

the pursuer's right, and obliged himself to infest him in the lands in question; 2dly, Though the pursuer had but possession without any right, he might not be ejected, but by a precept of ejection from a judge, which is not alleged. The defender *answered*, That these articles of agreement were never perfected nor extended, and could only import a personal action against the defender, for extention or implement, wherein, when the pursuer insists, he will get his answer, that he can have no benefit of the articles, being mutual, until he perform his part thereof, which is not done.

THE LORDS repelled the defence and duply, and sustained the ejection.

The defender *alleged* further, That that member of the libel, craving violent profits for that part of the land possessed by tenants, because, by the defender's persuasion, they became his tenants, is not relevant, because ejection is only competent to the natural possessor upon violence, and persuasion is no violence. The pursuer *answered*, That the prevailing with the tenants was consequent to the casting out of the defender out of his own house and natural possession, and was as great a fault as intrusion, and equivalent thereto. The defender *answered*, That the law has allowed violent profits only in ejection or intrusion, which can be drawn to no other case, though it were as great, or a greater fault.

THE LORDS sustained the defence, and found violent profits only competent for that part that the pursuer possessed naturally; but if the whole lands had been an united tenement, or labouring, that the pursuer had been ejected out of the principal messuage of the barony, and the ejector had thereby got possession of the whole, it is like the LORDS would have sustained ejection for the whole; but this was not pleaded.

*Stair, v. 1. p. 558.*

1669. February 19. MR. JOHN HAY *against* The TOWN OF PEBBLES.

MR. JOHN HAY insisting in his declarator, that certain hills libelled were proper part and partinent of his lands libelled, wherein he stands infest in property; it was *alleged* for the Town of Peebles, That they do not acknowledge his right of property; but they alleged that they are infest by King James II. in their burgage lands, with the commony of Priestshiels, and likewise by King James IV.; and that Queen Mary having directed a Commission of Perambulation to the Sheriff of Edinburgh, he perambulated their commony, and hath set down meiths and marches thereof, which are expressed in their decret of perambulation, within which their meiths lie; and that *in anno* 1621, they have a charter from King James VI. of their burgage and commony of Priestshiels, comprehending expressly these hills, by virtue whereof they have been in peaceable possession thereof, as their proper commony, by pasturage, feuel, fail, and divot, and by debarring all others therefrom. The pursuer *answered*, That

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Right of property in a commony held to depend on the possession and interruptions of the parties, which admitted to proof before answer.

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their charters were but *periculo petentis*, the King having formerly granted the right of these lands to his authors; and the decret of perambulation by the Sheriff of Edinburgh was *a non suo judice*, the lands not being within the shire; and for any possession they had, it was not constantly over all the year, but only a while about Lammas of late, and was still interrupted by him and his authors; and offered him to prove that they have been in immemorial possession, by tilling, sowing, and all other deeds of property; and that these hills cannot be part of their commonty, there being other heritors' lands interjected between the same and the commonty of Priestshiels; so that the pursuer ought to be preferred, being *in libello*, and far more pregnant, and especially alleging acts of property by tillage, and the defenders having declarator depending of their commonty; and alleged a practique at the instance of Sir George Kinnaird, where he alleging upon property more pregnantly, was preferred to another in probation, alleging pasturage.

THE LORDS preferred neither party to probation; but before answer, ordained a perambulation to be, and witnesses adduced, *hinc inde*, anent the situation of the bounds, and either parties possession and interruption.

*Stair, v. 1. p. 608.*

1669. July 10. ALEXANDER GLASSE *against* JOHN HADDIN.

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In a competition for mails and duties, a proof of possession before receiving a factory, was allowed, to do away the exception, that the possession had been in consequence of the factory.

ALEXANDER GLASSE and William Reid having a proper wadset of the lands of Alairtnenie, and John Haddin being also infeft in an annualrent forth thereof some days prior, compete for the mails and duties. Haddin *alleged*, That both infestments being base from the same author, his infestment of annualrent is preferable, because prior and first clad with possession. It was *answered*, Any possession he had was by a factory from Glasse. It was *replied*, That he offered to prove possession before that factory. It was *duplied*, That by Haddin's back-bond produced, bearing expressly that Glasse had had a valid right to the mails and duties of the lands, and that he was in possession thereof, and that Haddin had accepted a factory from him, and was obliged to compt to him for the mails and duties without any reservation of his own right; this was an unquestionable homologation and acknowledgment of the right, and equivalent to a ratification thereof.

THE LORDS found by the back-bond produced of the tenor foresaid, that Haddin had so far acknowledged Reid and Glasse's right, that he could not quarrel it upon his own right; but he proponing that there was a reservation of his own right related to in the back-bond, the LORDS found the same relevant, he proving possession before the other party, and before the factory.

*Stair, v. 1. p. 634.*