quhan by John Gilmor, he assigned the apprising to John Whiteford, who assigned or disponed the same to Kilkerran; in which assignation, there was an express reservation of the multures of Dalmorton to the mill of Sklintoch; upon which infeftment, the Earl received Kilkerran in these lands, who is author to the present vassal. No 3.

THE LORDS found the clause aforesaid in John Whiteford's charter not to infer a servitude of the lands of Dalmorton, not being therein expressed, and holden of another superior; nor no decreets nor enrollments of court, alleged to astruct the servitude. And found also the second reason relevant, viz. That the Earl as superior, not having consented, was not prejudged by any deed of the vassal's. But as to the *third* point, the LORDS found, that the reservation in Kilkerran's right, unless it were *per expressum*, contained in the charter subscribed by the Earl of Cassillis, could not infer his consent, albeit the charter related to a disposition containing that clause; but if it were alleged to be expressed in the charter, they ordained, before answer, the charter to be produced, that they might consider the terms of the reservation. *See* WARD.—THIRLAGE. *Stair, v.* 1. *p.* 410.

1673. *January* 23.

ALEXANDER, WILLIAM, and THOMAS FORBESES *against* FORBES of Pasling.

No 4.
A legacy of 1000 merks out of the rests in the tenants hands, is not a special legacy for which the legatee himself can pursue, and therefore has only action against the executor.

THE saids Alexander, William, and Thomas Forbeses, having a legacy of 1000 merks left them by their goodsire, did intent action against Forbes of Pasling, as executor nominated and confirmed, for payment thereof. It was *alleged*, That the pursuers legacy was *speciale legatum*, viz. 1000 merks to be paid out of the rents of the lands due by the tenants; but so it is, that the tenants were owing no rests, having paid the rests to the defunct; and, the most that the executor was obliged to do, was to assign the pursuers, which he was content instantly to perform. It was *replied*, That albeit the tenants were not due in any sum, yet the legacy ought to be fulfilled, there being sufficient moveables to pay the whole debts and legacies; and, where there is *speciale legatum*, albeit the same should perish as to the being or substance of the thing itself, yet the executor is obliged *prestare valorem*, as was found, 24th June 1664, Falconer against M'Dougall, *voce* QUOD POTUIT NON FECIT, where a sum of 1000 merks due by the Earl of Murray, being left in legacy, and assigned by the defunct in his own time, his executor was found liable to pay the like sum to the legatar. THE LORDS did sustain the action against the executor; and found, that an offer to assign was not sufficient *post tantum tempus*, he never having done diligence against the tenants; but did not give their interlocutor *in jure* upon the first point, supposing that the defunct had truly uplifted in his own time, if, in that case, the executor should be liable; as to which, it is thought he should be liable, albeit it

No 4. be *speciale legatum;* seeing, by the law, if a defunct should leave that which belongs to another, and not to himself, his executor is liable *prestare valorem*, and a special legacy is *in favorem* of the legatar, and so cannot put him in a worse condition than a common legatar.

Fol. Dic. v. 1. *p.* 338. *Gosford, MS. No* 559. *p.* 301.

*** This case is reported by Stair, No 14. p. 2263.

1673. *July* 29. DUNDASS *against* SKEEN.

No 5.
A thirlage was found constituted by infeftment of a mill from an ecclesiastic, *cum astrictis multuris omnium et singularum terrarum de Aldliston*, being before the defender acquired his lands, though it was alleged for him, that his lands were the mains or dominical lands of the barony, which could not be understood thirled by a general clause, more especially as it could not be proved that these lands paid astricted multures before or since the constitution of the thirlage.

DUNDASS of Breastmill pursues a declarator of thirlage of the lands of Hallyards to the mill of Breastmill; and, because Hallyards was building a new mill within that thirle, by petition he desired that the cause might presently be heard, or the work to be stopped; whereupon the LORDS having ordained the parties to produce their rights, Breastmill produced an infeftment of the mill from the preceptor of Torphichen, bearing, *cum astrictis multuris omnium et singularum terrarum de Aldliston, et cum servitiis tennentium earundem*, which being before Hallyards' original right, did constitute the thirlage. It was *alleged* for Hallyards, That his lands being the mains or dominical lands of the barony, could not be understood to be thirled by this clause, unless it were proven that they paid astricted multures then; but they neither paid any then, nor since. *2do*, Though this clause could thirle them, yet they had recovered liberty by prescription; because it is offered to be proved, that past memory Hallyards did without controul, go to other mills, sometimes for ten or twelve years together; and when he came to Breastmill, paid only out-sucken multure, and that there is an in-sucken multure of a greater quantity, which did more import his acknowledged liberty, than if for 40 years he had never come to the mill. *3tio*, Though he were thirled, he might build a mill upon his own ground, not being *in emulationem vicini*, because he might have the multure of neighbouring lands that were not thirled at all. It was *answered*, That prescription is taken off by any possession; which, though it may abate the multure to less, it cannot take away the astriction; and that no man can build a mill within the thirlage of another; and alleged a decision observed by Haddington, in the case of Hardis mill, *anno* 1622, *voce* THIRLAGE.

THE LORDS found that there was a thirlage constituted by the charter, but the prescription of liberation being so doubtful, they found no ground to stop Hallyards building upon his own peril, leaving Breastmill to insist in his declarator as accords. *See* THIRLAGE.

Fol. Dic. v. 1. *p.* 340. *Stair, v.* 2. *p.* 225.