

1672. *January 16*, and *June 20*. SANDILANDS of Couston *against* The EARL of Hadington.

*January 16*. IT was this day debated, whether a man having sold lands with absolute warrandice, and that they were free of all incumbrances and inconveniences whatsoever; the buyer afterwards finds they owe a servitude of thirlage, pasturage, or the like, to his neighbour's mill or lands; the question is, if he will get relief of the seller, upon the clause of absolute warrandice, because of this servitude or burden. *Advocates' MS. No. 299, folio 124.*

*June 20*. IN this action came to be debated that question marked by me *supra* at No. 299. The Earl disposes some lands to this defender, with absolute warrandice from all wards, reliefs, non-entries, recognitions, &c. and from all dangers, burdens, and inconveniences whatsoever, as well not named as named, &c. as also he disposes the lands *cum molendinis et multuris*. Before the disposition, there is a bond of thirlage of thir lands given by the former heritor to another man's milne. Couston finding so considerable a servitude and burden upon his lands, pursues the seller upon the warrandice for relieving him thereof; and ALLEGES, that where he had bought these lands at eighteen years purchase, he would not have given fifteen if he had known them to be affected with such a burden; that it would put us all to immeasurable trouble, if they should not sustain prior thirlage to be a contravention of the warrandice; that the general clause, of all other burdens should then have no signification; and that thirlage, pasturage, and all other things that can any ways make land of less value, must hereafter be specially inserted and warranted against. It may be as well said that a prior infetment of annual-rent granted by the disponent falls not under the warrandice, seeing it is but a servitude no more than thirlage. *Vide omnino l. 75 D. de Evictionibus, ibique DD.*

The Lords found that a man selling lands with absolute warrandice did not thereby oblige himself that the lands were free of astriction; and therefore found a constitution of a thirlage by the disponent, prior to his disposing, no contravention of his absolute warrandice.

My Lord Chancellor carried it in behalf of his nephew; but my Lord President reclaimed exceedingly, and protested it might not be a preparative for other decisions in time coming.

*Vide Joan. Superioris proœmium ad T. de Servit. in fine cap. Vide leges 169 and 189 D. de verborum significatione, ibique Alciatum et Wissembachium. Advocates' MS. No. 343, folio 135.*

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1672. *June 22*.

ONE being pursued for payment of a sum, he ALLEGED the same was a public debt, contracted upon the occasion of the late troubles; and that by act of Parliament in 1669, these debts were all suspended till they should give farther order thereanent.

REPLIED,—That the said act of Parliament has been found by the Lords to suspend only such debts as were contracted by the committee of estates, but not those which were only due by the committees of shires; of which last kind this debt now sought is. *Item*, that it is their own fault they are not paid, since in Middleton's Parliament they got a commission for stenting the shire till they were repaid.

DUPLIED, the Lords have made no such distinction of public debts; and that nothing can be imputed to them why they made not use of the said commission, because the said act of Parliament has supervened as *medium impedimentum*; and as it suspends all public debts, so also does it tacitly suspend their commission.

*Advocates' MS. No. 345, folio 136.*

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1672. June 22. KER *against* SCOT of Horsliehill.

ONE Ker pursuing Scot of Horsliehill to make arrested goods forthcoming, the process was casten, in regard the arrester had not called Bell of Belford, his principal debtor, who, if he were cited, might allege the debt to be paid.

*Advocates' MS. No. 346, folio 136.*

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1672. June 22. The TOWN OF DUNDEE *against* The EARL OF FINLATER.

AT this time I got account of an action pursued lately by the town of Dundie, against the Earl of Finlater. The case was, the town having suffered a prisoner to escape, and being convened to pay the debt, there is decret given against them *in foro contradictorio*; whereupon they capitulate with the creditor, and pay him upon this condition, that he pursue the Earl of Finlater as oy and heir to the deceased Earl of Finlater, who was cautioner in the bond; which he condescends to.

It was ALLEGED for Finlater, that he offered him to prove, by the pursuer's oath, that this pursuit was to the behoof of the town of Dundie. Which being granted by him, then he alleged that there could be no process at the town's instance against him, who was only the oy and heir of a cautioner, because what they had paid it was *in pœnam delicti*, whereof they could have no repetition save off the principal debtor, whom they suffered to escape furth of their prison. *Quod a quoquam pœnæ nomine exactum est, id eidem restituere nemo cogitur; pœnæ depensæ repeti non solent; l. 46 D. de regulis juris.* That they are now come in place of the debtor, who could never have pursued him, *ergo*, neither can the town. *Vide etiam l. 203 D. de R. Juris.*

They say that the Lords assoilyied him from the pursuit. I think it was very hard measure.

*Advocates' MS. No. 347, folio 136.*