

1672. June 21. SANDILANDS *against* EARL of HADDINGTON.

The deceased Earl of Haddington, this Earl's grandfather, having disposed the lands of Coustoun with absolute warrantice, *in anno* 1610, William Sandilands having now right, pursues this Earl as representing his goodsire for declaring of the distress of the lands, by a bond of thirlage, granted by the Earl's author, astringing the lands to the mill of Torpichen, for payment of the nineteenth curn. The defender alleged, That the clause of warrantice being general, without mentioning astringing, it was not contravened by the bond of thirlage, because it infers no eviction of the lands, but such an ordinary burden as lies commonly upon lands, especially being feu-lands, astringed to the mill of a Barony, whereof they are parts, and which the buyer is presumed to know, and is obliged to enquire after; for eviction is not extended to a visible or known defect, as if the thirlage had been contained in the rights of the lands disposed; *2do*, No general warrantice can be extended to servitudes, which do not evict but affect the property, otherwise eviction would take place as to ways, aqueducts, or the like; and even a servitude of pasturage would not infer eviction, and therefore thirlage being but an ordinary servitude, should not be comprehended in the clause of absolute warrantice. It was answered, That the general clause of absolute warrantice doth always express or import, that the right disposed shall be free, safe, and sure, of all dangers, perils, and inconveniencies; and by that clause, where any thing is sold *uti optimum maximum*, the law beareth expressly that it should be free of all burden, L. 90. D. De verborum significatione, Qui, uti optimæ maximæque, ædes tradit, non hoc dicit servitutem illis deberi, sed illud solum ipsas ædes liberas esse, hoc est nulli servire, et L. 169. Eodem titulo, where the like is generally asserted, as the meaning of the said clause; and therefore as annual-rents and tacks which are most ordinary, do infer eviction, by a general clause of warrantice, though not expressed; so much more thirlage, which is so heavy a burden, and oftentimes extends to the thirteenth curn, and here to the nineteenth, and is a considerable part of the value of the land; and here in the charter, mills and multures are expressly contained in the *tenendas*; which shows that thirlage was under consideration of the parties; and albeit general warrantice would not extend to ways or aqueducts, which may be seen by the eye, or to servitudes relating to pleasure, as prospects, &c. or to such a thirlage as hath no considerable detriment, as being very small, yet to such a heavy servitude as this, it must extend. It was replied, That this thirlage is but very light, and that it was obvious to the buyer to know or enquire, whether this land being a part of the Barony of Torpichen, was thirled to the mill of Torpichen, and that he and his authors having continued at that mill for so long a time, without pursuing any action of eviction, it is an evidence what was the meaning of the parties from the beginning.

No. 53.  
Absolute and general warrantice was found not to extend to thirlage of the lands to the mill of the Barony for a light thirlage, but it was not determined that no thirlage could infer warrantice.

No. 53.

The Lords found no recourse upon the warrantice, as to this thirlage, as it is here circumstantiated, but did not determine, that no thirlage could infer warrantice at this time, nor yet that all servitudes would infer warrantice.

*Stair, v. 2. p. 86.*

\* \* \* Dirleton reports this case :

Thomas, the first Earl of Haddington, having disposed certain lands, with absolute warrantice, *in anno* 1610, the now Earl of Haddington was pursued as representing his great grandfather, to warrant the said lands from astriction to the mill whereunto they were astricted, before the Earl of Haddington disposed the same. It was alleged, That the warrantice doth not extend to the case of servitudes, such as common pasturage, thirlage, and such like, which are not latent, and may, and are presumed to be known by purchasers; who ought, and do ordinarily enquire and inform themselves concerning the condition and burdens of the lands they intend to purchase, specially in the case in question, the multure being not exorbitant. It was replied, That in law where *prædia* either *rustica*, or *urbana*, *ut optima maxima*, are disposed, they are disposed as *libera*; and that the lands in question are so disposed, it is evident, in respect the warrantice is absolute, and they are disposed *cum molendinis et multuris*. It was duplied, That the Romans were in use to dispose either simply, or *cum ista adjectione, prædia ut optima maxima*, the import whereof was, *servitutum non deberi*: But where lands are disposed simply, it is construed and presumed in law, that they are disposed *talia*, and such as they are; and with such accessories, either as to burden or advantage, as *tacite veniunt*, albeit these be not expressed as servitudes either active or passive; and as to the warrantice, it is of the ordinary stile without mention of servitudes; and it appears from the stile and conception of the ordinary clause of warrantice, and the speciality therein mentioned, viz. wards, non-entries, inhibitions, apprisings, that such incumbrances are only intended, whereby the right or possession of lands, or the mails and duties, or any part of them are evicted; whereas, in the case of astriction, the heritor doth enjoy his lands and duties of the same entire; and seeing his corns must be grinded, it is not a material prejudice, that they should be grinded rather at one mill than another; and it appears by the disposition, that it was not *actum* and treated, that the said lands should be disposed *ut optima maxima*, the warrantice being in the ordinary terms without mention of servitudes; and the clause *cum molendinis* is only in the charter and *tenendas*, and is *ex stilo*, and imports only freedom of thirlage as to the disponer.

The Lords upon the foresaid debate, and that the mill was a mill of the Barony of Torphichen, whereof the lands astricted are a part, and that the same were astricted before the Earl of Haddington acquired the same, they found the defence relevant and assoilzied.

*Dirleton, No. 173. p. 69.*

\* \* \* Gosford also reports this case :

No. 53.

In an action of warrantice pursued at Coustoun's instance against the Earl of Haddington, as representing his grandsire by progress, upon this ground, That his grandsire had disposed to the pursuer's authors *in anno* 1610, the lands of Coustoun; by a charter bearing *cum molendinis et multuris*, and a clause of absolute warrantice against all burdens whatsoever, and yet notwithstanding the feuers of the mill of Torphichen had obtained a decret against the pursuer for paying of astricted multures to the said mill, and there concluded, that that being a burden upon the lands, the Earl ought to relieve him thereof. It was alléged for the defender, That the charter whereupon the summons was founded could be no ground for any such warrantice, seeing the clause *cum molendinis et multuris* was not in the dispositive clause, but only in the *tenendas*, and at most could only infer an exemption of thirlage from the disponder's mill; whereas the pursuer is distressed upon a prior thirlage to another mill before the said charter, and in law is only interpreted to give a liberty to build a mill upon the ground disposed. And for the clause warrantice, it cannot be extended to a thirlage, seeing they are only intended to secure and warrant lands and heritages from all prior rights and incumbrances, such as prior infeftments of annual-rents or wadsets, wards, and marriages, and such other rights as may hinder the possession of the lands disposed; but for thirlage, common pasturage, and the like, which are only real servitudes, and hinder not the possession of lands and heritages, out of which they are due, they are not comprehended under the clause of absolute warrantice. It was replied for the pursuer, That the clause of warrantice being to warrant from all perils, dangers, and inconveniencies whatsoever, which can diminish the benefit and advantage of the lands, which are not excepted out of the warrantice, are therein comprehended, and the disposition not being of any special title, or for all such rights which the disponder hath, but simple and absolute, it is clear in law, *L. 90. D. De Verborum significacione*, that it comprehends a security from all servitudes, where the words, *qui uti optimæ maximæque, ædes tradit, non hoc dicit servitutum illis deberi, sed illud solum ipsas ædes liberas esse hoc est nulli servire*; which law hath thereafter in that same title, *L. 169. reference to emptio et venditio* which is our case.

The Lords did sustain the defence, notwithstanding of the reply, wherein, besides the ground of law whereupon the same was founded, there were these specialities; that the thirlage was not constituted by the disponder, but long before he had right himself; and that since the year 1610, never any action of warrantice or relief was intended, albeit the heritors of these lands had constantly gone to the mill of Torphichen as the mill of the Barony; as likewise, that the said thirlage being only the nineteenth curn, which was not exorbitant, and could not but be known to the first buyer, who had no mill of his own, but behoved to grind his corns at some mill, or be thirled to the mill of the Barony, it could not be thought

- No. 53. in reason, that he intended to secure himself by the clause of absolute warrandice, unless that thirlage had been particularly enumerated amongst the rest of the burdens, seeing hardly in any charter servitudes are set down in the clause of warrandice, and never any action was intended, or decret given upon that ground ; and if it were otherwise sustained, it would open a door to infinite pleas.

*Gosford MS. No. 494. p. 259.*

- No. 54. 1675. February 9. BURD *against* REID.

The Lords having formerly found, That the cedents of personal bonds, are liable only to warrant *debitorum esse*, but not *esse locupletum* ; it was pretended, that there being a question concerning warrandice of a right of annual-rent out of land, the same should be warranted no other way. But the Lords found, That the warrandice of lands, or of such real rights, upon or out of land, are absolute, unless they be expressly limited and qualified by their right.

Clerk, *Hamilton.*

*Dirleton, No. 248. p. 118.*

- No. 55. 1675. July 22. MENZIES *against* CAMPBELL.

A purchaser insisting for possession of the warrandice lands, the principal lands being partly evicted by a wadset, he was found to have access to the full rents of the warrandice lands, applying the superplus, more than the annual-rent of the wadset sum, for payment of the principal.

*Gosford. Stair.*

\* \* This case is No. 51. p. 10652. *voce* POSSESSORY JUDGMENT.

- No. 56. 1676. January 19. MENZIES *against* MENZIES.

No. 56.  
Warrandice  
of lands was  
found not to  
take effect by  
a process  
against the

Menzies of Castlehill infert his second wife, and the eldest son of the marriage, in the lands of Sokartoun with warrandice. William Menzies of Raw having right to this infertment, pursues this Menzies of Castlehill, as heir to his goodsir upon the warrandice, to pay the value of the lands, and the rents thereof 45 years past, upon this ground, that his goodsir before the contract had given an irredeemable