

1698. *January 28.* MUNGO MALLOCH *against* JAMES LINDSAY of KAVILL.

I REPORTED Mungo Malloch, baxter in the Canongate, against James Lindsay of Kavill. Malloch, as executor-creditor to Margaret Litster, pursues Kavill for payment of 600 merks contained in his bond. His DEFENCE WAS,—Discharged by the said Margaret in her latter will and testament. ANSWERED,—That was only *donatio mortis causa*, which cannot prejudice her creditors; likewise, he is nominated executor, and burdened with her debts; and so, founding on the testament, *quoad legatum liberationis*, he can never repudiate it *quoad* the obligation to pay her debts. REPLIED,—If the discharge was merely gratuitous, without antecedent onerous causes, Malloch might quarrel the same on the Act of Parliament 1621, Kavill being her uncle; but, in fortification of the discharge, and to adminiculate and support, he offers to prove he alimeted her by the space of three or four years before her decease, and was at all the expense of her funerals; and the Lords, on the *26th of January 1669*, *Chisholm against The Lady Brae*, allowed a party to condescend on the onerous cause of their right, and prove the same. DUPLIED,—As to the privileged debt of her medicaments and funerals they did not contend; but he could never bring in an illiquid ground of aliment to compensate his clear instructed debt; and cited the decision, *18th January 1676*, *Crockat against Ramsay*. TRIPLIED,—*Quod statim potest liquidari habetur pro jam liquido*; and, to support his discharge, a term may be allowed him to prove the aliment; which being done, he ought at least to come in *pari passu*, as all executor-creditors confirming within six months, by the act of sederunt, do.

The Lords repelled the ground of compensation as illiquid, and preferred Malloch's debt next to the funeral charges. *Vol. I. Page 817.*

1698. *February 4.* The EARL of SOUTHESK *against* The TENANTS of SIR DAVID CARNEGIE of PITTARROW.

THE Earl of Southesk, pursuing maills and duties against the Tenants of Sir David Carnegie of Pittarrow, on an infetment for relief of cautionary he had paid for him, and prevailing;—the question arose, *A quo tempore* the tenants were to be decerned; for the cause had depended four or five years in discussing a competition, and during that time they had continued to pay their rents to those who were in possession before.

ALLEGED for Southesk,—They were *in mala fide* after his citation, but should have suspended on double poinding, else a bankrupt master keeping his creditors, by calumnious allegiances, out of possession, may *lucrari fructus* during all that time; and the tenants' rusticity ought not to excuse them here. ANSWERED,—When a cause depends long, it is a prejudice both to the master and his creditors that the rents lie in the tenants' hands unuplifted, for either they break or the rent squanders; but the true remedy for creditors, in that case, is either to get a factor, and the rents sequestrated, or to arrest them; and if they neglect this, and the poor tenants pay to their former master, it were most rigorous

to cause them, at the event of a long depending plea, to pay over again ; and the *Tenants* were assoilyied in the case of *The Creditors of North Berwick*.

The Lords thought it severe to decern the tenants for so many years, (though in strict law they might do it ;) and therefore only found them liable from the date of the last charge given them. *Vol. I. Page 821.*

1698. *February 9.* PATON of KINALDY *against* DR URQUHART.

PATON of Kinaldy, having married Dr Urquhart's daughter, in the contract of marriage there is 3000 merks of tocher stipulated. The lady being dead, and leaving a son behind her, Kinaldy charges the Doctor for the tocher. He SUSPENDS on thir reasons, That, though it be made payable by the contract after year and day, yet he promised that, *quoad* 2000 merks of it, his father-in-law should liferent it, and the payment should be suspended during his life ; *2do*. The charger, Kinaldy, was obliged to infest the son of the marriage in the lands, which he had done only by a base infestment, without showing he is infest himself ; and had reserved his own liferent, which was noways provided for by the contract of marriage ; *3tio*. He craved compensation for the expense of Kinaldie's wife's in-lying of her child, and for her burial.

ANSWERED to the *first*, Any promise emitted by him was when minor, having curators, and so null ; as also, it was expressly *contra fidem tabularum nuptialium*, and so *contra bonos mores*, and reprobated by law ; as appears, *tit. D. et C. de Pact. Dotal. et de Fundo Dotal.* And Voet, in his Practical Observations, tells, that *clandestina pacta* cannot derogate from the faith of public and solemn contracts of marriage ; and we have oft decided conform, as on the 16th of July 1672, *Duff against Fowler, &c.* To the *second*, An obligation to infest in fee is contradistinguished from the liferent ; and there can be nothing more unreasonable than for a father to divest himself both of the fee and liferent of his lands to his infant son. To the *third*, It was against his will that they drew away his wife ; *et qui, invito, negotium gerit, is non repetit impensas.*

The Lords repelled the *first* and *second* reasons of suspension, in respect of the answers made thereto ; and referred to the Ordinary in the cause to try if the father was infest himself, and to adjust the grounds of compensation and the account of expenses betwixt them ; though, in strict law, it was refusable, because a compensation not instantly verified. *Vol. I. Page 821.*

1698. *February 10.* FARQUHARSON of BALLATRACH, and other PARISHIONERS of GLENTANNER, *against* ALEXANDER GILLANDERS.

ARNISTON reported Farquharson of Ballatrach, and other Parishioners of Glentanner, against Alexander Gillanders, for rebuilding the church of Glentanner, and paying the damage, as he who occasioned the burning of the same, in so far as he would have his father, a common ordinary person, to be buried