which the other party cannot demand implement of without implementing his part? And as little can his assignee, whether voluntary or legal. And upon this point a decision was referred to between *Graham of Greigston* and the *Creditors of Trail*, in the year 1747, as concluding *a fortiori* to the present case. I will not trouble your Lordships with repeating it. You have it fully set forth in the Earl's information.

" As to the extent of the balance of the price due, the Earl only founds upon this account which he found among his father's papers, as a presumptive evidence that such was the balance, unless Sir James or his creditors prove it to have been less."

[Lord Elchies states that " the Lords found the Earl preferable for the balance yet resting of the price."]

1753. *August* 12. MAJOR FORBES *against* MISS MAITLAND.

THIS case is reported in *Fac. Coll. (Mor.* p. 14431.) The following is the opinion delivered by Lord KILKERRAN, who was against the judgment:—

" I gave my opinion when this case was formerly before the Court, that this retour, which bears no more than this, that Mrs. Jean Maitland was heir of provision to her brother, Sir Charles Maitland, without specifying the deed under which she claimed to be served, was altogether inept, void, and null, and I remain of the same opinion.

" But when I say this, I do not mean to say that every service in general of an heir of provision is void and inept, where the deed by which the provision is made is not produced before the inquest, and specified in the retour; far from it, for I have no doubt but that in many cases a general retour of an heir of provision may be effectual to carry the provision, albeit the deed in which the provision is made be neither laid before the inquest, nor specified in the retour; and the question will be, whether the present retour be one of those or not? And in order to answer that question, I cannot do better than first to state these cases, and then compare them with the case in hand.

" Where there is a general service of an heir of provision, which specifies the character under which one serves, to be as heir of line, or as heir male; in that case, though the retour do not specify the deed of tailyie by which the subject is provided, I think it a good service, and that it will carry every subject to which the heir of line, or the heir male, shall appear to be provided.

" And the reason is plain. A man can have but one heir male, and, therefore, a service of heir male and provision is a proof that no other person is at this day existing, who at any time before could have claimed that provision as heir male: in other words, as a man can have but one heir male, the service, as heir male and provision, is a proof that none other can claim the provision in that character.

" Nay, I may carry the matter a little farther, that a service as heir male in general, though not adding *and of provision*, will carry every subject that shall appear to be provided to the heir male; for the same reason I have given that as a man can have but one heir male, such service is a proof that if any other did

ever at any time exist, who might have claimed the provision as heir male, he is now no more existing. In other words, this service is a proof that none other can now claim the provision in that character. Nor is this any way contradicted by the decision in the case of Elshiesheils, which, by the bye, has nothing to do more or less with this question. The case there was a provision made to the heir male of a second marriage. The man who truly was heir male of the marriage, served himself not heir male of the marriage, but heir male general. This service was found ineffectual to carry the provision, and justly, because he might have been heir male general, and not heir male of the marriage; but had the provision been to the heir male general, the service would have been good, because none other could have claimed the provision but he who was served heir male.

"These are the cases in which a general service is effectual to carry a provision, though the retour do not specify the deed by which the provision is made, where the retour bears the character of the person serving to be that he is heir male and of provision, or simply that he is heir male, or heir of line; because, as I have said, that as a man can have but one heir male, one heir of line, the service is a proof that none other than he can claim a provision made to the heir male, or to the heir of line—none other can claim in that character.

"It remains now to consider whether it will follow, that because a retour, which specifies the character under which the person serves, to be as heir male to the defunct, will carry every provision that shall appear to be made by the granter to his heir male, therefore, a retour of one, as heir of provision, which specifies no such character, will carry every provision that may appear to have been made by the defunct to the person retoured; and in my apprehension, there is not the smallest argument from the one case to the other.

"A man, as has been said, can have but one heir male, and the service of one, as heir male, is a proof that no other person existing can claim in that character. The case is the very reverse in the case of a provision made to one who is neither heir of line, nor heir male. A man may have twenty heirs of provision. Every person in a destination is an heir of provision to the defunct; the second, and third, and even the last called in the destination, as well as the first; nor does the retour of any one of those that he is heir of provision, prove any person who may have preceded him in the order of the destination has failed; the retour of one, as heir male, proves that none other exists that can claim under the character; but the retour of one, as heir of provision, proves no such thing. Let me add farther, a provision may be made to two or more jointly; each of them are heirs of provision. How can it appear from a retour, as heir of provision, without specifying the deed by which the provision is made, that such is not the case? There cannot be joint heirs male; there can be but one heir male; and, therefore, a retour of one, as heir male, proves that no other can be entitled to a provision made to the heir male; but a retour as heir of provision proves nothing, and is, therefore, inept and void, unless it specify the deed by which the provision is made.

"Or may not the case be more shortly this?—

"A man can have but one heir male. He may have twenty heirs of provision. A retour, as heir male, is a proof that no other can take in that character but he. A retour, as heir of provision, is not a proof that none other can take;—it is not a proof that any one is dead, or has failed, that may have preceded him in the order of the destination, for every one in a destination is an heir of provision.

"Between 1680 and 1730, no less than 340 instances of retours that bear special reference to the deed of taily to which the heir was served.

"It is true that in that period there are also several instances of retours that bear no such reference, though not nigh so many; and if from these shall be deduced the services which are of heirs-male of provision, and which are of heirs of line and of provision, which do not need to refer to the special deed of taily, the erroneous instances will be very few. Again, No. 2, between the 1730 and 1752, there are no less than 620 instances of general services which refer to the deed of taily; and the contrary instances in that period are yet less in proportion than in the former.

"*2dly*, There are no less than 32 instances wherein the blunder of the conductor of the erroneous service is corrected."

1753. *November* 21. CREDITORS of Carleton *against* WILLIAM GORDON.

This case is reported by Elchies, (*Tailyie, No.* 51.) also by Lord Kames, (*Mor. p.* 10260.) and in Fac. Coll. (*Mor. p.* 10258.) It was reported by Lord KILKERRAN to the Court. His Lordship's report is as follows:—

"JAMES GORDON of Carleton, made a tailzie of his estate in the 1684. It is wrote with his own hand, and being of his own dictament, was a very inaccurate performance, and has given occasion to a variety of questions, many of which being now finally determined, there is no occasion to mention them.

"All that is needful to say for understanding the question now to be reported is, That the persons first called were the heirs-male of the granter's body, whom failing, John Gordon, third lawful son to Earlstoun, and the heirs-male of his body, whom failing, Nathaniel Gordon, and the heirs-male of his body, whom failing, to James Maitland, and the heirs-male of his body, whom all failing, to his own nighest heirs whatsoever. And as there were no heirs-male of the granter's body, and that John Gordon, first called after them, predeceased the granter, and that no infeftment had followed on the entail, Nathaniel, to whom it next devolved, made up his title by service as heir in general to James, the maker of the entail.

"That by this tailyie, the several persons called to the succession were prohibited 'selling wadsetting, impignorating, nor anywise away putting either legally or conventionally my lands and estate aforesaid, nor granting any annual-rents nor yearly duties forth thereof, nor contracting debts, *nor doing any other deed, directly or indirectly*, (words which give rise to a good part of the present debate,) above the equal half of the full value thereof, whereby the same may be apprized, adjudged, or otherwise evicted in law from them, in prejudice of the foresaid tailyie.'

"The estate thus devolving to Nathaniel, he, in the contract of marriage of his son Alexander with a daughter of Earlston's, disponed the estate to him, and the heirs whatsoever of the marriage, in direct contradiction of the entail; and upon this title Alexander possessed all the days of his life, as an illimited fiar.

"It happened that, as Nathaniel had, during his incumbency, contracted several