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

MATTHEW Campbel having obtained decreet 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 decreet; 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 allegeance 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*.

Page 732.

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