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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.*