

1985

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Recommended Citation

Cole, Robert C. (1985) "Young Boswell defends the Highlanders," *Studies in Scottish Literature*: Vol. 20: Iss. 1.

Available at: <https://scholarcommons.sc.edu/ssl/vol20/iss1/3>

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Richard C. Cole

Young Boswell defends the Highlanders



James Boswell returned in February 1766 from his European sojourn of some thirty months to resume his study of Scots law. In July he passed his examination in the law and had his Latin thesis accepted. On July 26th he was admitted to the Faculty of Advocates, and he began his practice three days later. An early case, or cause as provided by Scots law, of particular interest and one that has not been identified or discussed is the cause of Macdonell *vs.* Macpherson. A number of documents survive that show Boswell the young advocate working in behalf of the Macdonell family over a period of four years from 1766 until 1770. These were exceedingly productive years not only for Boswell the man of law but for Boswell the man of letters; his bibliography for this period consists of five books, one of them his *Account of Corsica* a best-seller, a published thesis in civil law, and hundreds of periodical writings on the rebellion in Corsica, the Douglas Cause, and other vital issues of the day.¹ Nevertheless, these literary activities did not interfere with Boswell's busy and generally successful legal practice. He pleaded criminal causes before the High Court of Justiciary and

civil causes before the Court of Session in Edinburgh, but civil causes like *Macdonell vs. Macpherson* were much in the majority. The cause invites analysis for several reasons. It shows how a major Scots author earned his living for twenty years, and it casts some light on perhaps his most deeply felt commitment. The cause is also significant for at least two historical reasons. The cause was sufficiently important to make its way through the several Scots courts to the House of Lords in the English Parliament for final adjudication. A cause concerned with removal of clansmen from their ancestral lands in the Highlands, it also shows long range consequences of the forfeiture of lands resulting from the second Jacobite revolt of 1745.

The first document in the cause is a letter by Alexander Macdonell or Alastair Ban, of Tullochcrome, to James Boswell dated 26 August 1766.² The letter gives no details about the cause, but it is clear that Boswell has already represented Macdonell and his elder brother Ranald Macdonell of Aberarder before the Barons of Exchequer. Macdonell expresses his gratitude for Boswell's past services and his hopes for Boswell's help in the future, but he writes primarily to notify Boswell that he is sending him a collie dog named Syder from the Highlands as a token of his appreciation. Boswell later learned that the dog's name, *saighdear* in Gaelic, meant *soldier*, an appropriate name for a dog from the warlike Macdonell family. Alexander Macdonell had been the main tenant of Tullochcrome, Laggan parish, Inverness-shire, since at least 1721.³ Boswell had met Ranald Macdonell at Ruthven, Inverness-shire, on 13 May 1761, and wrote in his journal about the Highlander: "not so much of a Gentleman—but much friendship and Vivacity—quite an untamed Highlander."⁴ Roman Catholics and active Jacobites, the Macdonell brothers had fought in Prince Charles Edward's army during 1745-46 at Prestonpans, Falkirk, and had participated in the invasion of England. After the defeat at Culloden they had aided Prince Charles Edward in his escape to France.⁵ The earliest specific evidence of Boswell's involvement in the Macdonell cause is provided by the consultation or fee book in which Boswell listed all his causes from the beginning of his legal career in 1766 until 1772. Under the dates 1 and 6 December 1766 Boswell lists the cause of *Macdonell vs. Macpherson*, for which he received a fee of 3.3⁶ after representing the Macdonells before the Court of Exchequer in

Edinburgh. It is clear from later documents that Boswell was actively involved in the cause during 1766 and 1767, but there are no documents describing the cause until 1768.

The first statement of the cause that has survived is a printed statement of thirteen pages by Boswell entitled *Memorial for Ranald and Alexander Macdonells, tenants in Aberarder and Tullochcrome, against Henry Butter, factor appointed by the Barons of his Majesty's court of Exchequer upon the forfeited estate of Clunie*.⁷ In the first section of this memorial dated 19 July 1768 Boswell presents the history of the cause. Alexander and Ranald Macdonell and their families and retainers totaling over eighty clansmen held Aberarder and Tullochcrome and other properties of the Laird of Mackintosh for over a century. At the end of the rebellion of 1745 when lands of prominent rebels were confiscated, the lands inhabited by the Macdonells were assigned by the Court of Exchequer, the agents of the Crown, not to Mackintosh but to a leading rebel Evan Macpherson of Clunie and were accordingly declared forfeited and thus available for sale. In 1766 a former British army chaplain, the Reverend Robert Macpherson, who was not a relative of Evan Macpherson of Clunie, leased the Macdonell lands from the Barons of Exchequer and obtained an order removing the Macdonells from Tullochcrome and Aberarder, which were part of the forfeited estate of Clunie. Henry Butter as the factor for Clunie appointed by the Barons of Exchequer petitioned the sheriff of Inverness to remove the Macdonells from their lands. The Macdonells objected in the spring of 1767 that Butter was only the interim factor and had no right to eject them, and the sheriff accepted the validity of their argument. Butter then appealed to the Court of Session in Edinburgh, the highest civil court in Scotland, but the Court in June 1767 sustained the sheriff's ruling. At the insistence of Robert Macpherson, who had obtained a new order from the Barons of Exchequer on 1 July 1767, Butter again took the Macdonells before the sheriff of Inverness and was successful on 11 March 1768 in obtaining an order removing the Macdonells. The Macdonells again appealed to the Court of Session with Boswell as their advocate.

The argument section of Boswell's *Memorial* has five parts of varying cogency called objections. Boswell argues first that the Barons of Exchequer are only interim managers of the forfeited estates and have no power to remove tenants. His second

argument is that there are several other claimants to the ownership of Clunie, such as the Duke of Gordon and Sir Lodowick Grant, and until the question is resolved, the Barons of Exchequer have no right to remove tenants. Boswell's closely related third objection is that the title to Clunie is defective. The fourth objection presented by Boswell on behalf of the Macdonells is that Butter has not taken the loyalty oath to the government or the oath not to benefit personally from the sale of the forfeited estate. In his fifth argument Boswell includes signatures of seven officials that the bill of execution has not been properly signed by the witnesses. Boswell's conclusion goes beyond the evidence he has presented and stresses the human costs of the action against the Highlanders: "The memorialists, in duty to themselves, and the numerous families connected with them, have now stated to your Lordships their defences against an action of removing, which, if carried into execution at present, would be the means of throwing above eighty innocent industrious persons into a most deplorable situation." In a handwritten postscript dated 22 July 1768 Boswell notes that the fifteen judges or Lords of Court of Session accepted the validity of his fourth and fifth arguments. Later documents, however, make clear that the judges were not favorably impressed by the first three objections or by the argument as a whole. Boswell in another handwritten note of the same date observes that several of the Lords of Session, including his own father Lord Auchinleck, believed, contrary to Boswell's first argument, that Parliament had given the Barons of Exchequer the right to remove tenants from forfeited estates.⁸

No further document survives on this phase of the litigation, and the next statement in the sequence comes from a collection of published decisions of the Court of Session. On 7 August 1769, the Court rejected Boswell's petition in behalf of the Macdonells that their lands were under the jurisdiction of trustees for the annexed estates appointed by the Crown rather than the Barons of Exchequer, for whom Henry Butter was the factor. The Court of Session agreed with Butter that the Barons of Exchequer had the power to remove tenants and further ordered the Macdonells and their retainers to be removed from their lands by Whitsunday of 1770. The report of the cause adds that the Macdonells appealed the verdict to the House of Lords of the British Parliament in London.⁹

In London the appeal by the Macdonells to the House of Lords in January 1770 was presented by Thomas Longlands rather than by Boswell. The Macdonells asked that the ruling of the Court of Session against them of 1 and 10 August 1769 be reversed by the House of Lords. After several delays the House of Lords finally heard the cause on 4 April 1770. The Lords, who normally followed the advice of the two Law Lords, the Lord Chancellor and the Lord Chief Justice of the King's Bench, dismissed the appeal and upheld the ruling of the Court of Session ordering the removal of the Macdonells.¹⁰ This should have been the end of the matter, but Boswell was not ready to allow the Macdonells and their followers to be driven from their ancestral lands.

Boswell's final statement in the long litigation is a ten-page petition by the Macdonells to the Court of Session dated June 1770. The printed document surviving in the Houghton Library, Harvard University, bears the full title *Unto the Right Honourable The Lords of Council and Session, The Petition of Ranald and Alexander Macdonells, Tenants in Aberarder, Tullochroomb, etc.*¹¹ Boswell devotes the first part of his *Petition* to a review of the cause liberally sprinkled with denunciations of the Reverend Robert Macpherson, some of which he has underlined in ink. He condemns Macpherson's greed and harsh nature and contrasts his considerable income from his army pay, clergyman's remuneration, and land, with the poverty of the Highlanders. He also observes that Macpherson had blackened the characters of the clansmen and had harassed them in various ways. Boswell justifies his *Petition* on the grounds of new evidence, and he changes the argument he had presented to the Court of Session in July 1768. Boswell now admits that the Barons of Exchequer in 1768 did have the power to remove the Macdonells, but he goes on to deny that the Barons have such power in 1770. Since the Court of Session ruling of August 1769, Parliament has handed the administration of the estate of Clunie over to trustees appointed by the Crown: "The Barons were formerly intrusted with the management of this estate; but their powers are recalled, and as the claims of the subject-superiors are not finally determined by the late act of parliament, the forfeited estate of Clunie is, in terms of the annexing-act, vested in the Crown, and the sole and absolute management thereof given to the Commissioners appointed by

the King" (p. 8).

In his *Petition* of 1770 as in his *Memorial* of July 1768 Boswell goes well beyond the evidence he has presented in his argument and emphasizes humanitarian considerations:

The petitioners having their all at stake, had surely a right to inquire into the charger's title to bring so severe an action. They were conscious of having given no occasion for such harsh treatment: they were not in arrear of rent; and could hardly persuade themselves, that the mildness of government would allow fourscore honest highlanders to be turned adrift, and their bread to be eat by this merciless chaplain, who is to pay no higher rent than they had done. Courts of justice will always view in a most unfavourable light such oppression, and have an honest inclination to preserve possession, in examining very critically any flaws in the title of him who is made the instrument of it (p. 9).

Boswell's conclusion in a similar manner avoids strictly legal considerations and appeals to the Lords of Session as "equitable guardians of this country" to prevent the highlanders from being turned off their ancestral lands. Boswell's final word is a statement of hope that the highlanders, if allowed to remain on their lands, "may live to be of eminent service to their country at a time when the value of brave highlanders cannot be forgotten; for as it was well observed by a learned judge, 'The highlands are now the seminary for men'" (p. 10). The verdict of the Court of Session has not survived, but someone has written in pen at the top of the first page of the *Petition* "3d July 1770 Refuse."

Why Boswell participated in the Macdonell Cause with such vigor and tenacity in spite of its hopelessness is not revealed in his journals and correspondence from the period 1766-70; as a fledgling lawyer he might have served himself better if he had dropped the cause in 1769 when the Court of Session voted against his clients. Probably Boswell's own Jacobite inclinations and the sympathy that he always felt for the underdog during his long career in the Scots law helped to keep him working for the Macdonells. Even more important, however, was Boswell's strong sense of family unity and tradition necessarily rooted in the land. Boswell would describe on 18 August 1773 his own

ancient landed family as his "predominant passion,"¹² and his zeal for the preservation of other ancient Scots families was marked. The Macdonell Cause was but one of many causes from the period 1776-70 that reveals Boswell's deep commitment to "Family," as he so often wrote it. The best-known example is Boswell's involvement in the famous Douglas Cause,¹³ which stemmed in large part from his recognition of Archibald Douglas, in the words of Frederick A. Pottle, "as a symbol of Family itself fighting for its life in a degenerate world."¹⁴ His exertions on behalf of William Cairncross's claim to the ancient estate of Hillslap 1766-1768 prompted Boswell to write to his friend Sir Alexander Dick of Prestonfield in December 1766: "You know my old feudal soul and how much a cause of this kind must interest me."¹⁵ The desire of Sir Alexander Dick's cousin John Dick to secure the dormant baronetcy of Braid which had once been in his family captured Boswell's enthusiasm, and his vigorous campaign during the years 1766-68 was largely responsible for Sir John Dick's success.¹⁶

The same values were at stake in *Mackenzie vs. Mackenzie*. In arguing over a period of years that Hector Mackenzie should not be deprived of the lands entailed upon him, Boswell made these points before the Court of Session on 1 July 1767 about the entail that Hector Mackenzie's father Sir Alexander Mackenzie of Gairloch wanted to put aside: "And an entail is materially useful in a political view; because it is the means of preserving ancient families, which are like beams in the constitution, are the firmest security against tyrannical incroachments, and, in this state, must ever hold the balance between the sovereign and the people. Ancient families too contribute to the happiness of society, founded on just subordination. They are a blessing to the country, and, like stately trees, spread shelter and comfort around them."¹⁷ Boswell had an even more personal stake in Hector Mackenzie's success than in the success of Archibald Douglas, William Cairncross, and John Dick, since, he, too, might suffer in the future because of an entail. Lord Auchinleck on 7 March 1762 had forced Boswell to sign a legal document that would allow the estate of Auchinleck to be vested in trustees after Lord Auchinleck's death. Although by the terms of the document Boswell would be permitted to live at Auchinleck House and receive some income from the estate, he was treated as incompetent. Boswell always felt humiliated by this

"renunciation," as he called it.¹⁸ Undoubtedly, his belief that his own father had treated him unfairly contributed to the zeal Boswell displayed for the interests of Hector Mackenzie and for those of the eighty highlanders.

The aftermath of the Macdonell Cause for its numerous participants makes for an unhappy tale. Ranald Macdonell, the chief of this branch of the great Macdonald clan, lost Aberarder the next year and died. Two of his sons became officers in British regiments in India and Canada. His younger brother Alexander Macdonell Lost Tullochchrome but was allowed to keep the small farm of Inverwidden. The eighty relatives and retainers of the Macdonell brothers were driven from their ancestral lands, and most emigrated to America, primarily to Canada. The Reverend Robert Macpherson, the victor in the long struggle in the courts of Scotland and England, then followed the common late eighteenth-century practice in the Highlands of converting land that had traditionally maintained clansmen to grazing land for sheep.¹⁹ Boswell's defeat in the Macdonell Cause was unusual in these early days of his legal practice, but it did anticipate his later career in the Scots law which never fulfilled its early promise, and it also anticipated his hopeless failure after he shifted to the English bar in 1786 at the age of forty-six. Nevertheless, with their many successes in both letters and the law, these were the golden years from Boswell's own point of view. It remained for posterity to take a different view and regard these earlier years essentially as prologue to the writing of the greatest of all biographies.

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NOTES

¹The definitive account of Boswell's early career is in Frederick A. Pottle, *James Boswell, The Earlier Years, 1740-1769* (New York, 1966).

²Yale University, Boswell Papers, MS. C 1841.

³Scottish Record Office, *Index to Particular Register of Sasines for Sheriffdoms of Inverness, Ross, Cromarty, and Sutherland* (Edinburgh, 1967), LXIV, pt. iii, p. 56.

⁴Yale University, Boswell Papers, MS. Journal.

⁵Angus and Archibald Macdonald, *The Clan Donald* (Inverness, 1900-04), III, 443-45. Scottish History Society, *The Lyon in Mourning, or a Collection of Speeches, Letters, Journals, etc., Relative to the Affairs of Prince Charles Edward Stuart*, by Bishop Forbes, ed. Henry Paton (Edinburgh, 1894-96), III, 182.

⁶MS. Consultation Book of James Boswell, 1766-72, NLS.

⁷Court of Session Papers, No. 124:9 (Edinburgh: Signet Library).

⁸Yale University, Boswell Papers, MS. Lg. 5.5, p. 38.

⁹*Decisions of the Court of Session*, ed. William M. Morison (Edinburgh, 1805), XXVIII, 11999-12000; also reported in *Decisions of the Court of Session, Faculty Collection*, IV, 390.

¹⁰*Journals of the House of Lords, 1768-1770* (London, 1770), XXXII, 405, 408, 440, 442, 529; also reported in *Decisions of the Court of Session, Faculty Collection*, IV, 390.

¹¹The cause is listed in W. H. Bond and Daniel E. Whitten, "Boswell's Court of Session Papers: A Preliminary Check-list," *Eighteenth-Century Studies in Honor of Donald F. Hyde*, ed. W. H. Bond (New York, 1970), p. 240.

¹²*Boswell's Journal of a Tour to the Hebrides with Samuel Johnson, LL.D., 1773*, ed. Frederick A. Pottle and Charles H. Bennet (New York, 1961), p. 32.

¹³See my article "James Boswell and Robert Colvill," *SSL*, 16 (1981), 113-14.

¹⁴*James Boswell, The Earlier Years*, p. 313.

¹⁵*Letters of James Boswell*, ed. Chauncey Brewster Tinker (Oxford, 1924), I, 96.

¹⁶*James Boswell, The Earlier Years*, p. 370.

¹⁷Yale University, Boswell Papers, MS. Lg. 10, p.5.
Information for Hector Mackenzie.

¹⁸*James Boswell, The Earlier Years*, pp. 80-81.

¹⁹Charles Fraser-Mackintosh, "The Depopulation of Arberarder in Badenoch, 1770," *Celtic Magazine*, 2 (1877), 418-26.