

1729. November — LOCKART against PURVES.

No 30.

A pension being granted to an advocate for life, 'in consideration of by-gone kindnesses, services, &c. and in respect the granter had left the charge of his law affairs upon him,' was found not to subsist after the granter was made a Lord of Session, because the condition then failed, in view to which the bond was supposed to be principally granted, viz. the management of the granter's law affairs. See APPENDIX.

*Fol. Dic. v. 1. p. 426.*

1738. December 19.

JAMES WADDELL, &c. against WILLIAM WADDELL.

No 31.

A legacy was granted to a person abroad, he coming home to receive it. The legatee died abroad after the death of the testator. Found that he not having come home, the legacy was not due.

GEORGE WADDELL of Abovethell, disposed certain lands to William Waddell his brother, with the burden of 3000 merks to the children of George Waddell his nephew, to be divided amongst them, according to the proportions therein specified; and, amongst the rest, there was one in the following terms; 'To George Waddell sailor 800 merks, he coming home to receive the same.' The said George Waddell (son to George the nephew), to whom the sum was left, outlived the devisor, but died abroad; whereupon a process was brought at the instance of his Executors, against William, for payment of the 800 merks.

*Objected* for the defender; That the legacy was conditional, *in case the legatar came home to receive the same.* *Answered*; The meaning of these words was none other but the better to secure payment to George, that it might not be lost by remitting it to him abroad; or perhaps it carried an admonition or invitation to him to come home. To illustrate which, the case was put, That the testator had said with respect to this legacy, he granting a factory to receive the same. Surely his death before the factory was granted, would not have annulled the legacy, and no more ought his not coming home, seeing his executors in his right might still receive it, conform to *L. 85. D. De condit. et demonst. L. 48. D. De verb. obligat.*

*Replied*; The words of the clause are of the same import, as if it had said to , in case he come home to receive the same; for, in common sense, as well as in law language, the ablative, put absolutely, has the force and effect of a condition; and the supposed case, That the testator had adjoined to the legacy these words, 'he granting a factory to receive it,' is no ways applicable to the present question; seeing no other rational sense could be put upon such a clause than this, that the testator was willing it should be paid to George's factor, though he continued abroad: But, in all cases of this nature, reason and common sense must be the guide, for explaining when

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 infetment, and all payment in virtue thereof, should be *simpliciter* suspended, and the said infetment 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 annual-rent 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-

No 31.

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.