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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.

No 5.

1673. July 29.

DUNDASS against SKEEN.

A thirlage was found constituted by infestment 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 infestment 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.