

their Marches and Possession thereof: That is to say, the said Defendant to hear and see Letters direct the Judge Ordinary where the same are, or of Judges delegated to take Cognition and to determine the Marches and Possession of the said Lands conform to the Act of Parliament made in that behalf in the 10th Year of King James the Sixth and daily Mattick of our Realm &c. according to Justice &c. In a simple Molestation which is *judicium possessorium Minor* ~~non~~ *lenetur placitare de hereditate paterna* 27 July 1675 Robertson contra Stewart.

But if we desire to have his Property of the controverted Parts and Portions also tried, he issues a Summons of Molestation containing a Declarator of Property founded upon his and his Ancestors Right thereto, the same Parties who are at Law about the Controversie, contest likewise the Possession of the Places whose Confiners are in Debate, it will be necessary in the first to determine the Possession, before the Question relative to the Property be decided C. 3. C. fin. reg. vid supra pag. To found an Action of Molestation, the Pursuer must, as in a Removall, have a sufficient Title with Opposition Slair Lib. 4. Tit. 27. J. 1. The first Movall Judgment is the Pursuer: But where there are mutual Actions, the Parties may insist Slair Jud. §. 6. The said Slair (p. 8. 7.) advances that in Molestations about Lands holding Ward, the Superior should concur or be cited his interest being greater than that of other Superiors, who need not to be called or cited in Molestations about Lands free of them. Minors are not bound to defend in Declarator of Rights joined to Molestations Mackenzie Observes on Act 42. Cor. li. §. 6. The only proper Defence in an Action of Molestation is upon a prior Cognation, or a founding Charter, which may be taken off by replying upon immemorial Possession altering the said Bounds Slair Jud. §. 29.

In which Actions the Lords grant Commission to the Judge of the Place or to some of their Number, to visit the ground and examine Witnesses therein inde as to Possession and Interruption, whose Report being accepted, the Commission is renewed to some, for settling the Boundaries of the said Lands confining upon one another, and redding Marches betwixt them by setting March-Stones or Land-Marks. Which March Stones are prohibitive at the Time within Prescription, tho' it be not clear when these Marches were set Slair Lib. 2. Tit. 3. §. 73.

Marches may also be tried and fixed betwixt neighbouring Heritors, in Controversie about the Boundaries of their Lands, by the Sheriff or other Judge where the controverted ground lies, upon a Brief of Perambulation issued forth of the Chancery to him for that Effect, Whereof the Tenor follows: *Viccomiti &c. Salutem. Mandamus vobis et precipimus quatenus per vos et fideles ac antiquiores homines patrie iuste et secundum usum terrae perambulare faciatis rectas metas et divisas inter terras de &c. cum pertinentiis quae sunt A. ex parte una, et terras de &c. quae sunt B. ex parte altera, jacent in Baroniam de &c. et infra balliam vestram. et sicut dictae divisae et metas iuste et secundum usum terrae perambulatione fuerint, ita eas de cetero firmiter faciatis observari. Tantum inde faciatis &c. Jussu meo &c.* Tho' the Brief of Perambulation bear per probos et fideles homines patrie in general, no Person can be received upon

the Inquest therein but such as have proper Knowledge, and dwell nearest to the controverted Land, unless the Marches be instructed scripto Act 79. par. 6. §. 6. But any public Witnesses, tho' not Canded Men, are allowed in Perambulations Mackenzie Observ. on Act 79. contrary to what is observed by Slope.

Perambulations before inferior Judges were appointed in Pursuit the Controversy which is a Matter of Fact, can best be tried upon the *placet per fideles homines de vicineto* Reg. Rapest. Lib. 2. Cap. 74. This requires the examining of many Witnesses, who cannot be brought up to the Session without great Expence. But Minors are not bound to defend in Perambulations Stat. Diale. 2. Cap. 20. For cap. Members of the College of Justice are compelled to pursue & defend such causes except before the Lords of Session Act 42. Cor. li. §. 5. Tho' even in that Case there should be a Commission granted for taking the Trial before an Inquest in the County during the Vacation, when no Attendance on the Session is required Slair Lib. 4. Tit. 27. §. 5.

If there be any Uncertainty about the Confiners of the Lands they are regulated by the Titles where there are any, which express the Extent which the Lands ought to have, by ancient <sup>Landmarks or other</sup> ~~Landmarks or other~~ like Proofs. And because after the Date of the Titles & Deeds, there may be several Changes in the Confiners, they are also regulated by Prescription, tho' in the Regard which ought to be had to these Changes C. 11. C. 12. ff. Fin. Reg. C. 2. C. 20. in a Ward the Confiners may be regulated by these or any other Ways which may lead Men to the Knowledge of them, if the Confiners of two Estates become uncertain, whether by the Deed of the Proprietor or Possessor of one of the Estates, or by an Accident which has carried away the Land Marks, or taken away the Knowledge of the Estate, it will be necessary to set new Land Marks by the Advice of skilful Persons, or according to the Titles of the Estates, or by other Ways above mentioned C. 8. pr. & §. 1. ff. Fin. reg. The Arbitrators or skilful Persons appointed to settle the Confiners may, according to the Circumstances of the Places, of the Obscurity of the Boundaries, and of the Conveniency of both Proprietors, either divide what is in Dispute if the Right of each Party be uncertain, or judge it wholly to one of them, if there be ground for it, or bound the Estates in another Place leaving one Side as much as is taken off the other, or obliging him who happens to be the Gainer by this Change, to make some Return to his Neighbour Act 2. §. 1. C. 3. & C. 4. ff. Fin. reg. In the Cognation of a controverted Piece of Ground before the Sheriff, Side of the Inquest having found and voted the controverted ground to be common to both Parties, and Right being non liquet, the Sheriff would not determine: And the Matter being brought before the Lords of Session by Devocation, they would not rest on that Verdict, but allowed Witnesses to be produced there inde before themselves 27 July 1675 Chiefly contra Baillie of Walstown. Yet if the Lords of Session should vote for the minor Part of them voting positive would make the Sentence, because they are the supreme Court Ordinary in Civil Cases. b. d. vol. 2 pag. 963.