

1800. *January 31.*

CAPTAIN PLENDERLEATH *against* The REPRESENTATIVES of the EARL of  
TWEEDDALE and the DUKE of QUEENSBERRY.

In the year 1680, John, Earl of Tweeddale, patron and titular of the teinds of the parish, disposed the lands of Blythe and Badinsgill, with the teinds, parsonage, and vicarage, to David Plenderleath, his son, his heirs and successors. The disposition proceeded on the narrative, "that certain considerable and great sums of money," had been paid to the Earl. The lands and teinds were to be held of the Earl, for payment of £10. 13s. 4d. Scots, of yearly feu-duty. The Earl assigned all right to the teinds in his person, and the disposition contained the following clause of warrantice; "And sicklike, to warrant the said lands, teinds, annuities, and pertinents thereof, to be free from all payment of any other duty and service, by any person or persons whatsoever, except the blench and feu-duties above expressed, payable to the superior in manner above specified, and from all other perils, dangers, and inconveniencies whatsoever, as well named as not named, bygone, present, and to come, at all hands, and against all deadly, as law will; excepting always forth and frae the warrantice immediately above expressed, the number and quantity of two bolls victual, whereof one boll and one other boll payable yearly out of the said lands of Badinsgill, and parsonage teinds thereof to the Minister of Linton, on one part of his legal modified stipend, allennarlie, in satisfaction of all that he or his successors can ask or crave, as due forth of the said lands of Blythe and Badinsgill, teinds, parsonage, and vicarage thereof: And likewise we, the said Earl of Tweeddale, bind and oblige us, and our foresaids, as patron of the kirk and parochin of Linton, titular of the teinds thereof, for the said David Plenderleath, his said son, and his foresaids, their further security and more peaceable possessing, bruiking and joying of the teinds of the said lands of Blythe and Badinsgill, in all time hereafter, to make, grant, and subscribe, in favour of the said David Plenderleath, his said son, and his foresaids, after expiring of the tacks of the said teinds now running, whereunto they are assigned in manner above written, new, sufficient, and valid tacks and assedations thereof, from time to time, for payment of one penny Scots, in name of tack-duty, and of the said two bolls of victual, payable to the Minister of Linton, forth of the said lands of Badinsgill yearly."

In the year 1696, the Earl of Tweeddale sold the lands and teinds belonging to him in the parish of Linton and county of Tweeddale, to the Duke of Queensberry, including the superiority of the lands of Badinsgill, and giving absolute warrantice as to the whole subjects, excepting certain lands and teinds previously disposed, and particularly those to Mr. Plenderleath. The disposition "excepted from the hail clauses of warrantice above mentioned, of the teinds of the foresaid five parishes, all augmentations of stipend that shall hereafter be granted to the Ministers of the said five kirks, and that shall be imposed upon the said teinds,

No. 95.

A clause in a disposition of lands and teinds, warranting them, to be free from "any other duty and service," except the feu-duties there mentioned, and two bolls of victual-stipend payable to the Minister, does not include warrantice from future augmentations.

NO. 95. after the decease or removal of the present incumbent, which shall nowise be comprehended under any of the clauses aforesaid : Declaring always, that we shall be liable and obliged for any augmentations that shall be granted to the Ministers presently serving the cure thereat, during the life-time, or continuing to serve the cure, and that at the rate above-mentioned."

In the year 1732, Plenderleath sold the lands and teinds of Badinsgill to James Dickson, with the following warrantice ; " And further, because the said James Dickson has paid as great a price for the said teinds as for the stock, therefore I bind and oblige me, and my foresaids, (viz. his heirs and successors,) to warrant the said teinds, parsonage and vicarage, of the said lands above disposed, to be free, safe, and sure, to the said James Dickson and his foresaids, from all Ministers' stipends, annuities, future augmentations, and other burdens and impositions whatsoever, imposed or to be imposed upon the said lands, except allenary the number and quantity of two bolls victual, payable yearly to the Minister of Linton, and his successors in office, out of the said teinds, and which victual-stipend above expressed, the said James Dickson, and his foresaids, shall be holden and obliged to relieve me and my successors of, from and after the term of Whitsunday 1732, and in all time coming."

The disposition from the Earl of Tweeddale in the year 1680 was specially mentioned in the clause of delivery, and an extract of it was at the same time delivered to Mr. Dickson.

In the year 1790, the Minister of the parish obtained an augmentation to his stipend, and in the locality a considerable addition was laid on the lands of Badinsgill.

Upon this, Mr. Dickson brought an action of relief against the representatives of David Plenderleath, founded upon the clause of warrantice in the disposition in the year 1732, and he in his turn brought a second action against the representatives of the Earl of Tweeddale.

Lord Monboddo assoilzied the defenders from this last action.

Upon advising a petition, with answers, the Court, (29th November, 1797) remitted to the Lord Ordinary to sist process till the Duke of Queensberry should be called.

A third action was then raised, and Lord Balmuto found, " That the general clause of warrantice, contained in the Earl of Tweeddale's disposition to the pursuer Captain Plenderleath's grandfather in the year 1680, of the lands of Blythe and Badinsgill, with the teinds thereof, does not extend to the allocation of part of the teinds, for payment of augmented stipend, or found the pursuers in the claim of relief now insisted in ;" and therefore assoilzied the defenders.

In a reclaiming petition, Captain Plenderleath.

Pleaded : Warrantice from future augmentation of stipend is not indeed to be presumed in a disposition of teinds ; but the law requires no particular form in which such warrantice must be expressed ; it may either be given *nominatim*, or inferred from circumstances, as clearly indicating the intention of parties. In the

present case, express warrandice from augmentations was not given, and the price paid by the purchaser was not mentioned; but there is every reason to suppose, that the same price was paid for the teinds as for the stock, which would of itself infer warrandice from augmentations; and it is quite clear, from the exception of the stipend then paid to the Minister, that future augmentations were meant to be included in the clause of warrandice.

If the parties had held stipend to be an inherent burden on teinds, to which a general clause of warrandice did not apply, such exception would have been unnecessary; and except as to the present stipend, the teinds were disposed, with absolute warrandice.

Where augmentations are imposed on teinds held in temporary lease, a prorogation of the lease is given to indemnify the tenant; but the pursuer cannot be indemnified in this way, as the Earl was previously bound at all times to grant leases of the teinds, for payment of a penny Scots.

The understanding at that period, that a general clause of warrandice included augmentations of stipend, is evident from the disposition of the Earl of Tweeddale to the Duke of Queensberry, in which it was thought necessary to except future augmentations, from a general clause warranting from all evictions.

In dispositions of church-lands with absolute warrandice, a claim lies on the disponent, when a glebe is afterwards designed from them, though the burden of glebe be not more inherent on church-lands than stipend is on teinds; July 1663, Elphingstone against Lord Blantyre, No. 39. p. 16585. ; 15th July, 1667, Watson against Law, No. 44. p. 16588. ; 20th February, 1683, Bonner against Lyon, No. 64. p. 16606.

The Court, upon the general ground, that it requires express warrandice from augmentations, to give a claim of relief, refused the petition, without answers.

Lord Ordinary, *Balmuto*.

For the Petitioner, *Montgomery*.

Clerk, *Gordon*.

*D. D.*

*Fac. Coll. No. 162. p. 363.*

1800. July 9.

The TRUSTEES of MRS. CALDERWOOD DURHAM, against ROBERT GRAHAM and Others.

Lord Torphichen, in the year 1689, sold the lands of Polbeth to Thomas Flint. In security of the purchase, his Lordship gave real warrandice over the lands of Camelty and others retained by him.

The lands of Polbeth have ever since been possessed, without objection, by Flint's heirs, on regular feudal titles.

In the mean time, the warrandice lands had been twice sold, under burden of the infeftments in security, with personal warrandice from the disponent.

No. 96.  
Certain lands were sold with real warrandice over other lands retained by the disponent. The lands sold.