

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.