

a condition is understood to be meant, when not; and here no meaning can be put upon the words other than to imply a condition; the testator intended that his money should not be carried out of the kingdom, and spent abroad, but to be enjoyed by the legatar, in case he came home and lived among his friends: But, even if the intention was, as the pursuers allege, the better to secure payment of the legacy, that it might not be lost, or as an admonition to George to come home, still these show that the legacy was made conditional.

THE LORDS found, That the legacy to George Waddell sailor; was conditional, viz. in case he came home to receive the same; and that he never having come home, the condition failed, and consequently the legacy was not due.

C. Home, No 108. p. 174.

1745. January 8.

SIR JAMES CAMPBELL *against* The PURCHASERS of the ESTATE of MAR.

In the year 1628; John Earl of Mar, who held the lands of Gargunnoch, taxward of the Crown, feued out the same to Arthur Erskine his son, for the feu-duty of L.81 Scots; and, at the same time, granted him an annuity of the like sum on the lordship of Alloa, in which grant was a clause, 'suspending the payment of the said annualrent until the time, and ay and while it should happen, the lands of Gargunnoch, &c. to fall and become in his Majesty's hands, by reason of ward, non-entry, or otherwise.' And by another clause, it is provided, 'That during the time of not ward, &c. the hail force and effect of the said infeftment, and all payment in virtue thereof, should be *simpliciter* suspended, and the said infeftment should have allenary force during the said time of ward and non-entry, for compensation's cause of the said feu-mail and duty, during the space foresaid;' and the Earl thereby granted a perpetual discharge of the feu-duty.

On the forfeiture of the Earl of Mar, Sir James Campbell of Ardkinglass, proprietor of Gargunnoch, expedite, in virtue of the clan act, a charter under the great seal, of the lands of Gargunnoch, to be held as the Earl of Mar had held them, and of the said annuity, and obtained a decree of the Commissioners of Enquiry, 17th November 1723, finding, 'That he was entitled to the annualrent or annuity of L.81 Scots, out of the lordship of Alloa, and that the estate of Mar should be sold, subject to the payment thereof, from the time of the purchaser's entry to the estate, and in all time coming.'

In the minute of sale entered into between the Commissioners and purchasers of the estate of Mar, there is this clause, 'Likeas the said Mr James Erskine and his foresaids, are and shall be burdened with the payment of L. 81 Scots yearly, from and after the term of Whitsunday 1724, and in all time there-

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No 32.

A superior feued lands for payment of a feu-duty, and at the same time granted to a vassal an annuity equal to the feu-duty, and to compensate it, in a certain event. The vassal having afterwards acquired right to the feu-duty, the annuity was found still to be exigible.

No 32.

‘ after, to Sir James Campbell of Ardkinglass, to which he is entitled by our
 ‘ decree passed in his favours, bearing date 17th November 1723, or at least to
 ‘ free and relieve the said Sir James Campbell of the like sum of feu-duty, pay-
 ‘ able to the late Earl of Mar for his lands of Gargunnock, at the hands of all
 ‘ persons having or pretending right thereto, and that for all years bygone and
 ‘ in time coming, and in satisfaction and compensation to the said Sir James
 ‘ Campbell, of the said annuity of L.81 Scots, payable by the said late Earl to
 ‘ him.’

Sir James insisted in a pointing of the ground, in which the LORDS, 14th No-
 vember 1744, “ Found that the lordship and estate of Alloa was subject to the
 annuity of L.81 Scots, payable to the pursuer, and decerned.”

Pleaded for the purchasers, in a reclaiming bill. That they did not think it
 imported them to give the Court much trouble about the first part of the inter-
 locutor, since they admitted the annuity did, in certain events, and *sub modo*,
 affect the estate of Alloa; but they were obliged to apply against the decerni-
 ture in the pointing of the ground, because, by the original constitution of the
 annuity, it was so connected with the feu-duty of Gargunnock, that when the
 one was not due, the other was not exigible; and therefore Sir James being
 now free from the payment of the feu-duty, had no claim to the other, which
 was granted only to serve in compensation thereof.

The decree of the Court of Enquiry, neither did nor could alter the nature of
 the right; it must be understood *secundum subjectam materiam*, Sir James was
 decreed a creditor, and the estate was ordained to be sold, subject to his claim;
 this and no more was the import of the decree, and so the Commissioners un-
 derstood it, as was plain from their bargain with the purchasers, who were most
 onerously so, having paid a full price, and that on the credit of the act 6th,
anno 4to, Geo. I. by which purchasers are declared free of all claims but such as
 shall have been ascertained by the trustees. This exception could not benefit the
 pursuer, because the decree had been so explained as to be perfectly consistent
 with the minute of sale: Were it not so, it was inherent in the nature of a so-
 vereign court to have the power of reviewing, explaining, or altering their own
 sentences; and it was apprehended no decree of the Court of Enquiry was final,
 till the same was executed, by granting a debenture, putting the party in pos-
 session of the estate, or selling it subject to the claim, according to the different
 circumstances of the case: The Court therefore did *optimo jure* explain their
 former decree, by their deed in the minute of sale.

2dly, No decret of pointing the ground could be pronounced, because the
 pursuer had no title to found it upon. A decret of any Court could not be a
 title, and his infeftments were clogged with the condition of the annuity not
 being exigible, when he was free of the payment of the feu-duty. It was true,
 that the charter expedie by him upon the Earl's forfeiture was pure; but the
 LORDS had found, 15th July 1738, “ That the act of Parliament for encouraging

vassals, &c. was sufficient no warrant to the Exchequer for granting that charter."

Answered, It is admitted the annuity was not intended to be exacted, except when by the ward or non-entry of the superior the feu-duty fell to be payable; in other cases, it was to compensate the feu-duty, not that the two rights were to compensate each other, for that was impossible, but that the sums should compensate as they became due; and therefore, if either of these claims were alienated, there could be no compensation, and the other would be exigible. Suppose Gargunnoch to have purchased his own feu-duty, he would still have right to the annuity; and this is exactly the case: Sir James, by claiming on the act of Parliament, has acquired the feu-duty; and it were to rob him of the reward of his loyalty, to take from him the annuity.

The purchasers were not ignorant of the decree of the Court of Enquiry, since reference is made to it in their right; or if they had been so, it was their own fault; for as the trustees had power to determine what should be burdens upon estates, no purchaser could be safe, without looking into the records of that Court. The interpretation sought to be put upon it is unintelligible; for what sense could there be in finding the annuity a burden on the estate, if, according to the petitioner's pleading, it was become extinct by the extinction of the feu-duty. Besides, not only is it decerned for in time coming, but the arrears are so from June 1715, when, according to the petitioner's argument, there could be no claim for arrears.

The respondent knows not how the minute of sale has been made up; but the Court could not, by any private deed between them and the purchasers, alter his right; and, if they had power of altering their interlocutors, which is denied, this ought to have been done *causa cognita*, and Sir James should have been cited and heard.

2dly, The pursuer's infestments are a sufficient title to insist in this action, and the clauses *in gremio* can be no bar, now that the condition is purified. The respondent cannot imagine what further should be necessary; a declarator of the purification is not so; but, if the condition is urged in defence, this may be relied upon: But here there actually is a declaratory sentence in the decree of the Court of Enquiry, and also there is one of the Court of Session, who, in a former process, found this to be a pure and perpetual burden; so that there can be no pretence of defect of title.

THE LORDS adhered.

The interlocutor finding the annuity a pure and perpetual burden, had been pronounced in a process from which the defenders were assoilzied, as being raised without a title. This gave occasion to a debate in this cause, whether the said interlocutor were a *res judicata* or not, which was not determined, the Court having proceeded on the merits of the cause, taking also into consideration the decree of the Court of Enquiry, on which they laid great stress.

Act. J. Campbell, jun.

Alt. J. Macleod.

Clerk, Kilpatrick.

D. Falc. v. I. p. 41.