" *August* 10, 1757.—This question was much agitated among the Lords.

" The President particularly laid it down as law, that a creditor, however alimentary, cannot affect an alimentary provision for furnishings in a prior year. On the other hand it was thought by others, that, however it may have been found, that an alimentary provision could only be affected for furnishings within the year, that could never mean more than that in competition between furnishings within the year, and prior furnishings, the furnishers within the year are preferable; but that the elapsing of a year from the date of the furnishings should forfeit the creditors' right, cannot be maintained, and one of the Lords went so far as to say, that if it was law, it was one instance of a contradiction of law to common sense.

" The *President,* in prosecution of the aforesaid proposition, further said, that, as we had modified L.200 of aliment to the lady, which the House of Peers had affirmed, this was a proper aliment, and to be judged of by the rules that govern alimentary provisions, and added, that we could not decern any thing to a wife separate from her husband, but as an aliment; and concluded that the lady ought in this case to be preferred to the creditors.

" The answer to this was in part made, supposing it to be proper aliment, but even that was doubted; it was a separate maintenance it is true, but not strictly alimentary, when so great an addition was made to her former provision; and to suppose that given to superfluities, when her creditors who had furnished to her, when she had little to spare her, (for all the debts were open accounts of furnishings,) were to catch at words and neglect things.

" The Lords preferred the Creditors to the extent of the L.100, to which they had acquiesced in her preference."

1757. *November* 15. AGNES LOGAN and her children *against* ANDREW CAMPBELL.

This case is reported by Kames, (*Sel. Dec. No.* 126; *Mor.* 3230, and in *Fac. Coll. Mor.* 3232.) The following is Lord KILKERRAN'S note upon the question which it involved.

" *February* 27, 1757.—A hearing in presence on this point, how far a man can on death-bed make rational provisions for his children, which may be thought not unreasonable; but after a series of decisions for the contrary, I thought, and said it would be a bold stroke to find so by a judgment. Lawyers were appointed for both sides. The Solicitor and Miller, Lockhart and Ferguson.

" *February* 24, 1757.—Upon this hearing, the Lords found, agreeable to the opinion of all our lawyers, and the series of former decisions, that a father on death-bed could not make provision for his younger children. The children pled upon two grounds, 1*st,* The expediency and rationality of receding from the former decisions, where it had been so found. 2*dly,* As the Court could give an aliment, why not sustain provisions to that extent?

" With respect to the first, it was thought neither in the power of the Court to recede from the former series of decisions, nor that it would be expedient were it in their power. 1*st,* Not in their power, as one branch of our law is our con-

suetudinary law, which is founded on the concurrent opinion of the writers on our law, and the current of decisions, which we can no more alter than we can alter a statute. True, we have in some cases receded from a course of decisions, but in all such cases, it has been where the former decisions have been found erroneous in point of principle, *e. g.* as in the case of *Ramsay of Wilycleugh* in 1738, where, contrary to former practice, we found that bygones on a debt whereon apprising had followed, to belong to the heir, though the current practice had been to give them to the executor, which was erroneous in point of principle, because an apprising is a disposition redeemable, and truly the lands come in place of the debt, after which there is no debt either principal or interest. The like in the decision, *Bell of Blackwoodhouse*, where, contrary to former practice, we found that where a person having a personal right by disposition to lands, had conveyed that personal right to one, and afterwards to another, who obtained infeftment, the second was preferable on his infeftment, contrary to the former practice which had sustained the first conveyance, on the ground, that the granter who had only a personal right was denuded by the first disposition, which was plainly erroneous in point of principle.

" *3d*, In the case of *Easterogle*, where, notwithstanding of three consecutive decisions, whereby it had been found that a charge on an adjudication excluded the terce, we, however, receded from that doctrine, and found it did not, and rightly, because the charge only concerns the competition among adjudgers themselves, and not between adjudgers and voluntary rights.

" And, *4thly*, The same may be said of our receding from the decisions that for some time sustained bills that bear annualrent. But there is no instance where we have receded from a series *rerum similiter judicatarum*, where these decisions were admitted to be agreeable to law; for that would be to alter law, which is only competent to the legislature: so much for our power. But *2do*, Were it in our power, we ought not, because if we should sustain such provision as rational, we behoved to do it on a principle that we are to sustain all rational acts; for provisions to children is but one instance of a rational act; and if the Lords shall go that length, then the ground of it may be understood, for it should coincide with the other cases above mentioned, where the Lords have receded from a series of decisions, as being erroneous in point of principle. But this will not be attempted, as it were to throw the law of death-bed out of our law-books. But further, of all acts that can be called rational, the reason is strongest for not sustaining such provisions to children, as was the chief view of the law of death-bed to prevent the influence of wives over husbands and of the clergy, whereof there are instances even in our own day over people when in *extremis*. *Vide Stair*, p. 600. Nor is it any answer to this, that all is under the correction of this Court when irrational, as nothing is more to be avoided than such questions as render the Court arbitrary. Witness the late case of *Mr. Craik* and , now the subject of an appeal.

" As to the second ground, that we may sustain provisions to the extent of a rational aliment, the answer is plain, that whatever we give must be alimentary from year to year, and no man can calculate what provision will correspond to an aliment; for it is erroneous to say that a child of ten years old can get an aliment till he is twenty-one, and it is easy to give a provision to answer that, for the child may die before he comes to nine years of age, whereby the aliment

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?"

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 outlayer 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"

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.