

1762. January 15.

The Honourable Captain WILLIAM STEWART of Cortland, *against* Sir WILLIAM MAXWELL of Monreith, and Others.

AT the meeting for election of a Member Parliament for the county of Wigton, held upon the 23d of April 1761, Captain Stewart claimed to be enrolled upon the following titles: *1mo*, Charter of resignation under the Great Seal in his favour, of the three merk land of Cortland, dated 26th July 1731. *2do*, Instrument of sasine following upon the said charter, dated the 11th, and recorded in the general register upon the 26th of August 1731. And, *3tio*, Extract of the retour of Alexander Stewart of Garlies, as heir in special to his father, dated 10th April 1604, whereby the said lands were retoured to be a three merk land of old extent, distinct from the ward-duties.

To this qualification, Sir William Maxwell and other freeholders *objected*, *1mo*, That the claimant having been enrolled 20 years ago upon the same lands, he was expunged upon the 31st of July 1747, in virtue of a decree of the Lords of Session; and that it was not competent to the freeholders, but to the Court of Session alone, to vary or alter that decree. *2do*, That the pretended extract of the retour produced, not being taken from the principal retour in Chancery, but from a copy-book, it can meet with no regard. And, *3tio*, That this extract can be of no avail, because from thence it would appear, that there had only been 13 jurymen upon the inquest, instead of 15.

Captain Stewart *answered* to the 1st of these objections, That, from the extracted decree of the Court of Session in 1747, it appeared that he was then struck off the roll for not producing his retour; and that it being now recovered, that decree stood no longer in the way of his being enrolled.

To the 2d, That, as original retours, preceding the year 1660, are not to be found, all extracts of retours prior to that period are taken from the record in Chancery, which bears faith in all cases equally with the principal retour itself; and that this very objection was repelled in the case of Colquhoun *contra* Freeholders of Dunbarton, 5th February 1745, No. 12. p. 8572.

To the 3d, That, although 15 is the common number of jurymen, yet that number is not absolutely required by law: That Sir John Skene and Sir Thomas Craig mention, that 13 or 15 are commonly chosen upon the brieve of mortancestry; and that numberless instances of retours occur in Chancery, where the inquest consisted only of 13.

The vote being stated upon these objections and answers, it carried Not to enroll; but, upon a complaint by Captain Stewart to the Court of Session,

“THE LORDS appointed the complainer to be added to the roll.”

Act. Walter Stewart.

Alt. David Dalrymple

A. W.

Fol. Dic. v. 3. p. 403. Fac. Coll. No 76. p. 170r.

No 20.

An extract from the copy in the books kept in Chancery full evidence of a retour.