

1675. July 16. CAMPBELL and RIDDOCH *against* STUART.

No 4.
 Adjudications
 in implement,
 held not to
 rank *pari passu*
 with other ad-
 judications,
 nor others
 with them,
 although
 within year
 and day of
 each other.

DAVID RIDDOCH of Aberlednoch, by contract of marriage of his third son, Mr Alexander Riddoch, dispones to him the mains of Aberlednoch; but thereafter, in *anno* 1646, he dispones to David Riddoch, his second son, the said mains of Aberlednoch, and several other lands, for payment of the disponer's debt; whereupon David was publicly infeft; but having made resignation after his father's death, upon his father's procuratory, the same, as being the father's mandate, was void *morte mandatoris*; and thereby the instrument of resignation fell in consequence. The said David Riddoch, the second son, disponed the said mains of Aberlednoch, and other lands, irredeemably, to James Stuart; whose oye* and heir, in respect of the nullity of David's infeftment, pursues adjudication of the lands, for implement of the disposition granted by David the father, to David his son: And there is also an adjudication of the mains, pursued at the instance of Campbell of Turreich, as assignee of Mr Alexander Riddoch, upon Mr Alexander's contract of marriage; whereby the mains were disponed to Mr Alexander: Both these adjudications being stopped by either party:—THE LORDS, considering that adjudications are extraordinary remedies, *ex nobili officio*; and not being for liquid sums, which would come in *pari passu*; they declared that they would hear both parties in the point of right, and would prefer the party, that had the best right: Also, because there was an improbation intended against Mr Alexander's right, and the assignation made by him to Campbell of Turreich, containing a reduction of the contract of marriage, as having been delivered back, to be cancelled. And it being offered to be proven by Campbell of Turreich's oath, that the pursuit is for the behoof of Mr Alexander Riddoch, his cedent; and his oath of calumny required, as to the retiring and giving back of the contract of marriage, to be cancelled; his oath was taken in Barbadoes by commission. The assignee deponed, he knew nothing of the assignation; and the cedent deponed, that the contract was not retired to be cancelled. And it being debated betwixt the parties, whether any progress could be upon this assignation, unless Mr Alexander Riddoch, or his assignee, would bide by the truth thereof; THE LORDS found, That the pursuit was for the behoof of Mr Alexander Riddoch; but seeing he resided in Barbadoes, they refused to grant certification against the assignation, to be holden as false; which would lead to a preparative for stopping the execution of all strangers processes; without prejudice to insist in the action of improbation; and that if thereupon the assignation should be improven, either by certification; (if Mr Alexander Riddoch, by commission, would not abide by the verity thereof;) or by probation of the forgery; that the adjudication to follow upon the said assignation, should fall in consequence.—Albeit it was alleged, that seeing the cedent owned the assignation, it was *jus tertii* to any other party to quarrel the same; for the Lords found, that in a competition of rights, where

* Grandson.

the first complete right would carry, the other party might improve any writ in the progress, and thereby have the best and preferable right.

In the dispute of preference of right betwixt the two dispositions, it was alleged that Mr Alexander Riddoch's disposition, being prior *tempore* to David Riddoch's disposition, was *potior jure*; and that David's disposition was fraudulent and null, by the act of Parliament against double alienations.—It was answered, That albeit this reason is relevant, if the controversy were betwixt the two brothers *de recenti*; yet, now David's right, though posterior, being acquired by Stuart, as singular successor, for great sums of money, which he can yet instruct, David's disposition, as now being his, ought to be preferred to Mr Alexander's; because it is a fraudulent right betwixt most conjunct persons, remaining latent in the father's hands, and no use made thereof for the space of near 40 years; whereby those who contracted with David the father, or David the son, were ensnared and deceived.—It was replied, That Mr Alexander's disposition being in a contract of marriage, whereupon marriage followed, and granted for a tocher, it was an onerous and unsuspected deed, and could not be annulled upon the account of fraud and latency. *2do*, Stuart had not only this mains of Aberlednoch, but several other lands, for sums far within the worth, and cannot, upon the pretence of latency of a prior solemn disposition, make any advantage; but the most he could pretend, is to be satisfied of his just sums.—It was duplied, That a right *ab initio* unsuspected, may *ex post facto*, by latency, become fraudulent; and cannot be sustained to ensare those who contracted *bona fide ex causa onerosa*; and, in this case, David Riddoch's right having been made public, by infeftment and possession 30 years, albeit, by the defect of a formality, the infeftment be void; yet, it being so public, it is a good ground to reduce a prior latent right among most conjunct persons. Likeas, Mr Alexander did, by a letter from Barbadoes to his brother David, design him of Aberlednoch; and writes, 'That he heard that the estate in his hand, was like to be in distress; and that he would contribute his help to preserve the same;' which is a clear homologation of David's right, and a pregnant evidence, that the contract of marriage was retired, or that there hath been a posterior contract of marriage in place of this.—It was triplid, That this letter imported nothing; because Mr Alexander was in probable ignorance, that his brother had resigned after his father's death; which, if he had not done, his brother's infeftment being prior, gave him the title and possession of the lands, so that he might be designed thereby; and these *verba officiosa* in letters, not being in *materia obligatoria*, are never respected.

THE LORDS had no regard to the letter; and found the reason of preference, upon fraud and latency of the contract of marriage, sufficient to prefer Stuart, who had bought *bona fide*, for making up his just and true interest; but not to give him any advantage by the bargain; and, therefore, adjudged in his favours; under reversion to Mr Alexander Riddoch, upon payment of what was truly wanting to Stuart, of the sums paid out by him; and not satisfied by the other lands. (See *Stair's Inst.* p. 421.)