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pursue an improbation, but as to those lands wherein he was expressly infeft, which is of the date 17th November last, Arniston having now insisted upon his title of improbation, that he stood infeft in his own lands, which were alleged thirled to Deuchar's mill, the mill of the barony; and, therefore, craved production of the writs of the said mill and lands, with certification; it was *alleged* for Deuchar, That no improbation could be sustained, unless Arniston would produce a real right to the said mill, and an infeftment of the said lands and mill, whereof the writs are now called for. It was *replied*, That thirlage being a servitude, and so odious of its own nature, the heritors, who are alleged to be thirled, may call for production of the whole writs and evidents, whereby they are alleged to be thirled, and may crave improbation thereof. THE LORDS did only sustain the improbation, for producing of all personal obligations, decreets, or acts of thirlage, whereby the heritors had constituted themselves liable to grind at the mill; and, therefore, that Deuchar was only obliged to produce such writs or evidents, whereby Arnistoun his predecessors or authors were obliged to grind at the said mill, whether they were contained in contracts, or any charters belonging to Deuchar and his authors.

Gosford, MS. No 802. p. 504. and No 814. p. 513.

*** This case is also reported by Dirleton.

1675. December 8.—WHEN lands are pretended to be thirled to a mill, the heritor has good interest to pursue an improbation against the heritor of the mill, of all rights and writs, bearing express constitution of the said servitude; but that general, *viz.* that the defender should produce all writs which may import thirlage, ought not to be sustained; in respect there may be writs importing thirlage consequentially, which the defender is not obliged to know what the import of the same may be; and it were hard, that, upon pretence of such an interest, the defender should make his charter chest patent to the pursuer; and the pursuer has a remedy, if he apprehend that the defender may trouble him, upon pretence of writs, which may import consequentially thirlage, he may force him to produce the same, by intending a negatory action and declarator of freedom.

Dirleton, No 312. p. 153.

1680. February 13.

EARL of MARR *against* The MARQUIS of HUNTLY, and Others.

THE Earl of Marr being infeft in the Earldom of Marr, and Lordship of Garrioch, pursues reduction and improbation against the Marquis of Huntly, and others, for reducing and improving their rights of certain lands, expressed

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In a case similar to Hay against the Town of Peebles, No 49. p. 664. the LORDS assign-

in the libel. The defenders *allege* no process, upon the pursuer's title produced, because the lands in question are not contained therein. The pursuer *replied*, That his infeftment of the Earldom of Marr having no enumeration of the particular lands, must be effectual to obtain certification *contra non producta*, which can only import, that if the lands in question be parts of that Earldom, the defenders must produce; but, if they be certain, and put the matter upon that hazard, that the lands in question are no parts of the Earldom, but were either never of it, or were dismembered from it, before any of the pursuer's titles produced, any certification against them will operate nothing, otherwise there could never be improbation upon the general designation of Barony or Earldom, such having no enumeration of parts, which is most ordinary. The defenders *duplied*, That, if the pursuer had only insisted for certification against all rights of the Earldom of Marr, or any parts thereof, there might have been some pretence; but, when he insists against particular lands named, it were absurd to conclude, that all the defenders rights thereof should be declared false and feigned, unless they were produced, for so he might force the whole kingdom to produce their whole writs; therefore, he must either libel, or reply, that the lands in question are parts of the Earldom of Marr, and must prove the same before they be obliged to produce, otherways he may force any man in Scotland to produce his rights upon the sole assertion, that they are parts of the Earldom of Marr; but the LORDS have found, in the case Hay against Town of Peebles, No 49 p. 6642. that part and pertinent behaved to be proved before any term were taken to produce. It was *triplied*, that the LORDS since have ordinarily assigned a term to produce; and ordained the pursuer, at the same time, to prove part and pertinent of lands not enumerated, by which neither party is prejudged; for, part and pertinent must be first proved, which form will allow to advise the probation, as to part and pertinent, summarily at that term; and, if it be proved, the defenders must then produce, or suffer certification, in the same way as any reply is to be proved, which does not acknowledge the defence.

THE LORDS assigned a term to the pursuer to prove part and pertinent, and the same term to the defender to produce, in case the same were proved, with certification, &c.

Fol. Dic. v. 1. p. 446. Stair, v. 2. p. 755.

. Fountainhall reports the same case :

THE Earl of Marr against the Marquis of Huntly, and others, for improbation of all rights of the Lordship of Garrioch, which he derives as heir to Dame Isobel Douglas, who was infeft in 1426. *Alleged*, Their lands were not in his infeftment. He offered to prove part and pertinent. THE LORDS ordained them to take a term to produce, and the Earl to prove part and pertinent.

Fountainhall, MS.

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