tract, was dated *anno* 1625, and thereupon inhibition served at Sir Alexander's instance against young Durris. Sir Alexander assigns his oye, Alexander Fraser, now of Philorth, thereto: who intents reduction of the right made by young Durris to Staniewood, (and in the reduction he calls the apparent heir of Durris, and this Lord Frazer apparent heir to Staniewood;) and that in so far as the same doth concern the clause anent the payment of the sum of £10,000. It was alleged for the defender, Absolvitor, because the sum is moveable, and cannot pertain to the pursuer as assignee, because the defender or his grandfather has right thereto from ——— Forbes of ———, donatar to the escheat of the said Sir Alexander; and which escheat is declared, and his sum, *per expressum*, declared to belong to the donatar; Sir Alexander also compearing. It was answered, That the decreet could not militate against this pursuer, on this head,—That the grandfather was debarred by horning, and thereby impeded to propone his defences; which could never have prejudged the rebel himself, if he had been thereafter relaxed; *multo minus* his oye, who pursues as having right: and if his grandfather had been heard, he had this defence to propone, from which he was maliciously debarred, *viz.* the sum is heritable, and cannot fall under the compass of the single escheat, because it is payable *intuitu* of an heritable disposition made of an estate, and, in effect, as a part of the full avail and price *pro damno et interesse;* the estate being the ancient fortune and chief house of Philorth, sold far within the avail to Durris, being of his own name, whom Sir Alexander bound up from disponing to any other in his own time, and who provided a reversion to his heir-male, if he should dispone after his death: and the price, being *surrogatum, est ejusdem naturæ* with the bond, and ought to belong to Philorth and his heirs-male, just as the lands would have done if they had not been sold; the contract being clear, and binding Durris not to dispone in Philorth's time; and if he should sell after his death, giving the reversion to his heir for payment of the sum received by old Philorth, which was far within the avail of the land; and to make up the avail, this £10,000 was condescended upon, *pro damno et interesse*, in case of selling *ut supra*. It was replied, That the £10,000 was not a part of the price, but *pœna*, in case of doing a deed prohibited;—that it would have fallen to Philorth's executors;—that Philorth reserved no reversion of the land to himself, but disponed the same irredeemably, only under a prohibitory clause not to sell it to another, which, of the law, is reprobated. Duplied *ut supra*, And that the sum, if Philorth had died, having right, would have belonged to his heir-male, to whom the estate should have appertained, and in whose favours a reversion was conceived *ut supra*, and not to his executors; and such clauses, conceived upon so reasonable and just considerations, are by no law reprobated. Much more was said, *pro et contra, in præsentia*. The Lords found the sum moveable; *me et multis aliis contradicentibus*.

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1663. *June.* GEORGE HOME of FOORD *against* THOMAS WOLFE.

GEORGE Home of Foord obtains decreet against Mr Thomas Wolfe for poinding the ground of his lands of Wedderly, for an annualrent of 100 merks, contained in an infeftment granted to Foord's father by Mr Thomas's father.

This decreet is craved to be reduced upon divers reasons, namely, That the ground could not be poinded for the said 100 merks, because the charter whereupon the decreet is founded, is relative to a contract; which contract, if it were produced, would bear that annualrent to be redeemable for 1000 merks, according to the case and custom for the time; and which contract Foord ought either to be ordained to produce, otherwise the Lords ought, in justice, to restrict the annualrent, according to the Act of Parliament: especially considering the many pregnant presumptions adduced in the case, which, though they be not so great evidences, as that the Lords could thereby judge the principal sum satisfied, and the infeftments renounced, in regard of the existence of the charter and seasine; yet they are such, that, unless the contract be produced by Foord, the Lords may very justly restrict the annualrent. The presumptions were the date of the infeftment *in anno* 1616, whereupon never any thing had followed, but only a process intented to interrupt prescription, and a decreet recovered after fifty years' time, the contract not extant; which seems to have been destroyed when the money has been paid, and the charter and seasine neglected to be retired and delivered. Foord's father, *in anno* 1624, received another right of annualrent for 3000 merks, not relative to the prior infeftment for 1000 merks, wherein it may be thought that 1000 merks was included, it not being reserved: and which 3000 merks was also satisfied, without any reservation; likeas, Foord's father, having acquired his estate of Foord, never sought nor questioned the said right which was prior; and he, having made a disposition of his haill estate to his son, this Foord, including all his lands, moveables, and others belonging to him, he did not therein maintain this annualrent; and the disposition made to this Foord, the second son, was done in regard the eldest son, yet living, was a person unfit for government, and such a one as was fit for nothing but for an aliment; and this Foord, after so long a time, falling upon this charter and seasine, caused this weak elder brother dispone a right thereof to him, as heir to his father, and did obtain himself decerned and confirmed executor, for establishing an interest to the bygone annualrent. These pregnant presumptions, and the whole merits of the cause, being considered, the Lords (though, in law, they thought the infeftment could not be taken away as to the annualrents bygone and in time coming, yet they) thought that they might restrict the annualrent, unless Foord would produce the contract, which was the ground of the infeftment, that it might be known whether the annualrent was redeemable for a principal sum or not. And, on the contrary, it was answered and suggested, That, seeing the Lords could not take away the infeftment, it behoved to stand *in terminis*, notwithstanding the contract was wanting, which, being a mutual evident, the granter was obliged to produce the same, if he founded any thing thereupon. But these many presumptions, and the contract, being wanting, and not produced by Foord, as well as the charter and seasine, after so long a time,—moved the Lords to restrict the annualrent.—*In præsentia.*

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1663. *June.* ANDREW SPRUEL *against* WILLIAM BROWN and ROBERT BLAW.

BY a charter party, at Stockholm, betwixt Andrew Brown and James Brown