

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.