross, Writer, Edinburgh, 1762-1772, Reg.No., Sir John Gordon to Robert Mackintosh, 10 Jan., 1766.

<sup>31</sup>.

Ross Letters, Robert Mackintosh to Sir John Gordon, 10 Jan., 1766.



these recent developments in the Court of Session "has open'd up new Ideas to Me, of which I will most assuredly make Use at the head Courts of Octr. next, if I live so long, in the case of their new Voters." This he proposed to do by entering objections against the decreets of division, maintaining his majority at all costs and refusing to accept the enrolments ordered by the Court of Session on the grounds that the valuations were not properly instructed. In his opinion the Court of Session had shamelessly debased itself by sustaining that decret and Don Quixote-like Sir John meant to make a wild charge upon the Auld Fifteen. "I will force the Court, if They mean to keep up but a Shadow of character for right judgment, to enter into special discussions before they Inroll."<sup>32</sup> Special interrogations were seen to be the order of the day, not altogether to Sir John's comfort. In his letter to Ross, he concludes with another neat little thumbnail sketch of himself, albeit dashed off this time in angry mood. "For when I take a firm Resolution, I may have Credit for my adhering to it, and I am determined that the whole History of ye Contest & Divisions of last Spring, shall enter the Minutes of the next head Court." And then in a fulminating passage he throws further light upon his remarkable character. He was independent, the tool of none, the devotee of liberty and the political friend of Wilkes although Sir John's Presbyterian



conscience adds the caveat that he detests the demagogue's "Personal private Character." This was all very Leicester House, making a virtue out of his inability to worm his way into ministerial favour. The "radicalism", such as it was, was also typical of the anti-ministerial attitude fostered by many years of devoted, and wasted, service to the Prince's Party.

In the meantime, apart from the processes, all sorts of other activities were going on apace. One great object of interest was the Register of Sasines kept at Inverness, perusal of which enabled Johnstone to deal a shrewd blow. On 6th. August 1765 Sir John Gordon had made out a charter on his lands in Cromarty in favour of himself, his heirs and assignees. This was the preliminary step to the making of freeholds. In September he called a meeting of the Commissioners of Supply and his CUMULO was divided, each parcel of land receiving a separate valuation. On 10th. October the lands were disposed to the following pairs in liferent and fee respectively:- Sir Alexander Mackenzie of Gairloch and Alexander Law; Robert Blair and James Hay; John Mackintosh and Robert Mackintosh; George Graham and John Graham; Leonard Urquhart and William Urquhart; John Gorry and David Ross; and David Ross and John Gordon. Infestments took place on 14th. October and, according to Sir John, they were registered in the Particular Register of Sasines at Inverness on



16th. October 1765.<sup>33</sup> The exact date of registration was important since claims for enrolment could not be entertained by a Head-Court until the sasines had been registered for a year. Thus "Mr. Johnstone was anxious to know whether the seisins were registered in time; and the respondents are informed, that it was his interest to make these inquiries; because had he found that any such sasines had been taken and registred, in due time, so as to give a chance to Sir John's intended nominal voters to be inrolled at the last head-court, certain measures would have been taken by him to strengthen the opposition to Sir John, which were otherways thought unnecessary."<sup>34</sup>

Johnstone, Fraser of Ardoch, Rose of Aitnoch and Charles Fraser, Sheriff Clerk of Ross, all inspected the Register of Sasines at Inverness on 17th. October 1765. No sasines in favour of Sir Alexander Mackenzie and the others named were registered at that time, and Alexander Faillie, Deputy Keeper of the Register, then gave it to be understood that none had been submitted but that he expected Sir John Gordon to bring or send some

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33.

Information contained in various papers in Session Papers, vol. 139, dealing with claims for enrolment of above-named persons. See, for example, vol.139:11, Petition and Complaint of Sir Alexander Mackenzie of Cairloch, liferenter, and Alexander Law younger of Elvingston, fiar, 29 Nov., 1766.

34.

Session Papers, vol.139:11, Answers for Roderick Macleod of Cadboll and Patrick Macleod, Writer in Edinburgh, 13 January, 1767, pp.8-9.



within a day or two. Johnstone further noticed that Fraser of Ardochy's clerk was at the time busy copying into the Register some of the sasines on the estate of Cromarty, and that even though the Register book was almost used up there were still a few of the sasines on Cadboll's lands to be entered. On 18th. October 1766, a few days before the Michaelmas meeting, Fraser of Ealnain inspected the Register and this time he found the sasines in favour of Sir Alexander Mackenzie and others registered as of 16th. October 1765, even though the Register was a new one and marked as having been delivered from the office at Edinburgh on 8th. November 1765. Baillie claimed that this situation arose through the sasines being handed in at a time when the old Register was completed.<sup>35</sup> But, as the other party sarcastically pointed out, "with regard to the blank leaves at the end of the register book, he tells a still more absurd story, that they were not sufficient for containing any of Sir John Gordon's sasines, tho' they would have held a sasine on any other man's estate."<sup>36</sup> Incidentally, Baillie had failed to produce the minute-book for inspection when Johnstone and his friends

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<sup>35</sup> For this episode, see Minutes of Freeholders, 21 Oct., 1766, pp. 30-42; also, Session Papers, vol. 139:11-15, various papers; Session Papers, vol. 632: 1-13, especially 632:1, Petition and Complaint of Robert Blair and James Hay, 29 Nov., 1766, and 632:2, Answers for Roderick Macleod of Cadboll and Roderick Macleod, Writer in Edinburgh, 13 Jan., 1767.

<sup>36</sup> Session Papers, vol. 632:2, Answers for Roderick Macleod of Cadboll and Roderick Macleod, Writer in Edinburgh, 13 Jan., 1767, p. 8.



called for it, alleging that it was at the binder's being repaired. To say the least, the whole matter had a very suspicious appearance.

Later, in the inevitable process that arose, elaborate proofs of registration procedure were taken, evidence being submitted by most of the keepers of Particular Registers.<sup>37</sup> Procedure was supposed to be rigidly defined by statute and the Lords of Council and Session were appalled to discover that the system of land registration, on which Scots jurists prided themselves, was administered by very AD HOC, not to say rule of thumb, methods. But to revert to Mr. Baillie and his peculiar ideas a more likely explanation occurred to Johnstone and his friends. Thomas Cair, keeper of the Register, obtained his office through the influence of Sir John Gordon and in fact often acted as Sir John's election agent. Alexander Baillie, under the influence of Cair, was likewise partial to Sir John and kept him regularly informed of the sasines brought in for registration. In this instance he proved his partiality by concealing the fact that he had the sasines on the 16th., thus effectively preventing Johnstone from

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<sup>37</sup> The lengthy arguments and elaborate proofs produced in this process are in Session Papers, 632, passim, but see in particular, 632:18, Copy Proof upon the Part of the Complainers in the Conjoined Complaints at the Instance of Sir Alexander Mackenzie and Alexander Law et al., 13 June, 1767, pp. 1-145; 632:19, Copy Proof upon the Part of Roderick Macleod of Cadboll and other Freeholders of Cromarty, no date, pp. 1-52. See, too, Robert Bell, "On the Completion of Titles", 1815, p. 222. It was finally decided that the date of entry in the minute-book must be regarded as the date of registration. At the same time the judges passed some scathing comments on the loose practices of many keepers of the Registers.



Johnstone from lodging sasines with a view to bringing forward more claimants at Michaelmas 1766.<sup>33</sup> Then, having hoodwinked the opposition, as he thought, he entered the sasines under date 16th. October 1765. The plot failed, due to the vigilance of Johnstone and his friends, and the detection of the fraud was a considerable adhesion of strength to that party at the Head Court of 1765.

At this comparatively early stage in the election contest another fertile source of trouble was the whereabouts of the previous minutes of the freeholders and the papers of the Supply. As we have seen, at the Michaelmas Head Court of 1765 Sir John Gordon had taken instruments against George Greig, Depute Sheriff Clerk, for failure to produce the minutes of the freeholders. Greig could only answer that these papers had been in possession of his predecessor, William Davidson, who died in 1761 and that the Principal Sheriff Clerk, Alexander Mackenzie, had attempted to recover these papers from his widow but she had referred the matter to her son, Henry, who was in London. Greig in a letter to Mackenzie in May 1764 had urged the latter to press Henry Davidson for these papers, the lack of which, and particularly the Register of Hornings, was leading to great inconvenience. Davidson answered that these matters would have to wait until he

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38.

Session Papers, vol. 682:2, Answers for Roderick Macleod of Cadboll and Roderick Macleod, Writer in Edinburgh, 15 Jan., 1767, pp. 8-9.



himself was in the county and could attend to them personally. In the summer of 1765, when it was known that a Head Court was to meet at Michaelmas, Greig again applied to Mrs. Davidson only to be informed that John Gorry, Sir John Gordon's factor, now had the papers. Gorry, indeed, certainly had the papers of the Supply, which he refused to give up, and perhaps, though not certainly, those of the freeholders too.<sup>39</sup>

Quite clearly this was the kind of situation only too apt to arise in a county so laxly administered as Cromarty had been. There is not a tittle of evidence that the Sheriff Clerk or his Depute were in league with Johnstone or anyone else for that matter. Sir John Gordon's paranoid tendencies, however, being what they were he must needs have it so. Greig had infuriated him by refusing to act as clerk to the Commissioners of Supply summoned by Sir John in September 1765.<sup>40</sup> The Depute had sound enough reasons for refusing to act as clerk, Sir John having been ousted from the convenership so far as was then known. This was the extent of Greig's trespass but to Sir John's suspicious nature it was enough. Further, it seems probable that the baronet set a

39.

See Session Papers, vol.139:7, various papers, e.g. Petition and Complaint of Sir John Gordon, 8 Aug., 1766, and Answers for Alexander Mackenzie and George Greig, 12 Nov., 1766.

40.

See Ross Letters, Sir John Gordon to David Ross, 20 Jan., 1766, for Sir John's highly coloured and choleric account of this affair.



deliberate trap for Greig and Mackenzie. Every obstruction was placed in the way of their acquiring the necessary papers and one set at least, pertaining to the Supply, which Sir John peremptorily demanded was, to his certain knowledge, in the hands of his factor, John Gorry. About the fate of the freeholders records one cannot be so definite, but Sir John certainly had in his possession the extract minutes of the election meeting of 1754. He kept it to himself and just happened "accidentally" to have it on his person wherewith to smite the unfortunate Greig at the Michaelmas meeting. As it was later put for Greig this savoured of sharp practice - "the Complainer's whole Conduct demonstratively proves, that he meant no more than to lay a Snare for Mr. Greig, by giving no Obedience to your Lordships' Deliverance, till the criticall Morning of the Michaelmas Court 1765."<sup>41</sup>

Sir John would accept no excuses from either Greig or Mackenzie and instituted proceedings against them for penalties of £100 Sterling under statute 16 George II. The respondents had a rough passage of it. They were held responsible by statute for the safe-keeping of the records and, so far as the law was concerned, either they produced them as required or they did not. That Sir John Gordon had been obstructive could weigh nothing with the Court. Indeed Sir John could vaunt his motives before

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41.

Session Papers, vol. 139:7, Duplies for Alexander Mackenzie and George Greig, 4 Dec., 1766, p.9.



the Court pretty openly. "The Petitioner [i.e. Sir John Gordon] would be the last man to insist for statutory Penalties from Persons who had incurred them through innocent Mistakes, but where he is convinced, that they have been incurred by a wilful neglect, on purpose to distress and incommode him, he thinks himself well intitled to demand them, and by taking the Benefit of the Statutes, by which they are imposed, to endeavour to indemnify himself, in some small degree, of the great Load of Expence that has been brought upon him by the Operations of his political Antagonists."<sup>42</sup> Even against such testimony no plea could avail, Mackenzie and Greig were found liable in penalties of £100 Sterling each, and despite strenuous appeals this decision was upheld.<sup>43</sup>

We come now to the proceedings of the Head Court held at Greymarty on 21st. October 1766, which Sir John despite his bravado can have attended in no very happy frame of mind.<sup>44</sup> At this important meeting there appeared Sir John Gordon of Invergordon, Hugh Rose of Aitnoch, William Fraser of Ardoch and James.

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<sup>42</sup>. Session Papers, vol.139:7, Replies for Sir John Gordon, 18 Nov., 1766, p.2.

<sup>43</sup>. Decision of 9 Dec., 1766, given in Session Papers, vol.139:7, Petition of Alexander Mackenzie and George Greig, 18 Dec., 1766, p.1.

<sup>44</sup>. Minutes of the Head Court of 21st. Oct., 1766.

~~<sup>45</sup>. Minutes of Head Court of 21 Oct., 1766, pp.1-2.~~



Crawford. Leonard Urquhart, for reasons that will appear in a moment, found it expedient to absent himself thus confirming the shift in the balance of power. That this was no longer favourable to Sir John was apparent from the beginning. Hugh Rose of Aitnoch was elected preses and George Greig clerk, which can scarcely have pleased the baronet.<sup>45</sup> But worse was to follow. All turned upon the order in which the meeting chose to consider its business. The preses proposed that the claims for enrolment should be heard first, whereupon Sir John protested that the dates were not set forth with the claims. Aitnoch answered that the Court was not bound to any rigid procedure and might transact its business in whatever order seemed most convenient. Sir John knew what this meant. He was the first to come under the consideration of the Court which determined to hear objections lodged by Cadboll and Crawford against his title to stand on the roll.

Sir John's reaction was characteristic - over on the attack, never on the defensive might well have been his motto. At once he launched into a tirade against Cadboll's title, the chief burden of which was that his lands lay in Ross, not in Cromarty, but Charles Fraser, Sheriff Clerk of Ross and procurator for Cadboll, dismissed this charge as irrelevant. Sir John's reply to this was a savage swipe impugning the titles of Cadboll, Crawford, Rose and Fraser of Ardochy, <sup>in</sup> ~~to~~ all which charges John



Gorry, as procurator for Leonard Urquhart, concurred. Sir John also protested that Rose and Fraser could not judge in their own cases but there was no authority for this contention. Sir John was not the only one who knew the election laws and these laid no binding procedure upon the freeholders. The majority, therefore, brushed all his protests aside as irrelevant and concentrated on the issues they had already determined to settle. Priority was given to the charge that Sir John Gordon had disposed his qualification to Sir Alexander Mackenzie of Gairloch and others. It was adding insult to injury for this was the precise form in which Sir John had attacked Cadboll the year before. The attack on Sir John, however, had more substance to it and was more ably conducted. Clearly, his circumstances had altered since 1751 and the new claim for enrolment that he now brought forward on the Old Extent of the lands of Brae required more elaborate proof than he was prepared to adduce. It was objected for one thing that this claim was incompetent since Leonard Urquhart had from 1739 been enrolled "in virtue of such a portion of the Lands of Brae as could not leave a qualification for Sir John Gordon." In vain did Sir John produce a renunciation by Urquhart of all rights on the lands of Brae. It was clear that the title by which Sir John was enrolled was no longer valid. It was equally clear that if he now founded upon a new claim that claim would have to be properly presented for the consideration of the freeholders and adequately instructed by sasine and proof of



valuation. In the meantime, it was voted sustain the objection and Sir John was accordingly expunged from the Roll.<sup>46</sup>

Despite Sir John's protests the meeting continued to administer drastic punishment to his "great Naturall Interest". Leonard Urquhart was next to go and the renunciation of his rights on Braes which had been produced by Sir John some minutes before put the seal on his fate.<sup>47</sup> In vain did Sir John fulminate against the titles of Aitnoch, Ardochy and Crawford. The preses, fitting practice to requirements, blandly proposed that consideration of these matters be postponed "till new claims were considered, that judgment might be given upon these objections by as full a meeting as possible."<sup>48</sup> To the accompaniment of frantic protests from Sir John Gordon, William Johnstone and one of his allies, Charles Urquhart of Braelangwell, were added to the Roll. They were followed by what can only be called by Cromarty standards a perfect troop of Johnstone voters. There were five in all - Henry Davidson of Tulloch, David Ross Commissary Clerk of Ross, Roderick Macleod writer in Edinburgh, David Ross of

46. Minutes of Head Court of 21 Oct., 1766, pp.2-7.

47. Minutes of Head Court of 21 Oct., 1766, pp.8-9.

48. Ibid., p.12.

Inverchassley and Captain Alexander Fraser of Culduthill.<sup>49</sup> Needless to say Sir John protested interminably and surely to one of his temperament the final insult must have been Aitnoch's generous gesture in allowing him to be heard on these matters although he was no longer a freeholder. So far as the Head Court of 1766 was concerned Johnstone was now in command and the fate of Sir John's claimants not in doubt for a moment.

He himself headed the melancholy list. He had lodged a new claim for enrolment based upon Urquhart's renunciation and the Old Extent of the lands of Brao. The claim was rejected on the grounds that the Old Extent was not instructed by the production of a retour as the law required.<sup>50</sup> Next to suffer was William Gordon of Newhall whose claim was refused on the ground that his CUMULO had not been divided. It was rather a pettefogging objection but it served its turn and Newhall's claim was refused.<sup>51</sup> Then came the said procession of Sir John's claimants, Sir Alexander Mackenzie, Alexander Law of Elvingstone, and the rest. Their titles and certificates of registration were produced and seemed ex facie good. Johnstone and his friends,

49. Ibid., pp. 12-20.

50. Minutes of Head Court, 21 Oct., 1766, p.21.

51. Ibid., pp. 22-5.



though, had an unpleasant surprise in store for Sir John. It was contended that the registrations could not possibly have taken place before 21st. October 1765 in which case the freeholders could not consider these claims. Proof by witnesses was ~~xxx~~ allowed but as the preses was to be the first witness this produced some difficulty. Finally, with comic regard to form, it was decided that David Ross, the Commissary Clerk, should be preses pro tem. whilst Aitnoch delivered his testimony. Hugh Rose, Johnstone, Fraser of Ealnain and Fraser of Ardoch then described their adventures with Alexander Baillie and the Register of Sasines.<sup>52</sup> This done, the meeting then considered the claims individually. Three objections were moved against them - first, on the grounds that the sasines were not registered for one year; secondly, on the illegality of the work of the pretended Commissioners of Supply in September 1765; and finally, on the score that these were nominal freeholds manufactured for no other purpose than to serve Sir John Gordon's political interest. The claims were all rejected on the first charge, without any real discussion of the other two objections.<sup>53</sup>

Salt was then rubbed into Sir John's wounds by the preses moving that it was now time for the freeholders, numbers thus augmented, to debate the objections lodged against Hugh Rose of

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52. Ibid., pp. 26-42.

53. Ibid., pp. 42-50.

Aitnoch, William Fraser of Ardochy and James Crawford. Needless to say these objections were unanimously repelled.<sup>54</sup> Again with comical regard to form Aitnoch vacated the chair while his own case was being "considered." The meeting then drew up the Roll of Freeholders for the shire. Johnstone's triumph seemed complete. The list ran:-

Hugh Rose younger of Aitnoch,

William Fraser of Ardochy,

James Crawford, Writer in Edinburgh.

William Johnstone, Esq. Advocate.

Charles Urquhart of Fraeslangwell.

Harry Davidson of Tulloch.

David Ross, Commissary Clerk of Ross.

1 voto { Roderick Macleod Writer in Edinburgh as Liferenter,  
and Roderick Macleod of Caddboll as Fiar.

David Ross of Inverchassley.

Alexander Fraser of Culduthill.<sup>55</sup>

Johnstone could count ten votes, Sir John Gordon not a single one. At last the Gordons had taken a great fall. Wiser men than Sir John would have given up at this stage but to withdraw was the last thought that occurred to the "Aeolian Knight."

Sir John in fact might well have anticipated Paul Jones'

<sup>54</sup>. Minutes of Head Court, 21 Oct., 1766, pp.51-3.

<sup>55</sup>. Ibid., p.55.



famous saying in a not dissimilar situation. On 29th. November 1766 he began <sup>his</sup> ~~the~~ fight in earnest before the Court of Session in the shape of sixteen petitions and Complaints handed in on behalf of himself and his allies. Blair and Hay and the rest petitioned for their respective rights in liferent and fee. Leonard Urquhart and William Urquhart petitioned for their respective rights in liferent and fee. William Gordon of Newhall petitioned against the refusal of the freeholders to enrol. His uncle did likewise. Then the whole Gordon party jointly lodged separate petitions against the enrolment of David Ross, Johnstone and Fraser of Culduthill. They petitioned jointly against the decret on the matter of the "superceded judgment" in the cases of Rose, Fraser of Ardochy and Crawford. They petitioned to expunge Cadboll. They petitioned against the enrolment of Henry Davidson of Tulloch. And all this at a time when the Court of Session was still busy trying to separate the rights and the wrongs of the decreets of division of the legal Commissioners of Supply and the "junte", whichever party that should prove to be. The whole thing became one vast involved web of casuistry and special pleading.

It is time now to examine the process over the decreets of division which, always treated as fundamental to the election contest, was by 1767 regarded as crucial. On the outcome of this depended whether or not Johnstone and his allies could maintain their places on the Roll of the Freeholders. There is no



need to treat in detail the objections to the divisions of Cromarty and Cadboll which have already been outlined. The plea put forward on behalf of Lord Elibank and Macleod of Cadboll that Sir John being no longer a freeholder rendered it incompetent for him to pursue the matter was rejected by the Court of Session.<sup>56</sup> The further objection that Sir John had omitted to name certain parties having interest - namely, Rose, Fraser of Ardoch and Crawford - he answered in no uncertain manner by bringing a new process against them. At the same time, for good measure, he threw in a fresh process against Roderick Macleod of Cadboll and those to whom he had granted rights or conveyances for freehold purposes. Of these latter the most important was the case of Captain Alexander Fraser of Culduthill. At the instance of the pursuers these actions were conjoined with the original process of reduction, but that concerning Fraser of Culduthill alone calls for detailed treatment.

In truth Johnstone and his friends scraped the bottom of the barrel to afford Culduthill<sup>1</sup>/a freehold qualification. This was based upon a wadset of superiority on nine different subjects each of which had an involved feudal history. The sum of his valuation was declared to be £417.17.10<sup>2</sup>/<sub>12</sub>d. Scots and on this title, despite Sir John's protests, he was enrolled at Michaelmas



1766. As well as the objections he had already urged against the decreets of division Sir John entered into minute detail in his petition against Culduthill's enrolment. Objections were advanced to each separate item on which his title stood. As some of these derived from Cadboll's estate the old objections already put forward, that these lands lay in Ross, were again pressed into service. The same objection was raised to Culduthill's right on Wester Gruinard. But the objection which seemed to hold out most prospects of success for Sir John concerned the decret of division of Cromarty generally, namely the assessment of the fous in the town of Cromarty that derived from the estate of that name. Here, complained Sir John, only feu-duties were taken by the Commissioners and not real rents, contrary to the Act of 1643.<sup>57</sup> The answer made, that the feu-duties did represent the real rent,<sup>58</sup> was not at first accepted, but after much wrangling Culduthill's title to be enrolled was sustained.<sup>59</sup> Sir John fought back by reclaiming petition and the process dragged on, to

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57.

Session Papers, vol.139:10, Petition and Complaint of Sir John Gordon and others, 29 Nov., 1766.

58.

Session Papers, vol.139:10, Answers for Alexander Fraser of Culduthill, 17 Feb., 1767, p.9.

59.

Session Papers, vol.634:15, Information for Alexander Fraser of Culduthill, and William Fraser of Balnain, 18 Jan., 1768, p.2.



produce some very interesting results.

To return now to the larger question of the decreets of division as a whole, on 22nd. June 1767 the Lord Ordinary, Kennet, repelled the whole reasons of reduction alleged <sup>in</sup> ~~in~~ the case of Cadboll and found similarly for the estate of Cromarty apart from the objection concerning the feus in the town of Cromarty which was being discussed by the whole Lords in Sir John Gordon against Pulteney, as Johnstone was now called. Sir John reclaimed against this interlocutor, Pulteney and his friends triumphantly paraded all their old arguments and on 28th. July 1767 all the Lords "agreed to adhere to the Lord Ordinary's Interlocutor, and to refuse the Desire of the Petition." The cause was remitted to the Lord Ordinary who on 31st July 1767 "repelled the two Reasons of Reduction taken by him to report, assolaid the Defenders from the Reduction, and also from the Conclusions of Declarator, and decerned, but found no Expences due."<sup>60</sup> Three interlocutors implied res judicata, or at least it would have done to any reasonable litigant. Sir John Gordon, however, was not such. He had much at stake and besides could never accept defeat, gracefully or otherwise. So we find him appealing against these decisions ad nauseam, to the disgust of his oppo-

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60.

For full details of this process, see Session Papers, vol. 684:1-14. A convenient and reliable summary is in 684:10, Petition of Sir John Gordon, 7 Aug., 1767 - a lengthy reclaiming petition of 67 pages.



nents and very likely of the judges as well. Here, then, is a fact of the first magnitude. Sir John despite all his efforts, despite the ingenious pleading of the foremost advocates at the bar, including skilled specialists in election law such as Dundas and Lockhart and the great Alexander Wight himself, failed in his attempts to reduce the decreets of division. In truth, he had attempted the impossible. The unmistakable impression conveyed by perusal of the documents in this long-drawn out and involved cause is that the Lords had already determined that, be the evidence what it might, the Supply must stand. They were prepared to suffer minor adjustments in the divisions but that these should be overturned entirely was what they had no mind to countenance. Some degree of raison d'etat as much as concern for justice stood behind these decisions. The attitude was correct. It would have been folly to create chaos merely because of the antics of the politicians. So long as the total valuation of the county was not affected by the fevered conveyancing of the candidates no real harm was done. But to find that much of that valuation properly belonged to the shire of Ross was stretching the somewhat loose jurisdiction of the Court of Session in election matters into new and altogether too dangerous fields. Their Lordships were confirmed in these views when they came to consider the work of Alexander Baillie and his peculiar system of registering sasines.

Pulteney had scored again, yet at times, particularly in his own case and that of Culduthill, it had seemed touch and go. To safeguard himself he too had brought a process of reduction in



November 1766 in an effort to destroy Sir John's "airy freeholds" and incidentally bolster up Culduthill's claim.<sup>61</sup> Various general grounds were urged against the validity of the decret. It was said to be vitiated by the fact that many of the Commissioners of Supply had no proper qualifications but were merely provided by Sir John with fictitious titles. Its reckonings were impugned as being erroneous, prejudicial to the county in general and to Captain Alexander Fraser of Culduthill in particular.<sup>62</sup> As well as this it was argued that it could not be a legal meeting since it was not summoned by the elected convener, Urquhart of Braelangwell. The defenders went to extraordinary lengths to delay this process and all sorts of pettifogging excuses were used to stave off a hearing in presence, notwithstanding frequent orders and interlocutors from the Lord Ordinary. Finally, the Lord Ordinary lost patience and brought it direct into the Inner House. Sir John then took a leaf out of Pulteney's book and pleaded that all parties having interest had not been cited. It was pointed out that the reduction then being considered was not a general one, but

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61.

As we learn from Session Papers, vol.684:34, Memorial for Fraser of Culduthill, 24 Sept., 1768, p.5. The opening Petition in Fulteney and Fraser's process of reduction against Sir John Gordon's decret of division is missing from the Signet Library collection, but the substance of it can be gathered from subsequent pleadings such as that referred to in footnote 62 below.

62.

Session Papers, vol.684:11, Information for William Pulteney, formerly Johnstone, and Alexander Fraser of Culduthill, 24 Sept., 1767, p.1.



aimed specifically at the division of the CUMULO valuation of William Gordon and particularly as this affected Culduthill. The persons whose names Sir John had mentioned had no interest in the estate of Kewhall. Still the baronet could not be moved, the summer recess came on and the hearing in presence of the whole Lords had to be delayed. Sir John's motive, of course, was plain. These complicated gyrations in the summer of 1767 were designed to enable Sir John and his friends to attend the Head Court of 1767 with the decret of division still intact. But on the 5th. of August the Lord Ordinary again ran out of patience and ordered the case to be heard in the Inner House on 25th. September following.<sup>63</sup>

There is no point in detailing the arguments and counter-arguments on the nominality of Sir John's Commissioners, on whether or not he was legal convener of Supply when he summoned meetings in September 1765, on whether or not his Commissioners acted in the approved manner in their reckonings - if indeed there was such a thing, which seems doubtful. All these questions, naturally, were hotly debated at great length, coming up in paper after paper, in season and out of season, with relevance and without relevance. In view of the reception accorded by the Court to Sir John's objections to Pulteney's decreets of division they cannot be regarded as of any great importance. Probably their true importance, apart from illustrating Sir John's dauntless courage in a legal

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63.

Session Papers, vol.684:11, Information for Pulteney and Fraser of Culduthill, 24 Sept., 1767, p.4.



field, was just to swell the advocates' fees, since they were paid by the amount of paper consumed. But there was one objection that must receive more elaborate treatment for it came to exercise a very important part in the election of 1768. This was that the lands of Glenurquhart which were comprehended in Newhall's CUMULO were not given a share of that valuation. Further, Pulteney's Commissioners had subsequently valued Glenurquhart's share at £57.18.8  $\frac{8}{12}$  d. Scots, and this formed part of Fraser of Culduthill's valuation, he then being infeft in the superiority of the lands in question.<sup>64</sup> Both sides, then, were using Glenurquhart's share of the CUMULO of William Gordon's lands to boost their valuations. The Court's decision on this situation in time became the dominant question in the entire fantastic tangle of litigation.

The case for Pulteney and Fraser was based mainly on a review of the progress of the lands of Glenurquhart. Their contentions were just. In 1667 these lands were alienated by Sir John Urquhart of Craigston to Hugh Dallas, Commissary Clerk of Ross, who in turn disposed them in 1679 to his brother, George Dallas of St. Martins. In 1696 they passed with the other lands of St. Martins to Sir Adam Gordon of Dalpholly, Sir John Gordon's grandfather. In subsequent valuations Glenurquhart was included in the CUMULO valuation of St. Martins and, to be precise, must have so figured in the valuation rolls of 1698, 1710 and 1743. But the judicial sale of Sir William

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64. Session Papers, vol. 634:11, Information for Pulteney and Fraser of Culduthill, 24 Sept., 1767, pp. 8-9.



Gordon's estates in 1751 upset this arrangement. Belsches, the purchaser, disposed parts of Sir William's lands to Sir John Gordon, Charles Hamilton-Gordon and Urquhart of Meldrum. Along with several other parcels Glenurquhart went to Meldrum. Point number one, then, is that after 1751 Glenurquhart was separated from St. Martins. The Commissioners of Supply, however, at this time worked at the behest of Sir John Gordon and its valuation was not separated from the CUMULO of St. Martins. But in 1756, to suit his own ends, Sir John made up a private cess roll in which he transferred parts of the CUMULO of St. Martins to himself, and, among other things, gave the valuation of Glenurquhart to his brother, Charles Hamilton-Gordon of Newhall.<sup>65</sup>

By further progress the lands of Glenurquhart came with the rest of the estate of Cromarty to Patrick, Lord Elibank and was feued by him to Fraser of Balnain. It still lay, however, under the old CUMULO valuation. So matters stood when on 30th. April 1765 Elibank presented his petition for a division of the CUMULO valuation of Cromarty. Even this early Glenurquhart was recognised to be a problem and the request was postponed until 22nd. May 1765 so that fuller information on this subject might be available. On 4th. June 1765 Lord Elibank craved to have the lands of Glenurquhart disjoined from the CUMULO of St. Martins, but the Commissioners of

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65.

Session Papers, vol.684:11, Information for Pulteney and Fraser, 24 Sept., 1767, pp.9-14.

Supply still delayed by requiring him to instruct service, that is to make intimations to Thomas Belsches and Sir John Gordon that they were required to furnish proofs as to the disposition of the lands. Not until 8th. October did the Commissioners - Pulteney's Commissioners, that is - lose patience and separate the valuation of Glenurquhart from Gordon of Newhall's CUMULO. It was assessed at £57.18.8  $\frac{8}{12}$ d. Scots, although it was a weakness in the pursuers' case that the means whereby this valuation was reached was by no means clear. Here an important consideration is at once apparent. Though Fraser of Culduthill's title was hotly attacked at Michaelmas 1766, and the most minute objections to his various parcels set before the freeholders and later the Court of Session, not one word was said against the valuation of Glenurquhart to which he held the superiority. Yet clearly if this could be impugned Fraser's title, diminished by £57.18.8  $\frac{8}{12}$ d. Scots, would have suffered irretrievable damage. The answer is not far to seek. On 12th. September 1765 Sir John's Commissioners had divided Newhall's CUMULO but made no allowance for the loss of Glenurquhart.<sup>66</sup> Rose of Aitnoch was present at this meeting and vainly protested against this move.

The defenders sought to prove that Glenurquhart was mere waste land, part of the Mulbuie or common moor of the Black Isle, which had as such never been subject to valuation and that in any case it



had never figured in the CUMULO of £456.12.6d. Scots allotted to the barony of St. Martins.<sup>67</sup> Some colour was given to this allegation by the valuation roll of 1743, but, as Sir John never tired of pointing out in the other processes, this was not an authentic valuation.<sup>68</sup> Sir John and his friends argued that any valuation to which Glenurquhart might be entitled was comprehended in the £129.12.6d. valuation set upon the lands of Bannans, Boghouse and Craighouse which had been taken from Sir John Gordon's valuation in 1756 and conferred upon Urquhart of Meldrum.

The rights and the wrongs of the situation are difficult to assess, largely because the valuation rolls and the minutes of the Commissioners of Supply cannot now be traced. Even if they could be uncovered, it is questionable how far they would settle these problems, for the available transcripts of the valuation rolls of 1698 and 1709 are vague and general. The name of Glenurquhart does not occur once, nor even that of the barony of St. Martins. The relevant entry in the roll of 1698 is as follows:- "Sir Adam Gordon of Dalfolly, in vice of St. Martins for all the lands he

67.

Session Papers, vol.684:12, Information for Sir John Gordon and others, 19 Nov., 1767, p.12.

68.

This, and his main contention, that Glenurquhart had never been valued may have been right. Certainly in a "Scroll from the Valuations in 1698 and 1710 of Sir Wm.'s Valuation", drawn up at the time of the political struggles of 1753 it was observed that "Glenurquhart was never valued." This is not conclusive proof but he may well have believed it. Chalmers' "Collections", vol.I, p.370.

bought from him except Wester St. Martins, Kirkmichael & Easter Balblair which is in Ross-shire.....£894.10. 0. Scots." In <sup>1709</sup>~~1710~~ the entry is even balder:- "The Laird of Dalfolly....£1026.10. 0. Scots."<sup>69</sup> The barony of St. Martins, Glenurquhart and other particles were all included in these totals. Doubtless, these latter were meaningful enough at the time, when taken in conjunction with other evidence, but in 1767 their precise meaning was obviously as open to doubt as they are at the present day. Yet, on the whole, Pulteney and Fraser make the better case. For instance, the contention that Glenurquhart had been treated by the Gordons as of no value they demolish by proving that Sir William Gordon used it among other parcels to augment his freehold titles at Michaelmas 1740. Glenurquhart must, then, have been understood to form part of his CUMULO, for clearly it would be absurd to seek to augment valuations by a subject that had no value.<sup>70</sup>

It is no part of our intention to get bogged down in Glenurquhart, but the matter is of such crucial importance as to call for further treatment. The first stage of the complicated process that raged over it was terminated by a brilliant paper handed in for the pursuers by Robert Macqueen. In this difficult and complicated branch of law Macqueen was then, to use the legal jargon of

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69.

Nat. Lib. Scotl., Mss.Coll., Hist. 141,35.6.4. George Chalmers', "Collections Concerning Scotland", vol.I, p.37 for 1698; p.43 for 1709.

70.

Session Papers, vol.684:11, Information for Pulteney and Fraser of Culduthill, 24 Sept., 1767, p.20.



his day, facile princeps. No other pleader had his grasp of the complexities of feudal law or possessed his strong good sense and clarifying intellect. Dundas, Mackenzie and Nairne were not first class advocates or learned lawyers and they frequently got into difficulties. But even first class advocates and learned men like Lockhart, Ilay Campbell and the ind/astrious Alexander Wight himself at times staggered under the weight of details. Macqueen never did. The one or two papers he contributed to the cause stand out in the mind like stray "Spectators" lost in a world of "Ramblers." Nor in this instance did Macqueen really present any new evidence on the problem of Glenurquhart.<sup>71</sup> He was probably briefed in his favourite tavern in the High Street, read over the pleadings and the evidence already adduced and then rapidly composed his paper. Rapid composition is suggested by the fact that his pen slipped over the valuation placed upon Glenurquhart which he gave as £53 Scots. But the way in which he fastened upon the key facts, striking out the irrelevant detail piled up by both parties and highlighting the true issues at law, bears the stamp of the master. Sir John's party could not withstand Macqueen's remorseless logic. His great plank was that in the process raised against the enrolment of Culduthill the defenders "however well disposed they were to lay hold of every twig, did not so much as acknowledge, that the procedure was

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71.

Session Papers, vol.684:13. Additional Information for Pulteney and Fraser of Culduthill, 28 Nov., 1767.

erroneous in taking the foresaid £53 Scots, which made part of the qualification, out of the cumulo valuation of Mr. William Gordon's lands."<sup>72</sup> This, says Macqueen, is conclusive of the question, since it proves the one thing necessary to be proved, viz. that the lands of Glenurquhart made up part of the cumulo valuation of William Gordon's estate. To find otherwise would be to produce utter confusion in the finances of the country. Macqueen then proceeds to prove his contentions in every detail.

It would be absurd to suppose, he argues, that Lord Tarbat, having in 1693 complained of being over-valued, would suffer Glenurquhart or any other lands of the Urquharts not held by him to be valued along with the estate of Cromarty. Glenurquhart could only have been valued with the lands held by its then proprietor, Dallas of St. Martins. Where else, then, can one look for its valuation if not in the cumulo of St. Martins? Where else indeed? And so it proceeds from demonstration to demonstration. Was Glenurquhart valueless? So much so that it was while part of the barony of Cromarty the subject of a crown charter "in which it is burdened with no inconsiderable proportion of the casualties of superiority payable to the crown out of the barony of Cromarty."<sup>73</sup> Was it feasible that Charles Gordon of Newhall should have paid cess on

72.  
Ibid., p.9.

73.  
Session Papers, vol.684:13, Additional Information for Pulteney and Fraser, 28 Nov., 1767, p.11.



Glenurquhart after it had been transferred to Urquhart of Meldrum? Too true, the more so as it was notorious that after the judicial sale of 1751 ill feeling existed between the Gordon brothers over the representation of the county. In these circumstances Charles was quite willing to pay cess on Glenurquhart and so keep his valuation up. Urquhart, a Roman Catholic, had no interest in parliamentary politics, but doubtless was keen enough to have part of his share of the cess paid by one who had.<sup>74</sup> Finally, to the objection that Glenurquhart was not attached to the united parish of Kirkmichael or Cullicudden, or to that of Cromarty, Macqueen answers, that, when the whole shire was held by one family it was difficult to distinguish the precise bounds of parishes and indeed even to define the exact bounds of the shire of Cromarty. This was a sound historical observation.

For the time being Macqueen's incisive paper settled the case. On 17th December 1767 the Lords found "That the lands of Glenurquhart ought to have had a proportion allotted to them of the cumulo valuation of the lands which formerly belonged to Dallas of St. Martins," and in this respect, but no other, reduced the proceedings of Sir John's Commissioners of Supply.<sup>75</sup> Sir John, however, just would not lie down. Glenurquhart continued to haunt their Lordships

74.  
Ibid., p.16.

75.  
Session Papers, vol.684:15, Information for Alexander Fraser of Culduthill and William Fraser of Balnain, 18 Jan., 1768, p.3.

for another year and more and, as the election of 1768 drew nearer and each side grew more excited (for reasons we shall examine shortly), from being modest 20 to 30 page productions the papers swelled into vast rambling Memorials of from 70 to 80 pages. War weariness was already making itself felt and in one of these later papers "the defenders (i.e. Culduthill and his friends) cannot conclude without saying that they have no hopes, that these pursuers will ever cease to harass them by pleading, and consume your Lordships time in judging the same points which have been over and over again determined, unless your Lordships shall think it proper to put some restraint, by subjecting them to expences, or otherwise; and which their manner of proceeding in the present case does, it is humbly thought in a special manner require."<sup>76</sup>

To sum up this complicated matter of the decreets of division, Pulteney failed to have the acts of Sir John's meetings reduced in their entirety, and for the same reasons that his adversary had failed to reduce Pulteney's decreets. Here it was decided, among other points, that the Commissioners of Supply were authorised to appoint a convener from time to time, and that they might remove him at any time by a simple majority vote. In the absence of a convener a perfectly legal meeting might be summoned by a private commissioner. The opinions of the judges on these points were interesting and, but for considerations of space, should have been given in full.<sup>77</sup>

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<sup>76</sup>•Ibid., p.9.

<sup>77</sup>•See A.Connell, "Election Law", pp.120-1.



Chapter VI

Cromarty IV.

Chapter VI.Cromarty iv.

It is time now to examine the fate of the petitions handed in to the Court of Session in name of Sir John's would-be freeholders. In each instance the liferenter and fiar petitioned jointly and in all seven such petitions, identical in terms mutatis mutandis, were handed in on 29th. November 1766. That of Robert Blair, Advocate, Liferenter and James Hay, Writer in Edinburgh, Fiar of the lands of Craighouse may be taken as typical.<sup>1</sup> It opened with a review of the dispositions made to the petitioners and the registration of their sasines at Inverness on, as was claimed, 16th. October 1765. It then recounted the procedure of the Head Court of 1766 and sought to rebut the objections there moved and sustained against their titles. In brief, it was argued that proof by witnesses such as the freeholders sanctioned in the dispute over the date of registration was not competent to that Court.<sup>2</sup> It also sought to rebut the objections to their titles based on the decreets of division. Finally, the petitioners denied that their votes were defeasible in that, owing to the dispositions made following the judicial sale of 1751, Sir John Gordon was under an entail and not free to alienate his superiority. If, they argued, William Gordon

1.

Session Papers, vol.682:1, Petition and Complaint of Robert Blair and James Hay, 29 Nov., 1766.

2.

Ibid., p.10.



of Newhall did not object, since he alone had right to do so it was jus tertii to the freeholders. "So your Lordships have found in many late cases, where the question has occurred of an heir of entail alienating the superiority of the tailzied lands; particularly, in a case decided 5th. February 1760, Campbell of Shawfield contra Muir of Caldwell."<sup>3</sup>

Two observations must be made on this pleading. First, in the matter of the registration of sasines, quite apart from the truth or otherwise of Alexander Baillie's account of his actions, the position adopted by the petitioners was a sound one. The jurisdiction of the Head Court, like that of the Court of Session in election matters, was vague and ill-defined. It was easy for the barons, led on by excess of zeal of some kind or another, to overstep the limits of their powers, and this, if found by the Court of Session, must prove fatal to the particular acts wherein the freeholders were held to have transgressed. Proof by witnesses was certainly no recognised part of the admittedly loose powers generally allowed to the freeholders. The second point to notice is that the question of nominal and fictitious, which the freeholders had mentioned in their objections but scarcely bothered to condescend upon, was passed over in discreet silence. This was natural, for after all the petitioners were out to dispel objections to their titles and not to raise them. This subject, however, was not allowed to lie dormant and was indeed to

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<sup>3</sup>. Ibid., p.18. For Campbell of Shawfield's case, see Faculty Collection of Decisions, vol.II, No. CCXII.

give rise to the most interesting and important developments in this whole series of cases.

The reply of the freeholders naturally elaborated the objections already sustained in their Court but as well as this the charge of nominal and fictitious was pressed. Sir John Gordon, they alleged, "having resolved to force himself upon the county of Cromarty," though unsupported by any real freeholders in it, had for two years harassed the genuine freeholders with one law suit after another, but knowing the uncertainty of the law, he had also resorted to other devices. Chief of these was that "out of 3434 L.5.10 Scots (the total valuation pretended by Sir John and his nephew, either in property or superiority) no less than nine freeholds have been endeavoured to be created; which he has bestowed on persons unconnected with the country, who have done him the favour to accept of those nominal rights."<sup>4</sup> It is important to grasp that the charge of nominal and fictitious was from the outset given prominence by the respondents, although at this early stage their main concern was to impugn the certificate of registration given by Baillie and to uphold their views on the entail. This brought the question back to nominal and fictitious, for, even if the entail were not an insuperable objection, these rights bestowed upon the claimants were purely elusory, resting upon the division of a blench duty of one penny Scots.<sup>5</sup> "The now superiors have no interest

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<sup>4</sup>Session Papers, vol.682:2, Answers for Roderick Macleod of Cadboll and other freeholders, 13 Jan., 1767, p.2.

<sup>5</sup>Session Papers, vol.682:2, Answers for Roderick Macleod of Cadboll and other freeholders, 13 Jan., 1767, pp.32-33.



whatever in the lands, as they cannot each of them have right to this indivisible blanch duty: They have not even the casualties of the superiority; for it appears from the title deeds that Sir John was bound to enter the vassal, his heirs assignies gratis. This the complainers seem to give up, and lay the stress of their argument upon this, That it is entirely jus tertii for the objectors to plead it, in respect that Mr. Gordon the vassal does not complain." The author of this able paper, John Swinton, concludes with a pregnant thought and one that had been bothering the judges for some time. If the freeholders have, as the complainers submit, no power to question papers laid before them "they would be obliged to receive every fictitious title that claimants might think proper to lay before them, provided the same only had the name, form, and appearance of a charter and sasine."<sup>6</sup> On such the same subject Ilay Campbell ended his answer for the freeholders to the petition of Leonard and William Urquhart with the following remarks: "Few words, however, will be necessary to be used on this head: for the devices which have been used in cooking them up, delaying or concealing their registration, and other circumstances above mentioned, it is clear, that if any such thing can exist, as a nominal and fictitious vote, the qualifications of these claimants do certainly merit that appellation."<sup>7</sup>

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6. Ibid., p.33.

7. Session Papers, vol.682:6, Answers for Roderick Macleod of Cadboll and others, 13 Jan., 1767, p.30.

Such were the lines on which the battle was conducted. On 13th. January 1767 matters were simplified a little by conjoining the complaints. In the course of other processes some of the objections were laid to rest and in particular the decisions on the decreets of division settled objections to the complainers' titles based on that score. Gradually, the real issues at stake in the conjoined complaints were revealed as the questions of registration and nominal and fictitious. At first it looked as if Pulteney's task was going to be easy. On 10 February 1767 the Lords found for the freeholders and declared each of the complainers liable to the respondents for £30 sterling, the statutory penalty, as well as full costs of suit.<sup>8</sup> But the petitioners reclaimed against this decision and the process dragged on.

Little need be said of the objections moved in the Court of Session by Sir John Gordon and his friends against Pulteney and his parchment barons, since for the most part they merely urged upon the Court once more views already well aired in the process concerning the decreets of division. One of the most daunting features of the Session Papers is, in fact, their tenacious and monotonous repetition of evidence. This is not surprising, for, not unnaturally, once committed to a point of view the litigants were forced pretty well to stick to it through thick and thin. Thus, Sir John and others

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8.

Session Papers, vol.682:30, Petition of Robert Blair and others, 18 Feb., 1768, p.2.



in objecting to the enrolment of Pulteney found largely upon the charges already brought by them against the division of the CUMULO valuation of Cromarty, reduction of which was then depending before the Court.<sup>9</sup> The same form was used in attacking the enrolment of Pulteney's friends, Ross of Inverchassley, Davidson of Tulloch and Urquhart of Braelangwell. Additionally, Inverchassley, Tulloch and David Ross, Commissary Clerk of Ross, were attacked on the grounds that their qualifications were nominal and fictitious. Ross of Inverchassley stood in the same situation as Roderick Macleod writer, and Charles Urquhart in that his qualification was on the estate of Cadboll.<sup>10</sup>

Some interesting facts emerged from these exchanges, as exemplified in the case of David Ross of Inverchassley. He was induced to accept a wadset right from Cadboll dated 10th. June 1765. The valuation was given as £414.16. 1.Scots and according to the Gordon party no "earthly consideration was paid for the wadset."<sup>11</sup> Sir John repeated the objections he had unsuccessfully laid before the freeholders. First, a wadset of bare superiority for an elusory sum redeemable whenever an election job was completed could

9. See Session Papers, vol.139:10<sup>D</sup>, Petition and Complaint of Sir John Gordon and others, 29 Nov., 1766.

10. Session Papers, vol.139:10<sup>E</sup>, Petition of Sir John Gordon and others, 29 Nov., 1766.

11. Ibid., p.7.

not be a good title. This was the case here, since the wadset was redeemable in 1769, a mere matter of months after the election it was designed to serve. Secondly, there was the old story, that the valuation was not properly instructed and was in fact the product of an illegal and irregular division. Finally, the lands of Cadboll lay in Ross, not in Cromarty. Sir John's advocate then gave a thumb-nail sketch of the rise of nominal and fictitious votes, from the appearance of the crude back-bonds of Queen Anne's time to the rich variety that flourished after the Act 16 George II, which sought in some measure to restrain the abuse. "But as anxious politicians, aided by the advice of cunning lawyers, will always fall upon schemes to elude the intendment of a law, by evading and escaping the words of it; so, even in this great constitutional point, such plans were devised, and carried into execution. Formerly the scheme was, to give a title good in appearance, and substantial while it lasted, but in effect grafted upon no real interest, because defeated and determinable by the effect of a back-bond. The scheme next invented was still more ingenious: the plan of it was, to give a vote where there was no estate at all, or in other words, to create a title so empty and elusory in every respect, as justly merited the character of a nominal and fictitious title."<sup>12</sup> David Ross's title must fall within this category, for

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12. Session Papers, vol.139:10<sup>E</sup>, Petition of Sir John Gordon and others, 29 Nov., 1766, p.9.



it "yields not as much profit as in an hundred years would defray the charge of expeding the feudal titles."<sup>13</sup> The answers made to these charges proved more than interesting. The stock replies to the charges concerning the decreets of division were trotted out but these need not detain us. The charge of nominal and fictitious, however, was openly admitted. "Yet until such alteration [of the electoral law] be obtained by an act of the legislature, your Lordships will no doubt continue to judge according to the law of the land as it is at present established."<sup>14</sup> The respondents all submitted that there was no case to answer, since none of the petitioners were freeholders, and this plea took up several months of heated argument before being dismissed.

Sir John Gordon also petitioned against his being struck off the Roll at Michaelmas 1766.<sup>15</sup> As well as the, from his point of view, irregularities of procedure of that meeting it had, he held, palpably erred in rejecting his claim for enrolment on new titles. The freeholders had objected that he had not proved the Old Extent of the lands of Brae on which he claimed, and the best Sir John

13. Ibid., p.11.

14. Session Papers, vol.133:27, Answers for David Ross, Commissary Clerk of Ross, 14 Feb., 1767, pp.5-6. Same Answer, mutatis mutandis, handed in in name of David Ross of Inverchassley.

15. Session Papers, vol.139:16, Petition of Sir John Gordon, 29 Nov., 1766.

could do was to argue that this was well known and required no proof. For the freeholders it was now replied that production of a retour was essential and that no claim on Old Extent could possibly be sustained where the claimant failed to produce a retour. Further, the retour on which Sir John now proposed to base his claim was precisely that of which Lord Royston had produced an extract to prove his objections to the four persons who had been enrolled in 1739 on the Old Extent of the lands of Brae. This retour had been then dismissed by the Gordons who alleged that it referred not to Braes but to the lands of Broy in the Lordship of Ardmannoch.<sup>16</sup> Later in the process the freeholders neatly turned the tables upon Sir John by alleging that the lands of Brae did not lie in the shire of Cromarty at all. The whole argument reads like a clever parody of Sir John's attack on Cadboll and probably had as much substance to it.<sup>17</sup> On 17th. February 1767 the Lords decided against Sir John Gordon on the grounds that he had not produced the retour to instruct his claim. They dismissed his petition, fined him the statutory penalty of £30 sterling and found him liable in full costs of suit.<sup>18</sup> Against this Sir John

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16.

Session Papers, vol.139:16, Answers for Hugh Rose of Aitnoch and others, freeholders, 13 Jan., 1767.

17.

Session Papers, vol.139:18, Replies for Patrick, Lord Elibank, 3 Feb., 1767, p.11.

18.

Session Papers, vol.139:18, Petition of Sir John Gordon, 24 Feb., 1767, p.3.



reclaimed, requesting the Court of Session to take cognisance of his retour.<sup>19</sup> But as the freeholders pointed out this was beyond the Court's jurisdiction and it had always "avoided the suspicion (which other judges sometimes incur) of partiality in matters of election, by adhering to general rules."<sup>20</sup> Before the Michaelmas Court of 1767 met the only real point to emerge from this confusing tangle was the enrolment of William Gordon of Newhall by decret of the Lords of Session.<sup>21</sup>

The Head Court that met at Cromarty on 20th. October 1767, the last before the meeting to elect a Member of Parliament, was obviously a crucial one.<sup>22</sup> Yet it was a relatively quiet affair. Pulteney now had such a command in that Court that Sir John Gordon could not hope to secure any advantage to himself or further his cause there. Through the one voter he had left on the Roll, William Gordon, all was done that could be done. Only Hugh Rose, Charles

19. Session Papers, vol.139:18, Petition of Sir John Gordon, 24 Feb., 1767, p.15.

20. Session Papers, vol.139:19, Answers for Rose of Aitnoch and others, freeholders, 6 March 1767, p.8.

21. Session Papers, vol.139:17-18, William Gordon against Freeholders, Jan., 1767.

22. Cromarty Sheriff Court Records, Box 40, Minutes of the Freeholders, 20 Oct., 1767.

Urquhart, Alexander Fraser of Culduthill and William Gordon compared. Aitnoch was elected preses and George Greig clerk.<sup>23</sup> Gordon moved that the claims should be considered in their order of presentation and that his own objection to the place he occupied on the Roll should be heard first. He complained that the Court of Session had not ordained him to be enrolled in his old place and that Greig, as Sheriff Clerk, should have rectified this error. The objection was not as trivial as it sounds for in certain circumstances the position a freeholder occupied on the Roll could be of considerable importance. In the absence of the parliamentary preses, or last elected commissioner, the freeholder who stood at the top of the Roll acted as preses and exercised a casting vote until a preses and clerk had been elected for that particular meeting. In a small county like Cromarty such apparently trivial points as these could make all the difference between winning and losing an election. Gordon's claim, however, was rejected and the only satisfaction held out to him was that if he chose he might insist on a process of declarator before the Court of Session.<sup>24</sup> Foiled here Gordon launched an attack upon Pulteney's title to continue on the Roll on the grounds of alteration of circumstances, since he no longer enjoyed the liferent interest on which he had been enrolled. Gordon argued, rightly, that the estate of Cromarty

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23. Minutes of Freeholders, 20 Oct., 1767, p.2.

24. Minutes of Frecholders, 20 Oct., 1767, pp.7-8.



had been sold to George Ross of Pitkerrie, an army agent who wished to settle down in his native Ross. Gordon argued that Pulteney's was not now a genuine liferent interest but defeasible at the will of George Ross. Following the precedent of the last Head Court he asked for a proof by witness and that in particular Rose of Aitnoch should be examined on these matters under oath. The preses coolly replied that the charge was not sufficiently instructed, that no deed or writing had been produced in evidence and that in any event parole evidence was not competent to the freeholders! Clearly, in the Court of the Freeholders of Cromarty it is to be remarked, not for the first time by any means, that law was whatever the dominant faction asserted it to be. Gordon pointed out the obvious, that parole evidence had been accepted in 1766, but the meeting could not be moved. The objection was repelled and Newhall left to find what comfort he could in the instruments he took out.<sup>25</sup>

Next the majority turned to more congenial business and enrolled George Munro of Pointzfield who had at last agreed to act for Pulteney. Here again the freeholders were guilty of chicane, for the claim, along with that of John Johnstone, had been lodged with the Sheriff-Clerk, George Greig, at Inverness and not at Cromarty. Gordon's objection to the surprise this occasioned was spurned. Newhall then protested that from the documents produced to instruct the claim Pointzfield did not have the requisite

valuation, the lands on which he claimed only being valued at £376 Scots and not, as claimed, £410 Scots. His arguments were to little purpose in this place but might be attended with more success in another.<sup>26</sup>

George Bean as procurator for Sir John Gordon then moved that his client's claim for enrolment should be considered since it was next in date. To this Aitnoch returned the correct, albeit the stock, answer - the freeholders could please themselves as to procedure. But, formal as ever, he let it proceed to a vote; which should be heard first, the claim for Sir John Gordon or that for John Johnstone? Needless to say it carried for the latter who was a kinsman and adherent of Pulteney's. He was promptly enrolled despite the objections and protests of Gordon and Bean.<sup>27</sup> Among other things they stigmatised Johnstone's title as nominal and fictitious, which provoked the following judicial utterances from the preses: "The charges made by the objector of Nominall and fictitious falls very improperly to be stated here, it is not confined to Mr. Johnstone the Claimant but Extended also to Mr. Pulteney and his other friends. It is so far abusive and is also void of all foundation and quite of a piece with other Clamorous assertions made by some Gentlemen who lately Claimed to be inrolled as

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26.

Minutes of Freeholders, 20 Oct., 1767, pp.14-22.

27.

Ibid., pp.23-34.



freeholders of this County, and whose title to be kept off the Roll was sustained by the Superior Courts."<sup>28</sup> And further, "The objectors are no doubt sensible that severall of their friends who claim to be inrolled, have no other than fictitious titles perhaps the most so that ever was presented before a Court of freeholders."<sup>29</sup> The gloves were on with a vengeance and blow followed blow. The dissident pair required Aitnoch to swear upon oath "as to the facts which do Evidently Evince that the titles of Mr. Pulteney and his wadsett voters are Nominall and fictitious and particularly as to the objections offered to John Johnstone Esqr. as in this [sic] Minutes."<sup>30</sup> But Gordon and Eean can have had no great hopes, although their points might register in the Court of Session and enable them to win par ricochet. Put to the vote it carried, except for William Gordon's dissent, "Do Not Grant this proof."<sup>31</sup> John Johnstone was thereupon enrolled.

Sir John Gordon's claim, which he had been foresighted enough to lodge in triplicate, was now dealt with. He claimed to be enrolled upon the Old Extent of Braes which was given as £8.8.2d.

28. Minutes of Freeholders, 20 Oct., 1767, pp.34-35.

29. Ibid., p.35.

30. Ibid., p.35.

31. Ibid ., p.36.

Scots. Though he took care to produce the retour this time it made no difference to the result, for in the Court of the Freeholders one pettifogging excuse was as good as another. The freeholders now contended, and rightly enough, that no necessary connection had been established between the retour and the claimant's lands. Indeed, the difficulty of properly instructing these old retours was notorious. Sir John's procurator, however, ignored this aspect of the affair and alleged that the freeholders were determined not to enrol Sir John whatever his rights. This protest was duly entered in the minutes by the clerk but ordered to be deleted "as it was calculate to thro' a Reflection on the Meeting."<sup>32</sup>

Gordon's "parchment barons" then had their claims for enrolment put forward once more but these were rejected simply by a reading over of the minutes relating to them at the preceding Head Court.<sup>33</sup> The business of the meeting terminated with a curious transaction. Fraser of Culduthill, conscious of the shaky nature of certain parts of his valuation, craved that an addition should be made to it, bringing it up to £426. 4. 2  $\frac{3}{12}$ d. Scots. This was carried despite the inevitable protests.<sup>34</sup> It was undoubtedly an unprecedented move. The Roll thus adjusted was then drawn up. From the point

32. Minutes of Freeholders, 20 Oct., 1767, p.47.

33. Ibid., pp.49-66.

34. Ibid., p.69.



of view of the then dominant faction it certainly seemed to point the way to a decisive victory at the next election, for it read:-

Hugh Rose of Aitnoch,

William Fraser of Ardochy,

James Crawford, Writer in Edinburgh.

William Pulteney, Esqr., formerly Johnstone, Advocate.

Charles Urquhart of Braelangwell.

Henry Davidson of Tulloch, Esq.

David Ross, Commissary Clerk of Ross.

{ Roderick Macleod, Writer in Edinburgh as Liferenter,  
{ and Roderick Macleod of Cadboll, Fiar of the same lands  
and others,

David Ross, Esqr. of Inverchassley,

Alexander Fraser of Culduthill Esqr.,

William Gordon, Esqr. of Newhall.

George Munro, Esqr. of Poyntsfield.

John Johnstone, Esq.<sup>35</sup>

The Pulteney interest mustered twelve votes, the Gordon but one.

A great shadow, though, hovered over Pulteney's bright prospects.

What, ultimately, was the law going to make of the numerous processes still depending in the Court of Session? Till that question was answered Pulteney need not rejoice, nor Sir John Gordon despair.

The scene shifts once more to the Parliament House.

Here the question of nominal and fictitious had been thoroughly thrashed out, each side denying the charge as it affected their

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35. Minutes of Freeholders, 20 Oct., 1767, p.70.

own freeholds but vigorously asserting that it applied to those in the opposite interest. Finally, the Court sanctioned the use of special interrogatories, a move that had been in the air ever since the test cases of Campbell of Shawfield and the Galloway voters. Pulteney's party seems to have been the first to offer to prove their case by this means, all others seeming to have failed, and in January 1768 the Court gave its permission for a proof to be adduced in the conjoined complaints brought by Sir John's rejected claimants, the principal feature of which was depositions under oath to the following propositions. First, that none of the complainers applied to Sir John Gordon or William Gordon for purchase of any part of their estates, but were asked to accept qualifications by Sir John Gordon for the sole purpose of voting for him at the next election. Secondly, that no consideration was paid to Sir John or his nephew. Thirdly, that none of them authorised the claim for enrolment. Fourthly, that they were all ready to denude at the behest of Sir John Gordon.<sup>36</sup> There is some mystery about these depositions in that only some of the complainers seem to have been required to undergo this test. But the depositions of such as did depone under oath proved to be very revealing.

Robert Blair deponed that he never applied to Sir John Gordon or his nephew for the purchase of any part of their estates. He acknowledged, however, that he had been asked by Sir John to accept

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36. Session Papers, vol.107:4, Copy Depositions of John Mackintosh of Dalmunzie and Robert Mackintosh, Advocate, 2 March, 1768, pp.1-2.



a freehold qualification in the county of Cromarty to enable him to vote if required to do so at the election of 1768. Blair could not even recollect whether the qualification was upon Sir John's estate or that of Newhall. He paid nothing for the disposition in his favour and had not as much as seen it until it was produced in the course of the process when, as counsel for Sir John, he was given all the documents in the case. He knew nothing of the rents of the lands or feu-duties or casualties. In fact, the land upon which his qualification rested was to him terra incognita. Nor had he given any instructions for the registration of the sasine or paid the expense of the necessary legal work. The whole business arose in the following manner. "Sometime in Summer 1765, Sir John Gordon told the deponent that, he had formed a plan of bestowing freehold-qualifications of the superiority of his estate, upon certain gentlemen whom he considered to be his friends; and asked the deponent, If he would agree to accept of one of these qualifications." Blair refused, but in uncertain terms, and later he heard that the disposition had been made and the sasine registered in his name.<sup>37</sup>

This remarkable testimony was confirmed by others. Hay deponed that Sir John Gordon had not even solicited him to accept a qualification and that one was bestowed upon him without his knowledge or consent! He did not feel himself bound to restore the

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37.

Session Papers, vol. 682:24, Proof in the conjoined Complaints, 27 Jan., 1768, Deposition of Robert Blair, pp. 3-5.

property to Sir John but would do so voluntarily purely out of personal regard for him.<sup>38</sup> ~~Leonard~~ <sup>Leonard</sup> Urquhart, Alexander Law and William Urquhart deponed to much the same effect.<sup>39</sup> David Ross, Writer in Edinburgh, as Sir John's agent had drawn up all the dispositions necessary to make the freeholds and, as he himself deponed, got one himself for his troubles.<sup>40</sup>

If true this was startling testimony. Unfortunately there is no way of testing its truth. One peculiar fact will be observed, namely that most of the deponents were lawyers. This could be taken to mean that they saw the threat implicit in the special interrogatories which was that a criminal action for perjury might well be brought against any who could be proved to utter falsehoods under oath. Whether this made them throw up the sponge entirely, knowing that this would absolve them of the whole business, since Pulteney would have secured his end, or whether they spoke true cannot be decided. One possibility seems as likely as the other, for that Sir John Gordon should use people's names in the reckless fashion most of them alleged was clearly not beyond the bounds of possibility. The next two depositions to be considered lend some colour to the latter alternative. John Mackintosh

38. Session Papers, vol.682:24, Proof in conjoined Complaints, 27 Jan., 1768, Deposition of James Hay, pp.5-6.

39. Ibid., pp.6-11.

40. Session Papers, vol.682:24, Proof in the conjoined Complaints, 27 Jan., 1768, Deposition of David Ross, pp.9-10.



of Dalmunzie admitted under oath that he knew nothing of the qualification until some time in the summer of 1766 when his brother Robert, who was an advocate, asked him to sign a claim for enrolment. This was the only matter on which he had been consulted. All else, registration of sasine, lodging of petitions, and complaints and so on, was done in his name but without his knowledge. He concluded, "That in all matters relative to his property or any law affairs in Scotland, he leaves the management of it to his brother Mr. Robert Mackintosh."<sup>41</sup>

Most interesting of all was Robert Mackintosh's deposition. He deponed, "That there has subsisted a very intimate friendship between Sir John Gordon and the deponent, from a very early period of the deponent's life. That ever since the deponent was in business, he has not only been employed by Sir John as his lawyer in public proceedings, but has been his confidential adviser in his private affairs." About 1761 or 1762 Sir John sought the deponent's advice about some family settlements that he wished to make and among other things "in event of accident wished to leave a secure political interest; and that measures should be taken with a view to that particular object." All this was before the contest arose with Fulteney and from these conversations Mackintosh understood that Sir John meant to confer a qualification upon him. Once Fulteney's scheme became known Sir John and Mackintosh

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41.

Session Papers, vol.107:4, Copy Depositions of John Mackintosh of Dalmunzie, and Mr. Robert Mackintosh, 2 March, 1768. Deposition taken, London, 24 Feb., 1768, pp.3-4.

frequently conferred on this subject and the latter advised the baronet "to purchase whatever superiorities of small valuations he could come at in the county, in order to strengthen his own interest." Later Sir John was forced to make qualifications on his own estate and Mackintosh advised that these should take the form of liferent and fee thereby diminishing the risk of losing a valuable vote by death or some unforeseen accident. "And he also told him, that as he, the deponent himself, entertained very nice scruples with regard to the freehold qualifications upon the freeholder's oath, he probably would meet with the same scruples in others of his friends." Mackintosh thought that the titles had been so cleverly conveyed that he could take the oath in good faith. Nay, he went further and "advised Sir John Gordon against freehold qualifications made in the way of wadsets of superiority, intimating a doubt he entertained in his own mind, if such wadsets of superiorities were within the provision of the statute 1681." Robert Mackintosh alleged that he offered to pay for the rights he had received, but that Sir John would not receive the money. Mackintosh stated that he would not denude himself of his title, and that he told Sir John this.<sup>42</sup>

The game seemed up as far as Sir John Gordon was concerned. If ever nominal and fictitious had been proved to the hilt it was here. Yet, so wary was the Court of Session on this intricate subject, that by an interlocutor of 9th. February 1768 the freeholders

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42.

Session Papers, vol.107:4, Deposition of Robert Mackintosh, 24 Feb., 1768, pp.4-16.



were only sustained on a technicality. This was that the division of the CUMULO of St. Martins had not been regularly carried out in that no valuation had been allocated to Glenurquhart, a matter that was still sub judice.<sup>43</sup> Subsequently it was agreed that the titles of Blair, Leonard and William Urquhart, Alexander Law and David Ross were nominal and fictitious as was proved by the evidence of their own testimony.<sup>44</sup> Sir John's fortunes had hardly had time to reach their nadir, however, when they began slowly but surely to improve. The turning point came on 19th. February 1768 when by a narrow majority and for very obscure reasons the Court overturned its former interlocutors on Glenurquhart. This meant that the decret of division of Newhall was intact and that those who claimed on the strength of it and were not otherwise debarred might be enrolled on their existing claims. Thus Sir Alexander Mackenzie, Robert Mackintosh, George Grahame of Drynie, Colin Grahame younger of Drynie and John Gorry were all added to the Roll of Freeholders by decret of the Lords of Session. There they were joined by Sir John Gordon who had at last convinced the judges that his claim was good and that he had suffered unjustly at the hands of the Freeholders.<sup>45</sup> Despite

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<sup>43</sup> Session Papers, vol. 632:32, Answers for Roderick Macleod and others, freeholders, 1 March, 1768, pp. 1-2.

<sup>44</sup> Ibid., p. 2.

<sup>45</sup> Minutes of Freeholders, 20 Oct., 1767, p. 71. The decret was dated 19th. Feb., 1768, and they were added to the Roll by George Greig, 24 March, 1768.



the deposition later made by Robert Mackintosh his claim was upheld by the judges who actually complimented him on an open and honest statement, which would seem to suggest that their Lordships took the other depositions with a considerable quantity of salt.

On the Roll the state of parties now stood, Fultenoy 12, Gordon 6 since the Grahames being enrolled on liferent and fee could only count as one vote. But things were moving in other directions not at all to Fultenoy's benefit. The papers covering this situation seem to be missing from the Signet Collection, but the main outline of events is clear. Sir John had apparently riposted on Fultenoy by demanding that his nominals should likewise undergo the test of the special interrogatories and as a result five of them were ordered to be struck off the Roll. On 20th. February 1768 Roderick Macleod, writer, and David Ross of Inverchassley were expunged by decret of the Lords of Session; on 5th. March David Ross, Commissary Clerk, was similarly expunged; on the 8th. March Henry Davidson of Tulloch, and on the 10th. John Johnstone suffered the same fate.<sup>46</sup> It really looked as if Sir John Gordon's dauntless courage in a legal field, which Tulloch had once noted, was again to carry all before it. The state of parties now stood, Fultenoy 7, Gordon 6. Still worse, however, had befallen Fultenoy, for the final decision of 19th. February

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46.

Minutes of Freeholders, 20 Oct., 1767, p.70. That they were victims of the special interrogatories, see A.Wight, "Rise and Progress of Parliament", vol.I, pp.264-6, citing the cases of David Ross of Inverchassley and John Johnstone.



over the valuation of Glenurquhart left Fraser of Culduthill in a very peculiar situation. The Lords decided that Glenurquhart was not entitled to derive its £56 Scots of valuation from the CUMULO of St. Martins but at the same time refused to expunge Culduthill, although he now had £56 of his valuation to account for.<sup>47</sup> It was a strange decision and led to an extraordinary situation. What precisely did it mean? Sir John instituted a fresh process to find out and sought desperately to have Culduthill expunged before the writ of election arrived.

So matters stood when the freeholders met at noon of 26th. April 1763 for the purpose of choosing a commissioner.<sup>48</sup> Thirteen freeholders appeared, seven of whom supported Tultenoy and six Sir John Gordon. The latter's great aim was to expunge Fraser of Culduthill but before this or anything else could be accomplished he needed to gain control of the meeting. Accordingly he claimed to open the meeting as "parliamentary preses" (i.e. as last elected commissioner) which, despite the shrill protests of the opposition, it was quite in order for him to do. At anyrate, Sir John proceeded to act the part and, despite repeated protests

<sup>47</sup> Session Papers, vol. 634:33, Memorial for Colin Grahame younger of Drynie, 24 Sept., 1763, p.3.

<sup>48</sup> The minutes of this meeting are not in the Cromarty Sheriff Court Records. They were probably mislaid in the course of the savage legal tussle that arose from the proceedings. However, we have copious excerpts of both accounts in Session Papers, vol. 634:27:23 (Tultenoy) and 634:29 (Gordon).



from Fultenoy, he called on George Dean, a writer from Inverness, to assist him as clerk. Fultenoy demanded that the oaths should be put to the freeholders, hoping to catch some of Sir John's voters with tender consciences. He also demanded that a preson and clerk should be chosen by the meeting, but Sir John had no intention of suffering this to be done until Culduthill was expunged. And so they wrangled from noon till 2.30 p.m. Possibly Sir John hoped to filibuster to such purpose that hunger or other pressing business would disperse a few of Fultenoy's men, which would undoubtedly have had the effect of expediting matters. He stubbornly refused to put the oaths to the freeholders unless they swore to the extent of their valuations and the genuineness of their estates. In short, he meant to put special interrogatories. Fultenoy's friends rejected all this as ultra vires and unstatutory. Indeed, Tulloch and the four others who had been expunged by decret of the Lords of Session protested against that measure and required Sir John to administer the oaths to them that they might vote under protest. This he contemptuously refused. Fultenoy and his friends appealed to the Sheriff, Sir John having expressed his intention of erasing the names of all Fultenoy's voters on the grounds that they refused to swear the oaths. "The Sheriff-clerk then asked Sir John, whether or not he would administer the trust oath agreeably to the words of the Statute? and, upon Sir John's refusal, the sheriff-clerk administered the said



oath to Mr. Pulteney, and 6 other freeholders."<sup>49</sup>

By this time it was 7 p.m. and tempers were fraying. Pulteney again appealed to Sir John to proceed to the choice of preses and clerk but the appeal went unheeded. At 8 p.m. Sir John read some minutes drawn up by his friend Robert Mackintosh, the advocate. Pulteney and company protested that these were inaccurate and moreover that Sir John's stated intention of expunging Fraser of Culduthill was illegal. "Sir John Gordon," the account then goes on, "took up a pen, and declared his purpose of erasing certain names" - not difficult to guess which. But "Mr. Pulteney declared, That if the majority of the freeholders concurred with him, he would not permit the record to be erased, without their authority."<sup>50</sup> Among his other sins Sir John in calling the roll had omitted the names of Culduthill and Cadboll. Pulteney's account relates that he then called upon the Sheriff-depute, who was present at the time, to take the minutes from Sir John. The latter alleged that this was not the case but that he was assaulted by Pulteney and his friends and forcefully dispossessed of the minutes. Whatever account be true, one point is clear, which is that from this juncture the minutes were in Pulteney's hands and the election proceeded.

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49.

Session Papers, vol. 634:27, Summary of Minutes, p.3 - more fully in 634:28, Minutes of Freeholders, pp.11-13.

50.

Session Papers, vol. 634:27, p.3; 634:28, pp.16-18.



Fulteney was elected preses and the Shoriff-Clerk, Alexander Mackenzie, clerk. Sir John protested volubly and refused to have anything to do with these proceedings, threatening all concerned with the statutory penalties for a separation. In his view they were illegal and could not lead to a valid election. Fulteney pressed on regardless and a new roll was made up in which Culduthill was included. Not only so but his valuation was increased by the addition of Cadboll's mortified lands of Mid-Genzies on which he held wadset rights dated 17th. October 1766 and which were redeemable for small elusory sums. These lands were, very conveniently, valued at £60 Scots, thus boosting Culduthill's valuation in case the £56 for Glenurquhart should be ordered to be deducted from his title.<sup>51</sup> Naturally this manoeuvre gave rise to further protests but since Fulteney was now firmly in command no heed was paid to them. "The vote was then put, Who should be commissioner to represent the county in the ensuing parliament? And the roll being called, all those who answered to their names, voted for Mr. Fulteney, as did the said Henry Davidson and the other four gentlemen who had been struck off the roll."<sup>52</sup>

Sir John Gordon in the meantime was busily engaged in

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51. Session Papers, vol. 634:33, Memorial for Colin Grahame younger of Drynie, 24 Sept., 1769, pp. 6-7.

52. Session Papers, vol. 634:27, Summary of Minutes, p. 4; 634:28, Excerpts of Minutes, p. 33.



another corner of the court-room having himself returned. According to his account of the affair it was Fulteney who had broken away from the main body of the freeholders by forcibly wresting the minutes of election from Sir John. Again according to Sir John's version of events, Culduthill had been lawfully expunged and the parties stood - Fulteney 5, Gordon 6. By virtue of the casting vote held by the commissioner last elected, that is Sir John Gordon, Robert Mackintosh was elected preses and George Bean clerk. The roll was made up, the election of a commissioner put to the vote and Sir John Gordon unanimously returned.<sup>53</sup> At 10 am. on the 27th. April George Bean presented these minutes of election to the Sheriff, Rose of Kilravock, who received them in his bedroom. Kilravock handed them back immediately, saying that he had already made a return in favour of Mr. Fulteney. Later he sent a written reply to Sir John in which he remarked, "That, having been present during the course of the election, heard all the minutes read, and given his utmost attention to the whole proceedings therein for sixteen hours, he made his return, in favour of William Fulteney, Esq. according to Conscience, the best of his Judgment, and, so far as he was able to conceive, according to Law."<sup>54</sup>

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53.

Session Papers, vol. 684:29, Minutes of the Election of Sir John Gordon, pp. 1-12.

54.

Session Papers, vol. 684:30, Memorial for Sir John Gordon, 24 Sept., 1768, p. 10.



Sir John immediately instituted fresh processes aimed at securing his election. Culduthill's vote was impugned by young Grahame of Drynie; Pulteney's election was challenged; and Sir John sought to have Kilravock fined the statutory £500 sterling for making a false return. In his reply to this charge the Sheriff Depute pointed out that so far from being partial and hostile to Sir John he had actually delayed the election for four days to accommodate the baronet who had intimated to him that four of his voters could not come forward before 25th. April.<sup>55</sup> It was no matter. Sir John cared nothing for professions, only results, and the case dragged for a long time before terminating in Kilravock's favour. The whole election contest went out in a tangle of litigation the outcome of which is not at all clear, although so far as one can judge it was not favourable to Sir John.

Pulteney was certainly upheld in the Court of Session but Henry Davidson who handled the case brought by Sir John before the House of Commons was fearful of the outcome.<sup>56</sup> Sir John charged that Pulteney was wrongly returned, due to the violence of his proceedings at the election and the partiality of the returning officer. With so little in the way of visible resources,

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55. Session Papers, vol. 684:31, Memorial for Hugh Rose of Kilravock, Sheriff Depute of Cromarty, 24 Sept., 1763, p.3.

56. Commons Journals, vol. XXXII, p.47, Petition of George Roan; Petition of Sir John Gordon.



with no ministerial or other connections, he fought remarkably well. Writing to John Mackenzie of Delvine on 24th. November 1768 Davidson of Tulloch says; "Since writing you and several other Friends this Evening, I have been at B [ath] House, where I found the wealthy Owner [Pulteney] under much Anxiety. From a strange Combination of Circumstances the doughty Kt., without any Interest of his own musters a formidable Party against him. Id. Clive & all the India House oppose their Enemy at the general Courts.<sup>57</sup>

The Haslemere Folks - as well as those of St. Ives,<sup>58</sup> concur to throw out the Brother of the Petr. against themselves - and the supporters of the Cumberland Petition have no Bias in favour of Govr. J [ohnstone] 's Brother. At the same time the Case is so strong, that it must be taken up by all the Men of the Law and I am persuaded a great Majority will in the end appear in the Cause of Justice, and preserve the salutary Act of the 16th. to Scotland. The Court of Session has unanimously given the statutory Penalty against Sir J. for omitting to call C [ulduth-ill] 's Name. The separation is likewise applied to him, tho' in that the Judges were much divided; and three of them (Lord

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57.

Pulteney had contested Shrewsbury with Clive, unsuccessfully. See Commons Journals, vol. XXXII, p.48, for Pulteney's petition against Lord Clive whom he accused of corrupt practices.

58.

Commons Journals, vol. XXXII, p.46, Petition of James Johnstone on election for burgh of St. Ives in Cornwall.



S - r, E - r, and P - s were non-luquits). This therefore will be brought under Review upon a reclaiming Petition.

The Fate of the Election may depend upon the Issue of the Proceedings below. Mr. P. truly estimates your Knowledge, as well as happy Talent of carrying home Conviction to others, wherever you are first convinced yourself. He flatters himself this is one of these Cases; and that if it be so, you will for the sake of Justice as well as out of Friendship to him, embrace any Opportunity that may offer, to explain the true state of the question, with its Consequences, which in one view, are indeed very alarming.<sup>59</sup>

Clearly, ministerial influence was not the only kind of influence that could be brought to bear in the discussion of disputed elections. Here we find Sir John Gordon cunningly availing himself of the political feuds in which Tulteney and his pushing brothers were elsewhere involved and making a sufficiently brave show to give the opposition considerable unease. Tulloch busied himself seeking skilled opinions, including those of Charles Yorke, Sir Fletcher Norton and Alexander Wedderburn - three of the most distinguished lawyers of their day. These were favourable but still Davidson had no great hopes. "In confidence, I have apprehensions about the Fate of the C [romart] y Election. My Hopes indeed are greater than my Fears, but there is a powerfull

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59.

Belvine Papers, 1258, f.257, Henry Davidson of Tulloch to John Mackenzie of Belvine, 24 Nov., 1763.



Combination. All the Men of the Law are clearly with us; and what I have Expectation of is that when John Bull (who in the Main is a good natured Animal) sees the State of the Case, & the Mis-  
chief resulting from adopting the Petr's Doctrine, that he will  
cave to Scotland the statutory Law of the 16th. of the late King.<sup>60</sup>  
Not until 21st. December 1768 did Delvine learn from Tulloch that  
Pulteney had succeeded. "The Case was so strong that even Sir  
John was compelled by his Friends (only however after the Council  
were at the Bar) to drop his Petition, on our passing from the  
Penaltys."<sup>61</sup>

So at last the "great Naturall Interest in the county of  
Cremarty" had suffered eclipse. Sir John Gordon had indeed put  
up a good fight but Pulteney, especially after his wife inherited  
the vast Bath fortune, provided very formidable opposition. Yet  
the great point to emerge from this contest was how little,  
relatively, wealth and connections counted in a tough contest in  
a Scots county. The side with the more astute writers and advo-  
cates was better connected than the one that could merely rely  
upon ministerial favour. In this instance the legal honours  
were about even and it was this perhaps more than anything else

60.

Delvine Papers, 1253, f.262, Tulloch to Delvine, 8 Dec., 1768.

61.

Delvine Papers, 1253, f.265, Henry Davidson to Delvine, 21  
Dec., 1768.



that led to such a close contest. The main outlines of the aftermath of the contest are clear enough although many of the details are obscure. The processes dragged on into the spring of 1769 and then suddenly terminated, to the relief of all perhaps except the indomitable Sir John. It looks as if some kind of agreement as to costs was reached and the subsequent Head Courts tend to bear out this theory of a compromise. One thing is clear. Fulteney had in his letter to Sir John in September 1765 seriously underestimated the expense of the litigation to which the contest might give rise. He then estimated it at £2,000 to £3,000 Sterling each, but in the event one process alone, that of Gordon's nominals, cost £733.6.8½d. which Sir John - since he stood behind their petitions - was found liable to pay.<sup>62</sup> Taking the extraordinary number of processes involved from beginning to end, with the penalties found due, the grand total must have been in the region of £15,000. For a Scottish election any such sum was crippling. Had Fulteney envisaged such a contest it is more than likely that he would have sought a seat elsewhere. It certainly had a chastening effect upon Sir John Gordon for thereafter he took little part in politics. All his time and limited funds were now devoted to improved agriculture and among other things trying unsuccessfully to lure skilled farm

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62.

Session Papers, vol. 632:47-56, Memorial for Roderick Macleod of Cadboll and others, with respect to Costs, 24 Sept., 1763.



managers into the barren north for inadequate remuneration.<sup>63</sup>

As to the triumphant Fultoney he sat for Cromarty from 1763 until 1774. It is a curious instance of how eagerly seats were sought at that same election of 1763 that he was also returned for the Perth burghs and unsuccessfully contested Shrewsbury against Lord Clive and Noel Hill.<sup>64</sup> He chose to sit for Cromarty and in general supported Lord North, although somewhat critical of his American policy. From 1774 until his death in 1805 he was consistently returned for Shrewsbury and his interest in Cromarty waned.<sup>65</sup> His career in parliament was not undistinguished, although he never attained high office. He might not unreasonably be described as the 18th. century equivalent of the modern prominent back-bencher and occasionally he undertook important tasks for the ministry. Thus in 1773 he wrote on conciliation with the American colonists and suggested some form of commonwealth.<sup>66</sup> Both he and his brother, Governor George Johnstone, conducted unsuccessful negotiations with American

63.

Ross Letters, William Macleay to David Ross, 5th. April, 1771. This describes Sir John's frantic economies. "He is so full of schemes that there is no end to them." Among others, he was trying to secure the services of a Mr. Burns whom Ross had recommended to him as an excellent farmer.

64.

James Fergusson, "Letters of George Dempster to Sir Adam Fergusson", pp.67-8.

65. Lodge, "Peerage, Baronetage, and Knightage of the British Empire", (1912), p.1099.

66. See Eric Robson, "The American Revolution, in its Political and Military Aspects", p.81.



representatives, Pulteney conferring with Franklin in Paris in 1778.<sup>67</sup> All this while Pulteney worked closely with John Robinson, the well known Clerk of the Treasury and electoral expert. In 1778 he was handling secret service sums through Robinson, possibly connected with his efforts at conciliation.<sup>68</sup> In the ministerial crisis of 1783-4 he was a consistent supporter of Pitt and Dundas and one of the stoutest opponents of Charles Fox whose India Bill he abominated. Wrexall noticed that in the winter of 1783 and spring of 1784 when Fox was vehemently arguing against a dissolution that the Johnstone brothers were among his most consistent opponents.<sup>69</sup> Pulteney rose on one such occasion, gaunt and threadbare as ever, to remind the House that, when it failed to speak with the voice of the nation it was time for it to be dissolved. His brother, Governor George, was less refined, and stated the constitutional issue bluntly. "What are we to deny the King the privilege of conversing with his own subjects and nobles? If so, we deprive him of the power of dismissing his Ministers." It was a true reading of the situation, although at

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67.

Robson, op.cit., pp.173-180 for Pulteney's talks with Benjamin Franklin; p.203 for Governor Johnstone's efforts.

68.

"Parliamentary Papers of John Robinson", ed. Inprado, p.143 et seq.

69.

"Wrexall's Historical and Posthumous Memoirs", ed. Wheatley, 1834, vol.III, pp.258-61.



the time the brothers were heartily abused in the style made familiar by Wilkes twenty years before. They were, after all, Scotch and by virtue of that fact madly in love with authority.

To return now to Cromarty we find that the effects of the struggle waged between 1765 and 1768 were felt in the future. No fierce contest took place between 1768 and 1832; the lesson of the Fultenoy-Gordon clash was not forgotten. Even so at the Head Court of 1769 some vestiges of the struggle can still be detected. William Gordon, George Graham of Brynie and John Gorry vainly moved that David Ross of Priesthill and John Gordon of Carroll should be enrolled as liferenter and fiar. They also vainly objected to the enrolment of Henry Davidson of Tulloch. The drawing up of the Roll, which then numbered 15, completed the business of the Head Court.<sup>70</sup> No further meeting of the freeholders took place until 1775, a sure sign that things were getting back to normal. In that year three freeholders appeared - Hugh Ross of Aitnoeh, William Gordon of Newhall and Sir John Gordon. All went amicably. Sir John was elected preson and nothing of moment took place, except that a very careful Roll, giving full details of titles, was made up. The number of freeholders was then given as 21. Most of the nominals thrown up by the great contest were now enrolled. David Ross of Inverchassley, one of Macleod's nominals (and later a Lord of

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70.

Minutes of Freeholders Head Court, Michs. 1769 (no date), pp. 1-12.



Session under the title of Lord Ankerville) was enrolled in 1770 "in virtue of a judgment of the House of Peers." John Mackintosh of Dalnanzie, Blair and Hay, Ross of Friesthill and Gordon of Carrol, and law of Elvingston and Roderick Macleod writer were all enrolled in 1774. Without doubt these enrolments were a consequence of the refusal of the House of Lords to back up the Court of Session in allowing special interrogatories. Yet the struggle was evidently over, since neither of the Gordons made the least move to amend the Roll which they might easily have done had they been so minded.<sup>71</sup>

At the next recorded Head Court, in 1777, Sir John appeared and made some valuable suggestions, particularly that the Sheriff-clerk should 30 days before Head Courts were due to meet advertise in the three Edinburgh newspapers such claims and objections as had been lawfully lodged with him and that this should be done at the freeholders' expense. The motion was carried unanimously. The Roll was adjusted, the names of Urquhart of Braclangwell and Graham of Drynie expunged, they being dead. Fraser of Ardochy intimated to the meeting that he was denuded of his title and expunged accordingly. Pulteney's wadsets were in fact being redeemed, largely to suit George Ross who had purchased the estate of Cromarty from Pulteney. James Crawford was also expunged at his own request. Ross, in fact,

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71.

Minutes of Michaelmas Head Court, 1775 (no date), pp.1-16.



was preparing to introduce nominals of his own creation and on this occasion three pairs were enrolled on liferent and fee, in one of which Pulteney acted as liferenter.<sup>72</sup> The Gordons made no objections. Sir John was old, financially embarrassed and perhaps no longer politically ambitious. He died in 1733, ironically just one year before his nephew, Henry Dundas, began his career as Harry the Ninth. Sir John had no heir. William Gordon had died in 1779 and Sir John's affections were equally divided between his two surviving nephews. With the arch mischief of the aged he could not make up his mind which to make his heir. Finally, he settled for John Lord Macleod, the third Earl of Cromartie's unfortunate heir, who after the rebellion had made a commendable career for himself in the service of Sweden and Prussia. During the War of American Independence he had served King George well in India.<sup>73</sup> The regiment that he raised and commanded, Macleod's Highlanders, finally merged in the Highland Light Infantry which, in memory of its founder, to this day wears the Mackenzie tartan. The Gordon interest, however, died with old Sir John, for his heir John Mackenzie, Lord Macleod, soon sold the estate to Macleod of Cadboll.

By 1788 Cadboll's heir, Robert Bruce Aeneas Macleod, had a

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72.

Minutes of Head Court, 21 Oct., 1777, pp.1-7.

73.

Sir William Fraser, "Earls of Cromartie", vol.I, pp.CCXXXVI-CCLVIII.



large, if not dominant interest, in the country. The records of the freeholders bear out the accuracy of Adam's account in his "Political State of Scotland, 1783", and particularly the prediction that Brodie the Rabob would be enrolled and set up for the county helped by Cadboll.<sup>74</sup> The Minutes of the Head Court of 1789 also bear out Adam's prediction that an attack would be made on seven nominals. Fultenoy was known to favour Duncan Davidson of Tulloch, the non-ministerial candidate, and consequently an attack was made upon the nominals, particularly those of them left over from the Fultenoy régime. First of all, four of them were expunged as being dead. David Ross (Lord Ankerville), Blair, Gordon of Carrol and Donald Macleod of Goanics, Sheriff of Ross, all intimated that they were divested. Captain David Ross, John Fraser and Mr. David Ross, who were present at the meeting, refused the oaths and admitted they were denuded. John Mackintosh was expunged. Rose of Aitnoch escaped only by fleeing the meeting before the oath could be put to him and Davidson and his friends were hard put to it to prevent him being expunged. The Roll was then made up and numbered 8 as against the 18 given in Adam's report. It ran:-

Hugh Rose of Aitnoch.

William Fultenoy, Esq. of Bath House.

Alexander Ross Esq. of Cronarty.

<sup>74</sup>.

Adam, "Political State of Scotland in 1783", pp.84-88.



Major James Fraser of Belladrum.

Duncan Davidson of Tulloch Esq.

Captain James Fraser of Culduthill.

Robert Bruce Aeneas Macleod of Cadboll, Esq.

David Urquhart of Braclangwell.<sup>75</sup>

Alexander Brodie must have been enrolled at the election meeting of July 1790 but of this no official record remains. We know, however, that at that meeting six freeholders appeared and that Davidson was returned by the casting vote of the preses, William Pulteney.<sup>76</sup> Pulteney had been at odds with Pitt and Dundas over the regulation of the East India Company, in which he had considerable interests, and the defeat of Brodie was perhaps the back wash of this temporary difference. At the Head Court of 1790 Cadboll and his ally Brodie set about strengthening their position by bringing on 7 nominals. Brodie never used the majority thus built up but Cadboll availed himself of it and for a long time the county seems to have been evenly divided between him and Davidson of Tulloch. Head Courts met infrequently and a working compromise seems to have been reached, Cadboll and Tulloch sharing the representation. Even after 1815 when Cadboll was a strong reform Whig and Davidson the complete Tory care was

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<sup>75.</sup> Minutes of Head Court 1789, passim.

<sup>76.</sup>

Anonymous, "View of Political State of Scotland, 1790", p.75; Holden Furber, "Henry Dundas", pp.229-231.



observed not to take their differences to law.

The last election under the old system was full of interest, oddly reminiscent in some ways of the tussle in 1763, although without the fierce legal warfare. Davidson and Macleod were rivals once more, for the last time as it happened. Macleod protested from the beginning that the writ of election had not been duly intimated, but Davidson professed himself satisfied from which it may be safely inferred that he felt himself in the stronger position. And so it proved. Fourteen freeholders appeared and divided evenly, seven for each candidate. But Davidson as last elected commissioner had the advantage of the casting vote and the last election held under the old system was typical of it. He was elected pressed by his own casting vote and thereafter the opposition was steadily outvoted. All was "carried by the casting vote of Mr. Duncan Davidson," or "rejected by the casting vote of Mr. Duncan Davidson." Davidson was finally elected by 8 votes to 7. Macleod protested but to no purpose.<sup>77</sup>

On 31st July 1831 the freeholders met for the last time to confer upon the proposed extinction of the constituency. Letters of protest were drawn up to be presented to the two Houses of Parliament. At the meeting various suggestions were put forward - that Ross and Cromarty jointly should return two



members; that Cromarty should join with Nairn in electing one; or that the town of Cromarty should be joined with the burghs of Tain, Dingwall, Fortrose and Stornoway. The Petition to the House of Commons rejected all these proposals and pleaded for the retention of the constituency. It pointed out that the population of Ross-shire was only 55,000 as against Cromarty's 13,828, yet Cromarty at present had to share representation with Nairn. When joined with Ross, the population would be 68,828 and still only one member would be returned. This, the freeholders held, was anomalous, especially if the populations of Sutherland and Caithness were considered. The Petition submitted that justice would be done by detaching the eight adjoining parishes of Easter Ross and joining them to the old county of Cromarty to make one constituency. Ross would be compensated by receiving the Cromarty enclaves. This failing, the other projects were urged.<sup>78</sup> It was hopeless opposition. In an era of reform the constituency of Cromarty had as much chance of survival as Old Sarum and in 1832 the ancient shiredom came at last to an end.

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78.

Minutes of Freeholders of Cromarty, 18th. July, 1831.