

No 86.

One personal creditor was found to have no right to propone defence against the constitution of the debt of another creditor.

1662. July 24.

ALEXANDER SHED *against* ROBERT GORDON and DAVID KILL.

ALEXANDER SHED pursues Robert Gordon pupil, as lawfully charged to enter heir to his father, to pay a debt of his father's. Compears David Kill, the pupil's uncle, who was tutor nominate to him, but refused to accept, and therefore shunned to propone any defence in the pupil's own name, least it should be an acceptance, or *gestio*; and therefore produced a bond of the defunct's and as creditor *alleged*, that he would not suffer his debtor's estate to be affected in his prejudice, and offered him to prove, that the debt pursued on was satisfied. The question was, Whether he had interest as creditor to propone this defence.

THE LORDS having considered the case amongst themselves, found that where creditors in this manner compeared, it is not competent to allow their defence, because it may delay the other creditors pursuing, so that a third creditor may be preferred in diligence; and therefore they repelled the defence *hoc loco*, but declared that it should be receivable against the pursuer, whenever he should pursue for affecting any of the defunct's means or estate, in the same case as now.

Fol. Dic. v. 1. p. 176. Stair, v. 1. p. 134.

No 87.

In a general declarator of bastardy, it was objected, that a defunct had obtained a legitimation from the King. It was answered, that legitimation, what effect it may have, cannot be disputed in the general declarator but must be reserved to the special, which was found relevant.

1669. February 19. KING'S ADVOCATE *against* CRAW.

THE King's Advocate pursues a declarator of the bastardy of one Craw. It was *alleged* for the defenders, That the libel was not relevant, unless it had been condescended who was the bastard's mother, and offered to be proven, that she was never married to his father. It was *answered*, That not being married was a negative, and proved itself, unless the defenders condescended upon the father, and offered to prove married. The defender *answered*, if that was relevant, the most of all Scotland might be declared bastards, it being impossible after a considerable time, to instruct the solemnising of a marriage; but law and custom doth require, that at least it must be condescended on and instructed, that the defunct was holden and reputed bastard at the time of his death.

Which the LORDS found relevant.

And it being further *alleged*, That there was produced a legitimation taken by the bastard from the King, which did import his acknowledgement of being bastard, and was stronger than being holden and reputed bastard; it was *answered*, *non constat*, that the defunct took this legitimation, but some other might have done it in his name, without his warrant.

THE LORDS found the legitimation sufficient to instruct the bastardy.

It was then *alleged*, That the legitimation denuded and excluded, the King not only giving power to the bastard to make testament, but to dispoise of his heritable rights, even on death-bed. It was *answered*, That whatever the stile of such gifts be, they are never extended to heritable rights, but only to a faculty to make testament, which bastards want by the law: but if the bastard made no testament, and did exhaust his moveables by universal or particular legacies, the executor nominate could only have the third, which follows the office, and the King would have the rest of the inventory not exhausted. *2dly*, All general declarators being summary, these debates are only competent in the special declarator.

THE LORDS repelled the defence *hoc loco*, and reserved the same to the special declarator.

Fol. Dic. v. 1. p. 177. Stair, v. 1. p. 609.

No 87.

1673. February 3.

RIDDOCH against STUART.

JOHN RIDDOCH, as apparent heir to his good-sire, pursues an exhibition *ad deliberandum*, against Robert Stuart, who having proponed a defence, that the good-sire was denuded by a disposition in favours of the defender's author, and that he was obliged to produce no further than that disposition; that defence was repelled in respect of this reply, That the defender's author being the good-sire's second son, all rights made to him without exception ought to be exhibit, albeit real rights made to strangers were not to be exhibit *ad deliberandum*, under that pretence, to open all men's charter-chests. The defender now further *alleged*, That the pursuer could not now deliberate, because he had immixt himself by disposing the heritage.

THE LORDS refused to sustain this allegiance against the exhibition, unless it were instantly verified, and would not suffer a course of probation to run to stop an exhibition only *ad deliberandum*.

Fol. Dic. v. 1. p. 177. Stair, v. 2. p. 164.

No 88.

An exhibition *ad deliberandum*, pursued by an apparent heir, was sustained notwithstanding the defender offered to prove behaviour, unless the defence were instantly verified; for, the Lords will not allow a course of probation to stop an action of this nature.

1685. November.

NISBETS against SMITHS.

MR. ALEXANDER HERRIOT having granted a disposition of his lands of Brockhouse, to Agnes Nisbet his wife, and she having pursued Isobel and Esther Smiths, as representing the said Mr. Alexander their uncle, upon the passive titles, for fulfilling of the disposition; *alleged* for the defenders, That they could not be obliged to fulfil, because the disposition was granted by the said Mr. Alexander upon death-bed, upon which they had raised a reduction, which they now repeated. *Answered*, That the pursuer being in course of diligence for completing of her right, it cannot be stopt upon any such reduction, where-

No 89.

A disposition of lands being granted without procuratory or precept; in a process against the heirs of the granter, for fulfilling the obligation