

This decret 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 decret 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 infestments 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 infestment *in anno* 1616, whereupon never any thing had followed, but only a process intended to interrupt prescription, and a decret 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 infestment 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 infestment 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 infestment, 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 infestment, 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

in Culross, the said James grants the receipt of certain commodities belonging to Andrew, which James is obliged to transport to Scotland for Andrew's use. These goods being alleged to be in the possession of William Brown, brother to the said James, and Robert Blaw in Culross, and to be intromitted with and disposed upon by them; they are convened by the said Andrew Spruel for the prices. It was alleged for the defenders, That they had right to the goods from James Brown, for an onerous cause; in so far as the defender did employ and intrust the said James with a considerable stock for Stockholm, to bring home with the return thereof such commodities as he could best bargain for. He accordingly did bring home the goods libelled, and delivered them to the defenders as the return of their stock; neither did they know, or were obliged to know, any bargain betwixt the said James and the pursuer. It was answered, That the pursuer had *rei vindicationem* against any who meddled with his goods, the goods libelled being properly his own; and he was in the same condition as if the defenders had bought the goods in a market *a non Domino*; and the said James not being owner, but trusted by the pursuer, the defenders should seek their warrantice of James. It was replied, That James being employed *ut supra*, and having returned and delivered the said goods in lieu of their stock, they might lawfully and effectually intromit therewith as their own: and were not in the case of persons buying in markets in Scotland, who are obliged to take caution for their warrantice, otherwise they buy upon their own peril; but they are in the condition of persons who buy from a merchant's servant or factor, who, coming out of foreign countries, sells commodities to merchants at home, who are not obliged to examine whether the goods be the seller's or not, they buying and receiving them *bona fide*: nor is any man, buying goods out of a shop, obliged to inquire whether the shopkeepers have good right to them or not; but if any pretended right to the goods sold, he ought to pursue the seller, and not the receiver. The Lords, before answer, ordained the defenders to condescend and prove what goods they sent over seas with the said James, and upon what terms; but they inclined to judge, that, if it were proven that they sent them away with commodities for a return to be brought home, and that, accordingly, the goods libelled were returned and delivered,—they would assoilvie the defenders.

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1663. June 23. CHARLES WARDLAW *against* WALTER DALGLISH.

THE deceased William Wardlaw, being debtor to Walter Dalglish in a sum of money by bond, which was conceived in favours of the said Walter, and Mary Home, his spouse, in liferent, and Christian Dalglish, their daughter, in fee; with power, nevertheless, to Walter to dispoise thereupon at his pleasure;—upon this bond a comprising is led of the debtor's lands of Logie, in favours of the foresaid persons *ut supra*, without inserting of the liberty and power foresaid, in favours of the said Walter; whereupon they are all three infeft. Thereafter, by a sale of a part of the comprised lands, Walter is satisfied; and yet, in his time, his wife and daughter are not denuded; whereupon Charles Wardlaw, son-in-law to William, pursues the wife and the daughter to denude themselves, in re-