Lord Kilkerran gives the following statement of what passed on the bench on advising the petition for the pursuer, and the counter petition and answers for the defenders.

"It is a practice for a factor to take bills in his own name, and that is not enough to subject the factor to the debt due by Bruce.

"*2dly*, It is not enough to subject the factor that he did not timeously give notice of the sale, as factors seldom give notice till the whole is sold; but what subjects the factor to Bruce's debt in this case is, that he does not answer and preserve letters whereby the pursuer desired to be told what sales were made.

"*January* 25, 1758.—Altered as to Bruce's debt, and find the defender liable for it." The counter petition of the defenders was refused.

1758. *June* 30. HAY *against* LORD CHARLES HAY.

This case is reported in *Fac. Coll.* (*Mor.* 14,369.) It was reported to the Court by Lord KILKERRAN. The report is as follows:

"IN the 1685, Sir James Hay then of Linplum, father of the late Sir Robert, in the contract of marriage of John his eldest son, granted procuratory for resigning the baronies of Linplum and Carfrae, which he held of the crown, and Tenendry of Baro, which he held of the family of Tweedale, for new infeftment in favours of the said John his eldest son, and the heirs male to be procreated of the marriage, whom failing, the heirs male to be procreated of the said John's body, of any other marriage; whom failing, to the said Sir James himself, and the heirs male procreated or to be procreated of his body; which failing, to the heirs whatsomever to be procreated of the said John his body; whom failing, to the heirs whatsomever, procreat or to be procreat of Sir James his own body; which failing, to John Earl of Tweedale and his heirs male and of tailyie contained in the charter of the Earldom of Tweedale.

"This marriage dissolved by the death of John in the year 1686, leaving issue only one daughter, Margaret, thereafter married to Lord William Hay; whereby, in terms of John's contract of marriage, the succession devolved upon Sir James himself, and as no seasine had followed on the precept, or in consequence of the procuratory contained in the said marriage contract, no more was necessary for Sir James to establish the right in him, than a general service as heir of tailyie and provision to his son, to carry the procuratory and precept in the marriage contract; and accordingly he appears to have expede a general service as heir of tailyie and provision, before the bailies in the Canongate in February 1694, but whether this service was properly expede, is the question which I am to state.

"But to proceed to the fact, it appears that in the 1699, Sir James and his son Robert concurred in a tailyie, containing procuratory for resigning the lands in favours of Sir James himself in liferent, and of Robert and the heirs male of his body in fee; which failing, to the Marquis of Tweedale and his heirs male contained in the charter of the Earldom of Tweedale, whereby not only Margaret, the only child of his eldest son John, but his own daughters, who were in num-

ber three, and the issue female of his son Robert, if any he should have, were excluded.

" Thus matters stood in 1704, when, upon Sir James' death, Sir Robert, who was fiar by the settlement 1699, took up the whole estate that remained; that is, Linplum and Baro, for it seems Carfrae had been sold off.

" And in the year 1748, Sir Robert made a new settlement; he disponed and granted procuratory for resigning Linplum and Baro to himself, and his only then surviving sister Margaret in liferent, and to the second lawful son to be procreat of the present Marquis of Tweedale, and the heirs male of his body in fee, and to his other younger sons *seriatim*, whom failing, to Lord Charles Hay, the Marquis's brother, but with a proviso strangely enough expressed, that if the succession should devolve on the second son of the Marquis of Tweedale before his existence, it should be lawful for Lord Charles Hay, or to the highest heir of entail in being at the time to establish titles in his person, and enjoy the rents until the first Whitsunday or Martinmas following the birth of the Marquis's second son, in whose favour Lord Charles shall be obliged to denude.

" Sir Robert died in 1751, and then Margaret, the grandchild of Sir James, and daughter of his son John, lady to Lord William Hay, appears to have been advised that no proper titles had been made up by her grandfather, Sir James, to the procuratory and precept contained in her father's contract of marriage, and that therefore there was no proper title either in the person of Sir James, or of Sir Robert, whereby they might have been enabled to make those gratuitous deeds in prejudice of her, now the heir of provision by her father's contract of marriage; and in consequence of that advice, she purchased brieves, and thereupon obtained herself served and retoured heir of provision to her father, by his contract of marriage in 1685, in order to carry the procuratory and precept in that contract which she was advised to have never yet been duly executed; and thereupon having expede an infeftment, she brought a process of mails and duties against the tenants of the tenandry of Baro.

" How she came to make her demand only with respect to Baro, and not with respect to Linplum, which seems to have stood on the same footing, is not material to inquire. It seems there was some transaction between her and the Marquis of Tweedale, taking burden for the heirs of entail. Be that as it will, it is enough to say that the present process of mails and duties is only of the lands of Baro, and the lady having disponed and made over her right to the premises in favour of Mr. James, her second son, for himself, and as trustee for his elder brother, the process proceeds at his instance.

" On the other hand, Lord Charles Hay being advised that proper titles had been made up, whereby Sir James was enabled to make the tailyie 1699, and Sir Robert to make the tailyie 1748; he also obtained himself infeft. The method he took was to execute in his own favour the procuratory 1699, as assignee thereto, by the deed 1748; and as thereby having the preferable right, compeared in the process of mails and duties, and pleaded preference.

" And the question comes just to this, whether the general service expede by Sir James in 1694, as heir of tailyie, and provision to his son John, did effectually carry the procuratory and precept in his son's contract of marriage or not. If it did, then Lord Charles falls to be preferred. If it did not, Mr. Hay will fall

to be preferred, as deriving right from his mother, who is the heiress of the former investiture.

" The parties, indeed, have expatiated at great length on some other matters. Much is said on the part of the young gentleman of the favour of the case, of unfavourableness of the settlements made by Sir James and Sir Robert, in prejudice of their nighest heirs; and 2*dly*, Supposing the general service in 1694 to have been ever so properly expede, that it was not in the power of Sir James gratuitously to give away the succession in prejudice of his grandchild, the daughter of John, who, by the marriage contract, was called to the succession, failing Sir James, and the heirs male of his body; and, on the other hand, it is pled for Lord Charles, that when, upon the death of John, Sir James's son, the succession opened to Sir James, he had no occasion to make up any new title by serving heir to his son; for that, as no seasine had been taken upon the marriage contract to divest Sir James of the feudal right that was in him, that feudal right remained with him, and the subaltern right granted to his son became sopite and extinguished.

" I say these and some other things are pleaded in the informations. But I am to trouble your Lordships with none of them, as from none of them would I have been moved to trouble your Lordships with this report. And the only question I am to state to your Lordships, is upon the validity or invalidity of the general service 1694, to carry the procuratory and precept in the marriage contract 1685. And this leads to state the objections made to it.

" The text is the general service itself, or verdict of the jury retoured to chancery, which you have, p. 3 of the pursuer's information, in these words: '*quod quondam Joannes Hay, jun. de Linplum, filius natu Maximus Domini Jacobi Hay de Linplum, Militis Baronetti, latoris presentium, obiit ad fidem et pacem, S. D. N. Regis et quod dict. Dominus Jacobus Hay est legitimus et propinquior heres talliæ et provisionis ejusdem quondam Joannis Hay, sui filii; et quod est legitimæ ætatis. In cujus rei testimonium,*' &c.

" It finds that Sir James is heir of tailyie and provision to his son, but by what deed it is silent.

" And ditto, p. 3. of said information, you are further told that the original proceedings before the inquest are extant, and among these, the claim given in to the inquest in these words: ' That he had purchased and raised breeves forth of their Majestie's chancery, for serving and retouring of him, as nearest and lawful heir to umquhile John Hay, younger of Linplum, his eldest lawful son, and seeing the said John Hay, his eldest lawful son, died at the faith and peace of our Sovereign Lord, and that he *(i. e.* Sir James,) was of lawful age; therefore, desiring their wisdoms (the inquest) to serve and retour him nearest and lawful heir of tailyie and provision to the said umquhile John Hay, his son,' but not a word in what estate, or by virtue of what deed of settlement. And in page 4th you are told, that for verifying this claim, no other proof was brought other than the oaths of two men, who deponed *affirmativè* to the claim, but still neither was the marriage contract 1685 produced, nor any evidence brought that ever such a deed had existed: and the case so standing,

" It was, on the part of Mr. Hay, objected, That as the retour makes no mention of the subject in which Sir James was heir of tailyie and provision, nor of the settlement by which he was made heir of tailyie and provision, it was inept, null, and void,

as it could not import a cognition of his being heir of tailyie and provision to his son in this estate by this settlement, nor indeed in any particular estate by any settlement.

"And for illustrating of this, it was observed, That every thing which is found proven by the verdict might be literally true, and at the same time, it might not be true that Sir James Hay was heir of tailyie and provision to his son in the lands in question.

"A man may be heir of tailyie and provision to another in different estates, by distinct and different deeds of settlement; but his being heir of tailyie in one estate will not be proof that he is heir of tailyie in the other estate, nor will his being entitled to be served in the one be a proof that he is also entitled to be served in the other, as the event in which he is called to the succession in the one may be different from the event in which he is called to the succession in the other. Though, therefore, it might be true, as the verdict and retour finds that Sir James was an heir of tailyie and provision in some estate, that will not prove that he was heir of tailyie and provision in the estate in question.

"Nor is it material in this argument, says the pursuer, That he cannot condescend on any separate estate to which this verdict might apply, because the question here is not whether really and truly Sir James was the heir of tailyie and provision to his son, in the estate in question, which we see to be the fact by the contract of marriage; but the question singly is, whether that be proven by this retour? the pursuer contends that it was not, as it refers to no particular subject or settlement, and is therefore void and inept, as it proves nothing.

"It was ANSWERED by Lord Charles Hay, whom I shall call defender, that it is by no means necessary in a general service as heir of tailyie and provision such as this, that the verdict should refer to the particular estate or deed of settlement in which the claimer intends to serve. It is enough that he be served heir of tailyie and provision, as that will carry every estate, in which, by any deed of settlement, he shall appear to be heir of tailyie and provision; that so the case is in general services, as heir male or heir of line; that such services, without referring to any deed of settlement in favours of heirs of line or heirs-male, establish a complete title to every estate that shall appear to be limited to heirs-male or heirs of line; and no good reason can be assigned why the same should not also obtain in the general service of heirs of provision.

"It was further said, that it appears from the records of Chancery, that great numbers of general services of heirs of tailyie and provision are received, and retours issued thereupon, in the precise form with the service and retour in question, on the validity of which a great part of the property of the nation may depend; and it should therefore be of dangerous consequences to find such services void and null.

"And, in the last place, the case of Pittrichy was referred to, where the very same objection to the lady's service was repelled by this Court, and the judgment affirmed by the House of Peers.

"To the first it was for the pursuer REPLIED,—That it may be true, that in general services of heirs of tailyie and provision, which specify the character under which one serves, to be as heir of line or heir-male, there is no occasion to refer to the deed by which the subject is provided, for this reason,—That a man can have but one heir of line, or one heir-male, therefore such service is a full proof

that no other person whatever can claim any provision in that character, and therefore such general service is a good service to carry every subject to which the heir of line or heir-male shall appear to be provided; but the case is very different where the service is of a person who is neither heir of line nor heir-male, for a man may have different heirs of provision in different subjects, and some of them called to the succession on the failure of heirs-male of his body, others only on the failure of heirs male and female of his body; and a verdict which retours one to be heir in one of these estates, can be no proof that he is heir in the other. But where a man is proved heir-male and of provision in one estate, it will also carry every other estate that is provided to heirs-male.

"As to the second, the practice of the Chancery,—It may well enough be remembered that there were several instances even of such services as heir of tailyie as this is, but I do not so well remember if there were any instances wherein the import of such services had been litigated. I rather think there were no judgments of this Court alleged upon the import of such services, so that, till the case of Pittrichie, it did not appear, so far as I remember, that any judgment of this Court had been given on the point. And this leads, in the last place, to the case of Pittrichie.

"To which the pursuer ANSWERED,—That it is but a single case, and that attended with many specialities.

"In the first place, it was a point but faintly litigated on the part of Major Maitland; there was but a single interlocutor on the point not reclaimed against by the Major, as another point was given for him, and on which he prevailed.

"*2dly*, Says the pursuer, there was this specialty in the case, that it appeared from the proceedings before the inquest, which were extant, that the settlement by Sir Charles Maitland in 1700, whereby, in the event that had happened, the lady was called to the succession, had been laid before the inquest, which, though it did not satisfy every judge, as some were of opinion that the retour must stand or fall without the aid of extraneous circumstances, may yet have prevailed with the majority.

"And, in the last place, that there was no general judgment on the point in the case of Pittrichie. The interlocutor only was, that Mrs. Jean Maitland's retour carried the procuratory in the tailyie 1700, which may have been just, and justly affirmed in the House of Peers, but will be no rule to other cases not attended with the like specialities; and what the pursuer now insists for is, your Lordships' judgment on the general point."

[Here Lord KILKERRAN's report ends.]

"*December* 14, 1757.—The Court pronounced this interlocutor,—On report of the Lord Kilkerran, the Lords find, that the general service in the year 1694, of Sir James Hay, as heir to his son John, was not sufficient to vest in him the personal right to the lands in his son's contract of marriage; but find that Sir James Hay had sufficient right, without the necessity of a service, to convey the said lands to Sir Robert his son, by the deed of tailyie 1699, and that they were properly vested in Sir Robert; and therefore repel the objections to the titles in the person of Lord Charles Hay, and prefer him to the mails and duties of the lands of Baro."

"*December* 13,—On this judgment Lord Kilkerran remarks; "Found the gene-

ral service null; but to the surprise of the lawyers themselves for Lord Charles, found that Sir James had no occasion for a service, which the Ordinary did not think worth reporting."

Both parties complained of this interlocutor.

The defender presented a petition against the first part of it, founding chiefly upon the case of Pittrichie and upon the evidence of the practice which was produced in that case from the record of services. The petition prayed the Court to alter the first part of the interlocutor above recited, to repel the objection to the service of Sir James Hay, as heir of tailyie and provision to his son John Hay, and to sustain the said service as sufficient to carry the personal right of the contract of marriage 1685, and consequently to find that the subsequent service of Lady Margaret Hay, as heir of provision to her father John Hay, under the same contract of marriage, was incompetent and inept.

On advising this petition and answers, the Court accordingly altered the first part of the interlocutor of 14th December. Lord Kilkerran says:—

1758. *February* 22.—"It was carried by the President's casting vote, to alter the interlocutor, and to sustain the general service, and parties acquiesced."

On the other hand, the pursuer complained of the second part of the interlocutor of 14th December, by which it was found, That Sir James Hay had sufficient right without the necessity of a service. On advising this petition with answers, this part of the interlocutor also was altered. Lord Kilkerran says:—

"*June* 28, 1758.—The Lords altered, and most justly. The principle urged by the President for Lord Charles was just, that where a man has two rights in him he might make choice of either, and no heir succeeding could take up the other right, and thereon quarrel his deed. But it did not apply, for here the two rights were not in Sir James, as he had not made up a title to the personal right which lay in *hereditate jacente* of his son."

1758. *July* 4. MRS. ANNE ARBUTHNOT *against* LIEUTENANT ROBERT ARBUTHNOT.

THE defender was heir, and the pursuer executor, of their brother the late James Arbuthnot.

James Arbuthnot had been served heir to his father in a burgage tenement in Edinburgh, and he was also infeft in an annualrent of 500 merks out of the lands and barony of Creiggie.

On the death of James, the defender being pursued by his sister before the Commissaries, and called on to account for the moveable property belonging to his brother in his possession, insisted that he was entitled to retain certain articles as heirship moveables.

"To this it was OBJECTED by the pursuer, That although the deceased had been infeft in a burgage tenement, this was not enough to make him a baron in the sense of the law, so as to entitle his heir to heirship moveables, and it was not alleged that he was a burgess: that supposing an infeftment, in such a