

1634. *July 23.* MATTHEW CAMPBEL *against* RONALD M'CHARTY.

MATTHEW Campbel having obtained decret of removing *against* Ronald M'Charty; this M'Charty intents reduction upon a reason, bearing that the reducer's brother, to whom he was apparent heir, had received a charter of the lands libelled from umquhile ——— Campbels, to whom the obtainer of the sentence was heir, or has behaved himself as heir; by virtue whereof the reducer, and his brother before him, have been in continual possession of the said lands since the date of the said charter, which is *in anno* 1597, and which contains absolute warrandice;—the Lords found this reason relevant to reduce the decret; albeit the obtainer thereof alleged that the charter, without sasine taken thereon, could not be sustained as a right to maintain the reducer in the right and possession of the lands; for he contended that it was not obligatory, being but the beginning of an imperfected Act, which cannot be sustained while it be complete, specially where the completing thereof depends upon the parties' own will, who, never seeking sasine, nor doing diligence therefore as he ought, his own fault ought not to be profitable to him. Which allegiance was repelled, and the charter sustained, albeit wanting sasine; in respect the party, now defender in the reduction, was offered to be proven to be heir, or behaving him as heir to the granter of the charter; whereby he could not quarrel it, being that person who is holden to warrant and perfect the same; and it was not respected, where the defender alleged that it was the parties' own fault, who did no diligence to obtain sasine; for thereby the defender might seek non-entry against the land, and make his best advantage thereof; but it was sustained, being clad with possession, to exclude removing pursued by this party; and it was not found *nudum pactum*, but sustained as a contract which would have defended against the contractor and his heirs.

Scot, *Clerk.*

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1634. *December 3.* MUIRE *against* ELIZABETH FLEMING.

ELIZABETH Fleming, as executrix confirmed to umquhile Matthew Muire, is pursued by one Muire, to pay to him 100 franks, addebted by the said umquhile Matthew; and the defender alleging, that the whole free gear was exhausted by sentences recovered against her, partly at the instance of creditors, and partly at the instance of legators, contained in the testament, and whereof she has made payment,—this pursuer never craving nor doing diligence for his debt, and she never knowing the same: And the pursuer contending that the legators could not be paid, as long as there was any creditor's lawful debt unpaid, but that he ought to be paid of his just debt, which could not be exhausted by the legacies, and that the executrix should be put to repeat the same from the legators: And she duplying, that she ought not to be put to seek the legators again, and to be vexed with pleas, seeing she could not eschew the payment, which was made for obedience of a sentence which she could not have stayed, there never being any intimation of this pursuer's debt before

these sentences, and before her payment ; and, seeing other creditors and legators have been more diligent, and this pursuer has been negligent, his negligence ought not to be prejudicial to her, but to himself ; so that he ought to pursue and repeat from the legators, and not she ; likeas she took caution from the legators to make the sums paid to them forthcoming, in case any other debts should break out for which she might be distressed ; to which caution she is content to assign this creditor ; and which ought to be found enough to exoner her, and to impose a necessity upon this pursuer to convene the said legators :—The Lords found that part of the allegiance not relevant to exoner the executrix anent her payment to the legators, albeit done by virtue of sentences ; but found that this pursuer should be paid as a creditor, and that the executrix ought to repeat that which she had paid to the legators from them, and that the creditor should not be astricted, nor urged to that repetition, because the executrix was his direct party ; for the testament could not be exhausted but by the debts ; and that legacies are not to be paid but if there be superplus of the free gear, *deductis debitis*. But, because this appeared to be hard to the executrix, who walked *bona fide*, and paid nothing but by virtue of sentences which she could not stay, this debt not being known, which might be imputed to this pursuer's own negligence ;—therefore the Lords ordained this to be delayed until the parties and their procurators should be inquired if they had any practiques to allege either *pro* or *contra* to this decision. But the civil law is, *in terminis*, opposite to the same ; for, in l. *scimus*, sect. “ *Et si præfatam,*” c. *de Jure Deliberandi*, it is clearly determined, that the heir (that is, to us, the executor,) who pays to the creditors who first convene him, or to the legators, is exonerated of all other creditors who thereafter come to trouble him, where the inventory is exhausted by the first payment of these, whether they be creditors or legators who first come ; and the heir can never be further troubled by any of them, albeit the creditor last coming was anterior to the other who is paid : and these other creditors have only action of repetition from the creditors paid, or from the legators paid, to compel them to refund to him, as in law they best may ; but nowise to impeach or molest the heir, who has once paid the whole inventory to the creditors or legators who first came ; neither can the buyer from the heir be convened for that which the heir sold to him, and the price whereof he converted to these creditors' or legators' use, so paid by him. How this express law agrees with our practise, it is well to be considered, and the equity and reason thereof.

Scot, Clerk. Vid. 25th July 1634, Matheson.

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1634. December 12. Ross against WILLIAM DICK and HUME of HEUGH.

In a reduction of a contract, and some other special writs called for, following upon that contract, of the lands of Heugh, made to the said William Dick by the said Hume of Heugh, as done since an inhibition executed by the said _____ Ross, pursuer, who was creditor to the said good-man of Heugh ; where, in the said summons of reduction, the defenders were called by a general clause, to produce, not only the said special writs particularly called for, but