

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