

No 10.

Found in conformity with the above.

1623. February 5. KER against Scot of Hartwoodmyres.

MARK KER pursuing Scot of Hartwoodmyres for the mails and duties of the lands of pertaining to him, as donatar to the non-entry thereof, the LORDS found, That the retour of the barony, whereof the lands libelled was a part, albeit the lands libelled were not specially retoured by themselves, was sufficient to liberate the defender from all further duty claimed for the said lands, for all years preceding the declarator of non-entry, except the proportion of the retoured duty, to which the whole barony is stented by the retour, effeiring to the proportion of the said lands, compared and considered with the rest of the lands, whereof the whole barony retoured was componed and made up.

Act. *Oliphant.*

Alt. *Scot.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 6. Durie, p. 44.

* * * Haddington reports this case :

February 4. 1623.—In an action pursued by Mark Ker against Hartwoodmyres and his tenants, for the ordinary mails of some lands of the Lord Borthwick, whereof he had the gift of non-entries, with declarator, the LORDS would not sustain the summons both against the tenants and the master *in solidum*; but willed him to summon every party, for that part which he would prove they possessed and intromitted with, and would not suffer it to be divided by the probation.

February 5.—In the action pursued by Mark Ker against Hartwoodmyres, for the ordinary mails and duties of the lands of Borthwick-shiels, the years preceding his declarator; it was *excepted*, That no profits could be craved for years preceding declarator, but only the retoured mails.—It was *duplied*, That they were a part of the barony of Ligertwood, which barony was retoured to a twenty pound land, and therefore the lands were only subject to pay the proportion of that retoured duty.—THE LORDS found the answer relevant, and ordained them to condescend upon the proportion of this land, with the rest of the barony.

February 7.—In the action of non-entries pursued by Mark Ker against Hartwoodmyres, the defender *alleged* that his lands were retoured two merks and an half, and that behoved to be the proportion to the extent of the retour of the barony.—Mark *replied*, That no respect could be had to the retour made after his gift of non-entry.—Nevertheless the LORDS sustained the exception.

Haddington, MS. No 2742. 2746. & 2750.