

ceases, whereas a provision once given he will cut out the heir. We may also give an aliment to an unprovided wife, but still it must be alimentary. Who ever heard of giving her a sum of money to answer that?"

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1757. *November 23.* JOSEPH ALLAN *against* JAMES YOUNG of Netherfield, and JOHN MILLER.

THIS case is reported in *Fac. Coll.* (*Mor.* 10,047.) Lord KILKERRAN'S note of the proceedings is as follows:—

“ *August 2, 1757.*—The *President*, that a penalty is but the liquidation of the expenses in case of failyie, and if any expense has been laid out of which the out-layer had no title to be reimbursed, the penalty cannot be due to that extent; and therefore as the expenses of the litigation on the charge would not have been granted as the court was much divided, neither can the penalty to that extent.

“ The Lords altered, and found the penalty not due on account of the expenses.

“ But does not this seem to import, that in no case can a man get the penalty to the extent of his expenses, except where that expense is such as would be due, although there were no penalty in the obligation, though surely this is more than was intended ?

“ The charger Allan petitioned against this interlocutor, but the Court adhered; on this occasion Lord KILKERRAN observes :

“ *November 23, 1757.*—It was by the *President* Colston, and others said, that the obligation for a penalty in case of failyie, is only to take place where the failyie is wrongous, but it will not always be deemed wrongous where the defender at last succumbs ; no, it will not be thought a wrongous failyie, where the suspender had a *probabilis causa litigandi*. This was a doctrine in which *Kilkerran*, *Kames*, and *Prestongange* differed. Notwithstanding that,

“ The Lords on that reasoning adhered.

“ I was against the interlocutor”

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1757. *December 14.* STEVENSON and COMPANY *against* ROBERT MACNAIR, and Two OTHERS, Partners of the Annan Fishing Company.

THIS case is reported by *Kames* (*Sel. Dec. No.* 135, *Mor.* 14,667.) and in *Fac. Col.* (*Mor.* 14,561.) Lord KILKERRAN'S note of the judgment is as follows:—

“ *December 14, 1757.* Found that the partners are not liable beyond their subscriptions, and that the process has not been properly brought, and remit to the Ordinary to proceed accordingly.

“ The PRESIDENT—That in all societies, there is no bringing partners into Court, without calling either the managers or the whole partners. *2dly*, M’Nair had sold out before the action was brought. *3dly*, The pursuers own they had three shares themselves; must they not at least discount their own shares? *4thly*, Suppose the company insolvent, how can any subscriber be liable but for his subscription? *unusquisque debet scire conditionem ejus cum quo contrahit.*”

*N.B.* There is a material discrepancy between Lord Kames’ report of this case, and that given in the *Fac. Col.* The latter represents the judgment as having proceeded solely on the ground “that all parties having interest were not called into the field;” while the former represents it to have proceeded on the opinion of the Court, that the several partners were not liable beyond the amount of their subscriptions. Lord Kilkerran’s notes confirm this last account.

1757. *December 20.* ELIZABETH BRODIE and OTHERS *against* ARCHIBALD STEWART.

THIS case is reported in *Fac. Col.* (*Mor.* 3912.) Lord KILKERRAN has the following note of the opinions of the Judges:—

“ *Colston* said, that a decree dative vests the right before confirmation. The person decerned has right to intromit, and from that time he was accountable to his brothers and sisters, and upon that he put his opinion. *Kames et alii* put it upon the obligation.”

“ *December 20, 1757.*—The Lords found the pursuer entitled to her share of the debts as well as of the moveables.”

1758. *January 13.* M’KAY of Bighouse *against* GILBERT BARCLAY, Merchant in Cromarty, and WILLIAM FORSYTH, Merchant there.

MR. MACKAY raised an action against the above defenders, setting forth that the said Gilbert Barclay, by his missive letter, addressed to the pursuer, dated the 17th August, 1752, proposed to buy from the pursuer a certain quantity of salmon, at the same price, and upon the same condition as he, Barclay, had bought a quantity of salmon from the Earl of Sutherland’s commissioners; that the pursuer, by his letter, dated the 19th of the said month, addressed to Barclay, agreed to sell his salmon upon the same terms that the Earl of Sutherland’s commissioners had sold theirs, as to the price and security, without mentioning further particulars, or fixing any term of payment; and that Barclay, by his agreement with the Earl of Sutherland’s commissioners, was to pay for his Lordship’s salmon, at the rate of 50 shillings per barrel, deliverable at Cromarty on the risk and expense of the sellers; and that by a bill on Messrs. Coutts and Company, merchants in Edinburgh, and not upon James Stewart, merchant there, upon whom Barclay, contrary to pac-