

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.

The Lords repelled the defence, and found the debtor of the wadset was not liable for the wadsetter's ward, nor so much as the composition paid for the gift.

No. 71.

Harcarse, No. 108. p. 285.

1687. *June.*SOUTHESK *against* SINCLAIR.

Sir Robert Sinclair of Lockermacus having granted to my Lord Caithness a back-bond of reversion of an expired apprising of the lordship of Caithness, at Sir Robert's instance, obliging himself to denude upon payment of 108,000 merks to himself, and 12,000 merks to Orton; and Sir Robert having thereafter made over his adjudication to Breadalbane, upon payment of the 108,000 merks, and burdened the transmission with the reversion, in so far as concerned Orton's debt; Southesk, as come in place of Orton, pursued Sir Robert Sinclair's son upon contravention of the warrantice, by his father's so denuding himself of the adjudication.

No. 72.
Contravention of a back-bond.

Alleged for the defender: The reversion contained no obligation in favours of Orton, but was only an act of kindness in Sir Robert, which cannot be interpreted to the prejudice of his own right, to hinder to take payment before Orton got payment of his debt; nor is Orton's right prejudged by the transmission of the adjudication, which is burdened therewith.

Answered: After the back-bond, Sir Robert entered into articles with my Lord, whereby he was obliged to denude upon payment of his own debt only.

Replied: These articles were but a paper depositated in my Lord Hatton's hand upon conditions; *2do*, Whatever was in these articles, yet Breadalbane's right was, *de facto*, burdened with Orton's debt. And Orton had not apprised the lands, nor could have done any effectual diligence the time of the first back-bond, the adjudication being expired.

Duplied: Breadalbane's affairs are perplexed; and therefore the burdening his right will not so effectually secure Orton, as if the right had remained with Sir Robert.

The Lords found, That the said articles were a contravention of the back-bond. But thereafter, upon the defender's offering to purge the contravention, and dis-pone the adjudication for that effect, the interlocutor was stopped till June.

Harcarse, No. 1019. p. 289.

1687. *June.*DUNBAITH *against* BALNAGOUN.

Balnagoun having in the year 1617, granted a disposition of some lands to Sir John Sinclair of Stevenstoun, who by a back-bond, apart to Alexander Ross, trustee for Balnagoun, declared them redeemable upon payment of 25,000 merks at Whitsunday 1629, otherwise to remain irredeemable; the right of the lands came by progress in the person of Andrew Ross of Ginies, in the year 1643.

No. 73.
Double alienation.
See No. 69.