SECT. II.

Relative to Thirlage.—Legacies.—General Clauses in Assignations.—What a General Assignation will carry.

1666. *December* 8. TENANTS of Dalmorton *against* EARL CASSILLIS, &c.

No 3.
A barony was disponed with the mill thereof, and the multures used and wont. The multures of another barony belonging to the disponer were found not to be disponed, though the tenants had been in use of coming to that mill.

THE lands of Dalmorton being a part of the barony of Cassillis, and formerly holden ward by the Lairds of Blairquhan Kennedies, of the Earl of Cassillis; and now being in ward through the minority of the present heritor, who had succeeded in the right of the said lands, being acquired from the Laird of Blairquhan; the Tenants of the said lands pursued a multiplepoinding against the E. of Cassillis and Whiteford now of Blairquhan, and the heritor of Dalmorton; all pretending right to the multures of the said lands. The E. of Cassillis *alleged*, That during the ward they should bring their corns to his mill of the barony of Cassillis, there being no mills upon the lands of Dalmorton. The Laird of Blairquhan *alleged*, That he was infeft in the lands of Blairquhan and in the mill of Dalhovan, upon a right granted by Kennedy of Blairquhan *cum astrictis multuris et usitatis;* at such a time as Blairquhan had right to Blairquhan and Dalhovan, and to the lands of Dalmorton; and that before the said right granted by Kennedy of Blairquhan to John Whiteford of Ballach, author to this Laird of Blairquhan, the Tenants of Dalmorton were in use to come to the said mill, and to pay the like multure and service as the Tenants of Blairquhan did; and since the right, have been in use to come constantly to the said mill. It was *answered* for Cassillis, That unless there were an express constitution of thirlage, the said lands of Dalmorton (being a distinct tenement from the lands of Blairquhan, which hold of the King) cannot be alleged to be astricted to the said mill of Blairquhan; and if it had been intended that the lands of Dalmorton should have been astricted, it would have been expressed; and when the same did belong to Kennedy of Blairquhan, it cannot be said that it was astricted to his own mill with the foresaid servitude, *quia res sua nemini servit;* and he having disponed his mill, it cannot be presumed that he would have burdened his own lands with a servitude; and, though it were clear Kennedy had astricted the said lands of Dalmorton, yet he could not constitute a servitude without the superior's consent in his prejudice, when the lands should ward in his hands. It was *replied* by Whiteford of Blairquhan, That the superior had consented to the thirlage, in so far as John Gilmor and one Bonar, having comprised the said lands of Dalmorton from Kennedy of Blairquhan, and having assigned their said comprising to John Whiteford, the said Whiteford, by contract, did assign the same to Kilkerran, with a reserva-

No. 3. tion of the multures thereof to the mill of Dalhovan; and the said E. had granted a charter to Kilkerran upon the foresaid right.

THE LORDS thought, That these words *cum multuris usitatis*, do relate only to the quantity of the multures as to such lands as can be shown to be astricted; but, before answer to the debate upon the said charter and reservation, they ordained the charter and contract containing the reservation to be produced, that they might consider, whether it be in the charter, and how it is conceived; and what it should operate if it were only in the contract.

THE LORDS inclined to think that a clear reservation, though there were not a preceding thirlage, should import a constitution, as to those who accept or consent to such a reservation. *See* THIRLAGE.

Fol. Dic. v. 1. *p.* 340. *Dirleton, No* 58. *p.* 24.

*** Stair reports the same case:

AN action of double poinding at the instance of the Tenants of Dalmorton, against the Earl of Cassillis on the one part, and John Whiteford of Blairquhan on the other, both claiming right to their multures. It was *alleged* for the Earl of Cassillis, That the lands in question being holden ward of him, are now in his hands by reason of the ward of Knockdaw his vassal; he had now right to their multures, and they ought to come to the mill of his barony, whereof these lands were pertinent; and shew his infeftment, containing the lands of Dalmorton *per expressum*. It was *alleged* for John Whiteford, That he ought to be preferred; because, that Kennedy of Blairquhan, the Earl's vassal, both of the lands of Dalmorton and Blairquhan, had disponed to him the lands of Blairquhan and mill of Sklintoch, with astricted multures, used and wont; at which time, Blairquhan caused his tenants of Dalmorton to come to the said mill of Sklintoch; whereby the thirlage was not only constituted of the lands of Blairquhan, but of Dalmorton. It was *answered* for the Earl; *first*, That the thirlage of Dalmorton could not be constituted by the said clause; because the lands of Dalmorton being no part of that barony, whereof the mill of Sklintoch is the mill, but a distinct tenement, holding of a distinct superior, such a general clause could never have constituted a thirlage, unless the lands had been expressed. 2*dly*, Albeit the servitude had been constituted ever so clearly by the vassal, yet, if it was without the superior's consent, it could not prejudge him by ward or non-entry. It was *answered* for John Whiteford to the *first*, That the clause was sufficient to constitute the thirlage; and, if it wrought not that effect, it was of no effect; because the hail lands of the barony were disponed with the mill, and neither needed, nor could be thirled; and therefore, the clause of thirlage behoved to be meant of some other lands. 2*dly*, Vassals may lawfully constitute servitudes without consent of the superior which are not evacuated by ward or non-entry. 3*dly*, It is offered to be proven, that the Earl consented to the right multure, in so far as the lands of Dalmorton being apprised from Blair-

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