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

tenement, were in the general case sufficient to entitle the heir to heirship moveables, yet in this case the deceased, sometime before his death, had disponed the tenement in question to his sister the pursuer; and that as to the infeftment of annualrent over the estate of Creiggie, the deceased had also been denuded of it before his death by a conveyance in security of a debt which he owed her.

ANSWERED for the defender, That there could be no doubt that the infeftment of the deceased in a burgage tenement entitled his heir to heirship moveables: *Mack. Obs. on Act* 1474: *Stair* 3, 5, 9: *Bank.* 2—292: That the disposition of this tenement in favour of the pursuer, not only contained a power to alter, or revoke, or charge the subject with debt, but also a power to give it away gratuitously, and consequently was truly no more than a *donatio mortis causa,* which left the granter still fiar of the subject; that notwithstanding such a disposition, the subject would have fallen under James' forfeiture, and that a simple revocation by him would have annulled the pursuer's right without the necessity of James being reinvested: and lastly, As to the infeftment of annualrent, that the deed granted by James to his sister was not an absolute conveyance, but a mere right in security.

The Commissaries found, "That the defender has no right nor title to heirship moveables."—But the cause having been advocated, the Court, July 4, 1758, "remitted to the Commissaries, with instructions to find Robert Arbuthnot entitled to heirship moveables."

Lord Kilkerran says:—"This the Lords thought, on both grounds, that of his having a house, and that of his having an infeftment of annualrent, whereof he was not divested by the assignation on security to his sister."

1758. *July* 7. ROBERTSON *against* HIS MAJESTY'S ADVOCATE.

THIS case is reported in the Faculty Collection, (*Mor.* 11,280.) Lord Kilkerran has the following note upon the point which it involved.

June 28, 1758.—"I incline to think the interruption good, because judgment might then have been given, albeit the pardon had not passed the seals upon production of the warrant, for the same reason that a witness, though *socius criminis,* will be admitted, having a pardon, on production of the warrant, though it has not passed the seals, as it has often been found; but a new point occurred to the Court, not mentioned in the memorial, that since that act of interruption the prescription was run, and the cause was put off till Friday.

"It was in ANSWER, to the case of a witness, observed by the President, that it does not apply to this case, for that a witness may be admitted whenever his terror is over."

"*July* 7, 1758.—Sustained the claim."