

No 179. deed, and therefore ought to abide at the truth of the deed itself, and that the quality that it was truly delivered, ought to be rejected as being only competent to a singular successor.

*Gosford, MS. No 757. p. 470.*

1675. June 30.

STEWART *against* RIDDŌCH.

No 180.

It was the opinion of the Court, that it was incompetent to abide by only as a factor, who had received the deed as true, but that there ought to be a party to abide by simply. See Caldwell *against* Blair, No 190. p. 6765.

JAMES STEWART of Aberlednoch, having obtained a decret *cognitionis causa* against John Riddoch, for implement of a disposition granted by David Riddoch his grandfather; and thereupon having also obtained a decret of adjudication, the same was stopped upon a bill given in by John Campbell of Tar-ririck, pretending that he had a right to a contract of marriage betwixt Alexander Riddoch and his wife, as assignee constituted by the said Mr Alexander, in whose favours the granter of the disposition to Stewart was obliged by the said contract to dispoise to him the same lands; and the assignation granted by the said Alexander Riddoch to the said Campbell being questioned as false,

THE LORDS thought fit to hear both parties on their several adjudications, reserving improbation of the said assignation; and with this declaration, that if the said assignation should be improven, the decret and adjudication upon the same should fall.

Because there was a competition in diligence, the LORDS did wave the debates in the improbation, being most as to that point, who should abide by the said assignation as true; seeing the assignee Campbell declared, that his name was filled up in the same without his knowledge, and was not concerned to abide by the same; and Mr John Drummond of Megginsh compearing, as having a complete warrant and commission from the said Mr Alexander Riddoch, who was in Barbadoes, to prosecute the said action, which had been intended in Campbell's name, offered to abide by the said assignation only as a factor.

Some of the Lords thought, that a writ being questioned as false, there should be some person to abide by the same upon their hazard simply, and not with such qualities; seeing the consequence and hazard of persons that abide by writs questioned upon falsehood, if the same should be improven, is the great bulwark and security of the people against falsehood, which doth increase daily. But this point was not decided.

*Fol. Dic. v. 1. p. 457. Dirleton, No 286. p. 138.*

\* \* \* Gosford reports the same case :

IN an adjudication at the instance of James Stewart against John Riddoch his goodsir, upon a decret *cognitionis causa* given against him for adjudging the lands of Aberlednoch, which were dispoised to the pursuer by the second son.

of the said David, as having right from his father by contract of marriage ; compearance being made for John Campbell of Tarririck, who did likewise pursue an adjudication as assignees by Mr Alexander Riddoch, third son to the said David as having right likewise to the said lands by his contract of marriage from his father ; it was *alleged* for Stewart, That Campbell could have no adjudication upon that assignation, because that his name was only borrowed to the behoof of Alexander, who knew nothing thereof ; which being referred to Campbell's oath, he did confess the same ; and thereupon Stewart craved that he might have his decret extracted, and that no adjudication should be granted in favours of Campbell. It was *alleged* for one Drummond, That he was factor for Alexander Riddoch the cedent, who sent the said assignation from Barbadoes to be pursued in Campbell's name ; and, albeit Campbell refused that his name should be made use of, yet he insisting in the name of the cedent, who ought not to be prejudged, and ought to have adjudication. This being sustained, Stewart did offer to improve the assignation as false, and craved that he might have out his decret, unless Campbell would abide by the verity of the assignation ; which he did refuse ; but Drummond offering to abide by the verity thereof as factor, it was *alleged* for Stewart, That unless he would offer to abide thereat as a true deed, it could not hinder certification, seeing whosoever abides by the verity of the deed, ought to be liable to the pain of falsehood if improven. It was *answered*, That all that he was bound to do was to abide by the same as factor, and to give his oath that he believed the same was a true deed, which he was willing to do ; and if this were not received, he was content to take commission to any in Barbadoes for presenting the same to the cedent, that he might abide by the same ; but craved, in the meantime, that Stewart's adjudication should not be extracted. THE LORDS having considered that, in this case, as it was now stated, he that obtained the first adjudication would absolutely carry the right of the lands in question, albeit he should succumb in the improbation, notwithstanding of the effect to improve the assignation which legally ought to sist process until the improbation be discussed, the LORDS did decern in both the adjudications, reserving to Stewart to improve as accords ; and finding that the factor's offer to abide by was not sufficient, they did grant commission to any in Barbadoes that Stewart should name to present the assignation that he might declare under his hand, that he would abide by the verity thereof, under the pain of falsehood ; and likewise did reserve that in case the assignation should not be improven, both parties to debate their rights, as accords.

*Gasford, MS. No 767. p. 477.*