yet he cannot quarrel a real right by infeftment; unless he produce his predecessors infeftment, and his own infeftment as heir to him. No 52.

THE LORDS would admit no certification till the predecessors infeftments were produced.

Fol. Dic. v. 1. p. 443. Stair, v. 2. b. 221.

1675. *November* 17. MURRAY *against* DUNDAS.

No 53.
A pursuer insisted in a reduction of all rights belonging to the defender, relating to certain land, alleged to be part of the pursuer's property. Found, that the pursuer must prove this averment, before the defender can be obliged to produce.

When lands are pretended to be thirled to a mill, the proprietor has good interest to pursue an improbation against the heritor of the mill, of all rights and writs, bearing express constitution of the servitude.

PATRICK MURRAY of Deuchar, as being infeft in the lands and barony of Temple, pursues reduction and improbation against Sir James Dundas of Arniston, of all his right of the lands of Halkerton, Castleton, Esperton, Hoodspeth, and Hobourn.—It was *alleged* for Arniston, no certification, because the pursuer produces no title; for his infeftment produced doth contain none of the lands libelled, but only Esperton, for which the defender craves a term to produce.—The pursuer *answered*, That he offered him to prove that the remanent lands were part and pertinent of the lands contained in his infeftment.—It was *replied*, That the said lands cannot be claimed as part and pertinent, because the defender produces his infeftments thereof, *per expressum*, and offers to prove that he hath been 40 years in possession by virtue thereof, and so they are distinct tenements, severally kend and known, and therefore the pursuer cannot be admitted to prove them part and pertinent of his lands.—The pursuer *duplied*, That it was sufficient for him to prove the lands part and pertinent, because most baronies, and many other tenements, had one common name, and had not the particular lands comprehended and enumerated; neither can the defender's possession 40 years secure him against improbation, because in the act of prescription 'falsehood is expressly excepted,' and therefore the defender must produce, to the effect the pursuer may improve the writs as false, and then the defender's naked possession without a title, can have no effect. 2*do*, The pursuer hath another ground to enforce the defender to produce, viz. That by his infeftment produced he hath right to the miln of Temple; and if the defender will produce his rights, it will appear thereby that they are burdened with a thirlage to the miln of Temple.

THE LORDS found, That for such lands as the pursuer was not expressly infeft in, albeit the defender produced no right thereof, yet before he were obliged to take terms to produce or suffer certification, the pursuer must first prove the lands in question to be part and pertinent of the lands contained in his infeftment, conform to his answer; but found the reply relevant to elide the same, 'that the defender is specially infeft therein, and 40 years in possession 'thereof,' and that thereby they are distinct tenements, and not part and pertinent; and that though there were interruption, yet the allegeance of part and pertinent is thereby excluded; and though the pursuer may proceed to declare his right of property, yet he cannot force the defender to produce his rights by

No 53. way of certification; but as to the lands that neither party is infeft expressly in, if both allege them to be part and pertinent of the lands whereinto they are infeft; the Lords allowed witnesses to be adduced for either party, for clearing the possession. But the Lords found that the pursuer could not crave certification upon the pretence that the defender's right contained a thirlage, but that he could only proceed by declarator for that effect, and might by incident get the defender to produce his writs *ad modum probationis*.

Dec. 7.—Arniston pursues a reduction and improbation against Deuchar, and insists for certification against all bonds or writs, constituting thirlage upon the pursuer's lands libelled, whereof he produces infeftments holden of the King, without any thirlage. The defender *alleged* no certification, because the pursuer's libel is not relevant to compel him to produce all his infeftments and rights of his lands and mills, upon pretence to free the pursuer of any thirlage that may thence arise; and, therefore, it was found this Session, betwixt the same parties, that Deuchar had no interest to pursue improbation of the rights of Arniston's lands, because, if his rights were produced, there is therein a constitution of thirlage. It was *answered* for the pursuer, That he had libelled most relevantly; for it is competent to any man to reduce or improve bonds, or other writs constituting thirlage, and he doth insist no further; neither doth it make any difference whether such constitution of thirlages be contained in the infeftments of the defender or not; nor can there be any hazard of opening of mens charter chests, or of producing their infeftments; because, though the pursuer were to insist in a declarator, he might force the defender *ad modum probationis*, to produce any right, even to prove against himself; and it is sufficient interest to improve a whole writ, that it contains an article prejudicial to the pursuer, which, therefore, he may remove. It was *replied*, That there is also in this process a declarator, which is far more competent.

The Lords sustained the interest for production of all writs containing an express thirlage, whether in infeftments or otherways; but declared, that it should not extend to consequential and illative thirlages, such as possession of multures, as being the mill of the barony, or being a King's mill, &c.

Fol. Dic. v. 1. *p.* 445. *Stair, v.* 2. *p.* 370. & 376.

*** This case is also reported by Gosford:

1675. *November* 17.—There being mutual declarators and improbations raised at the instance of Sir James Dundas of Arniston, and Deuchar, against others, wherein there was a day assigned to both parties to produce their rights; upon bills given in by both parties, as to the satisfying of the production, in relation to the improbation, it was craved by the Lord Arniston, that he should not be obliged to produce any rights, as to any of the lands libelled, except as to the lands of Hesperton, wherein Deuchar stood particu-

larly infeft; but, as to the rest of his lands, he was not obliged to produce in the improbation, Deuchar having no particular infeftment in these lands, without which he could have no title to pursue an improbation; whereas, Arniston was particularly infeft therein, and had been in possession for the space of 40 years, without interruption. It was *answered* for Deuchar, That, notwithstanding, the production ought to be satisfied, as to all the lands libelled, or certification granted, because he had a sufficient title to pursue an improbation, in so far as he not only stood particularly infeft in the lands of Hesperton, but likewise in the lands and barony of Temple, with the pertinents and parts, which gave him a sufficient title to pursue an improbation of these lands, which he offered him to prove, were parts and pertinents of the barony of Temple. 2*do*, He had a right to the feu-duties of these lands, for which he did yearly make an *æque* in the Exchequer. 3*tio*, He was particularly infeft in the mill of Ballintrado, within which barony all these lands are comprehended, and were particularly thirled to the said mill, as being the mill of the barony, and so had good interest to pursue an improbation, that Arniston's rights might be produced, that he might know the tenor thereof. THE LORDS, having seriously considered what was alleged by both parties, did find, that, as to the lands of Hesperton, wherein Deuchar was particularly infeft, his improbation should be sustained; but, as to the rest of the lands, wherein he had no particular infeftment, but only a thirlage to the mill of the barony, which was a servitude, that could be no title of improbation; and, as to his right of feu-duties, payable out of his lands, for which he counted to the Exchequer, it could give him no title to pursue an improbation, but only for payment of the feu-duties; neither could his infeftment in the lands of Temple, with parts and pertinents, be a title to pursue an improbation against Arniston, who stood particularly infeft in all these lands, and had been 40 years in possession, without interruption, which was sufficient to defend both in an improbation and declarator of property; and that, notwithstanding it was alleged, that prescription, by the act of Parliament, cannot defend against falsehood in an improbation. The great reason of the interlocutor being, that, by the act of Parliament anent prescription, that defence is only to be sustained where the pursuer of an improbation stands particularly infeft in the lands, whereof the rights are craved to be improved, and thereby hath right either to property or superiority, and ought to be extended to a right of thirlage, out of other lands, and to a right of feu-duties out of lands wherein they have no special infeftment, all improbations being of their own nature odious; and that, without a special infeftment to sustain an improbation, it would open a door to cause all proprietors produce their rights, and give inspection thereof to others, which would produce infinite pleas. No 53.

1675. *December* 8.—IN the fore-mentioned mutual improbations betwixt the said parties, there being an interlocutor, finding that Deuchar could not

No 53. 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 obligements, 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 intenting a negatory action and declarator of freedom.

Dirleton, No 312. *p.* 153.

No 54. In a case similar to Hay against the Town of Peebles, No 49. p. 6642. the LORDS assign-

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