

No. 69. find the offer made by Balnagoun to purge Mr. Thomas M'Kenzie's right could not exonerate him, in respect of the incumbrances upon Balnagoun's authors, from whom he had acquired Mr. Thomas's right; and the Lords liquidated the damage in this manner, viz. They find it sufficiently instructed, that Dunbaith had paid 11,000 merks to Andrew Ross, Provost of Tain, conform to Balnagoun's father's precept and his discharge, but do not find the instrument of consignation, (although sufficient *quoad* the solemnity of the order) sufficient to prove that the money did remain consigned, so as to make Balnagoun liable for the annual-rent thereof; as likewise, do not find that the disposition of the reversion to Dunbaith, and the re-delivery of Dunbaith's back-bond which he had given to Balnagoun, with a discharge thereof by Balnagoun, sufficient to instruct that Dunbaith had paid 14,000 merks farther as the full price of the reversion: But, in respect of the great trouble and expense Dunbaith had been put to in this long dependence, and in several other processes occasioned by the said double alienations, the Lords do modify as for damage and prejudice, and for lying out of the 11,000 merks he had advanced and paid, the sum of 20,000 merks, and so liquidated the whole eviction to 31,000 merks, and assoilzied *pro reliquo*.

Tarbet grudged extremely that they had only given him 31,000 merks, for he expected much more; so he gave in a bill, craving to be heard why the 14,000 merks was not due, and the annual-rents also: But the contradiction of his oath being insinuated to him, he inclined to hear of terms of accommodation. See No. 73. *infra*.

Fountainhall, v. 1. pp. 441, 449, and 455.

1687. February. EARL OF MARSHALL *against* SCOT of Lethem.

No. 70. Lethem being pursued on a contravention of a clause of warrantice, contained in a contract of alienation, he offered to reponer the pursuer in his own place, and refund expenses.

Answered for the pursuer: That *res* was not *integra*, he having in contemplation of that bought in another prior right.

The Lords sustained the defence of reponing, &c.

Harcarse, No. 1018. p. 289.

* * * The like defence was sustained for Sir John Sinclair against Lord Southesk, June, 1687. *Ibidem*.

1687. February. AGNEW *against* AGNEW.

No. 71.

A wadsetter of ward-lands having deceased, and his son having got the gift of ward, the donatar in the redemption contended, That the duties during the ward might not be imputed to the rents of the wadset.