[1st March, 1842.]

JAMES RENTON, Appellant.

ROBERT ANSTRUTHER, Esq. PHILIP ANSTRUTHER, Esq. and Dame SARAH ANSTRUTHER, Respondents.

Tailzie Titles. — Whether a party having a mere personal right to lands can validly make a procuratory of resignation as the basis of an entail. — *Query.*

IN the year 1806, Catharine Anstruther purchased from the Marquis of Titchfield the lands of Thirdpart, with money received from her brother, Sir Alexander Anstruther, then in India, and also with money advanced from her own funds; and obtained a conveyance to herself, which contained an assignation in these terms: — "As also we do hereby assign and dispone to "the said Catharine Anstruther and her foresaids, the whole "writts, evidents, rights, title-deeds and securities, both old and "new, and as well legal as conventional, granted and conceived "in favour of us and our ancestors and authors, of and concern-"ing the lands, teinds and others before disponed, with the "pertinents of the same, together with the procuratories of "resignation, precepts of sasine, clauses of warrandice, obliga-"tions for making writs furthcoming, and whole other oblige-"ments and clauses therein contained, and all action and "execution which have been, or may be, brought or used "thereupon."

Catharine Anstruther was infeft on the precept in this conveyance. On 5th March, 1808, she executed a disposition, which proceeded on this narrative: — "Considering that I some "time ago purchased from the Most Honourable the Marquis "and Marchioness of Titchfield, the lands and barony of

" Caiplie, comprehending the lands of Overtown of Caiplie, " called Thirdpart, and others hereinafter mentioned, in trust " and for behoof of Alexander Anstruther, Esq. Attorney- " General to the Honourable the East India Company at " Madras, my brother, the price whereof, excepting .. " of principal and interest from the has " already been paid, partly from sums belonging to my said " brother, and partly from money borrowed or advanced by me " on his account, and the said Alexander Anstruther being now " desirous that I should convey over to him the said purchase, on " his relieving me of the sums borrowed or advanced by me as " above mentioned, and also of that part of the price still " remaining unpaid; therefore I, the said Catharine Anstruther, " do hereby sell, alienate and dispone from me, my heirs and " successors, to and in favour of the said Alexander Anstruther, " and his heirs whomsoever, and disponees, heritably and irre- " deemably, All and Whole the lands and barony of Caiplie, " comprehending the lands and others after mentioned." After describing the lands the disposition contained an obligation to infeft " the said Alexander Anstruther and his aforesaid," by a double manner of holding; procuratory to resign for new infeftment in favour of " the said Alexander Anstruther and his " aforesaid;" warrandice against fact and deed; a precept for infefting " the said Alexander Anstruther or his aforesaid;" and a clause of assignation in these terms: — " As also, I do hereby " assign and make over to the said Alexander Anstruther and " his foresaids, the rents, maills, profits and duties due, payable " and prestable for and forth of the lands, teinds and others " above disponed, by the tenants and possessors thereof, for the " crops and years 1805 and 1806, so far as unuplifted, and for all " years and crops thereafter to come, with the tacks of the fore- " said lands, and whole clauses therein, and execution competent " thereon, and I do also hereby assign and dispone to the said

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" Alexander Anstruther and his foresaids, the whole writs, " evidents, rights, title-deeds and securities, both old and new, " and as well legal as conventional, granted and conceived in " favour of me and my ancestors and authors, of and concerning " the lands, teinds and others before disponed, with the perti- " nents of the same, together with the procuratories of resigna- " tion, precepts of sasine, clauses of warrandice, obligations for " making writs furthcoming, and whole other obligements and " clauses therein contained, and all action and execution which " have been, or may be, brought or used thereupon, which " assignation of the rents, maills and duties, and disposition of " the writs, I bind and oblige me and my foresaids to warrant " from my own proper acts and deeds only."

On the 22d September, 1808, Sir Alexander ~~Cochrane~~ executed a deed of settlement of the lands of Thirdpart, according to a special destination.

On the 18th January, 1810, while the procuratory and precept in Catharine's disposition were yet unexecuted, Sir Alexander Cochrane executed a procuratory of resignation, for the purpose of creating an entail of the lands. This deed contained this narrative: — " I, Alexander Anstruther, Esq. &c. considering " that Miss Catharine Anstruther, my sister, some time ago " purchased in my behalf, and for my use, the lands and estate " of Caiplie, and others after described, lying in the parishes of " Kilrenny and Crail, and county of Fife, the right and title to " which was taken and conceived in her favour, and still stands " vested in her person for my use; and that I having resolved, " for certain good causes and considerations, to execute a deed " of entail of the said estate, it is necessary that the said Catharine " Anstruther, as standing nominally vested in the right thereof, " should concur with me in granting said deed, and which she " has signified her readiness to do in manner underwritten: " Therefore witt ye me, with consent of the said Catharine

" Anstruther, and I the said Catharine Anstruther, as having " right in manner foresaid, and for fulfilling the intentions of " my brother, and we both, as in the right of the premises, to " be bound and obliged, as we hereby bind and oblige us and " the heirs of tailzie and provision after specified, without the " benefit of discussing them in order, and all others our successors " whomsoever, to infeft me the said Alexander Anstruther, " myself, and the said heirs after mentioned, in the said lands " and estate of Caiplie and others, lying and described in " manner particularly after specified, to be holden either of us " and our foresaids, or from us, of and under our superiors " thereof, as freely as we hold the same ourselves, and that either " by resignation or confirmation, or both, the one without " prejudice of the other; but always with and under the condi- " tions, provisions, clauses irritant and resolutive, declarations " and reservations underwritten; and for accomplishing the said " infeftment by resignation, we hereby constitute and appoint "

" and each of them, jointly and " severally, our lawful and irrevocable procurators, giving, " granting, and committing to them full power and commission " for us, and in our name and behalf, duly and lawfully to " resign and surrender, as we do hereby resign, surrender, " upgive, overgive and deliver, All and Sundry the lands and " estate after mentioned, viz. [here follows the description of the " lands,] as the said whole lands may be otherways or more " fully described in the rights and infeftments thereof, in the " hands of our respective immediate lawful superiors, or their " commissioners, in their name, having power to receive resigna- " tions and to grant new infeftment, in favour and for new " infeftment of the same to be made, given and granted to me, " the said Alexander Anstruther, and the heirs of my body, " whom failing, to the heirs of the body of the deceased

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" Brigadier-General Robert Anstruther, my brother; whom " failing, to the said Miss Catharine Anstruther, my eldest " sister, and the heirs of her body; whom failing, to Mrs Eliza- " beth Anstruther, otherways Campbell, my youngest sister, " widow of the deceased Lieutenant-Colonel Colin Campbell, " younger of Stonefield, and the heirs of her body; whom " failing, to the other persons called and entitled to succeed to " the estate of Balcaskie, under and by virtue of a deed of " entail of that estate, executed by Sir Robert Anstruther of " Balcaskie, baronet, my father, in the order therein set down " and expressed; whom all failing, to my own nearest heirs " whomsoever, and assignees, heritably and irredeemably; but " always with and under the burden of a free yearly annuity of " L.1000 sterling to Mrs Sarah Anstruther, my wife, in case she " survives me;" and other provisions not necessary to be noticed. After imposing the fetters of a strict entail, the deed proceeded in these terms: — " And we, the said Alexander " Anstruther and Catharine Anstruther, do hereby jointly and " severally assign and dispone to me, the said Alexander " Anstruther, and my said heirs of entail, whom failing, to my " other heirs as aforesaid, under the conditions, provisions, " declarations, and clauses irritant and resolutive herein con- " tained, all and sundry writs, evidents, rights, title-deeds and " securities whatever, both old and new, made, granted, and " conceived in favour of us and our ancestors and authors, of or " in relation to the said lands and others before assigned, " reserving nevertheless full power and liberty to me the said " Alexander Anstruther by myself alone at any time of my life, " *etiam in articulo mortis*, without consent of any of the heirs of " entail or heirs whomsoever before mentioned, by any writing " under my hand to alter, innovate, or revoke these presents in " whole or in part, as I shall think proper, but declaring if the " same shall not be altered or revoked by me, or if I shall not

" otherways settle the said lands and estate by any deed con-
" trary hereto, it is my intention, and it is hereby expressly
" provided and declared that these presents shall stand good
" and continue effectual and obligatory, not only as to all the
" lands and others foresaid, whereto a sufficient title shall be
" made up and completed in my person before my decease, but
" also to compel my heirs-at-law and other heirs to make up
" and complete titles in their persons to any part of the said
" lands and others to which I shall not have completed my own
" titles, and then to resign the same in the hands of the
" respective superiors thereof in favour of the heirs of tailzie
" herein before specified, with and under the whole conditions,
" provisions, clauses irritant and resolutive, and reservations
" before written: As also, although I shall hereafter take any
" of the rights and infeftments of the said lands and others
" before resigned, to and in favour of any other heirs than those
" of entail before written, yet it is hereby nevertheless provided
" and declared that these presents shall be effectual against such
" other heirs, unless it shall be expressly declared in the said
" rights that my intention is thereby, in so far, to alter this pre-
" sent right and settlement; and although these presents shall
" be found lying in my own custody, or in the custody of any
" other person, and no farther executed at my death than it is
" at present, yet I hereby declare that the same shall be equally
" good and effectual to all intents and purposes, as if the same
" had been duly recorded in the Register of Taillies, and fully
" completed by infeftment before my death." Here then followed the necessary clauses for registration of the deed, and a precept for infeftment, which set out in these terms. " And
" lastly, we," &c.

Although this deed bore to be made with consent of Catharine Anstruther, she never adopted, or in any way adhibited her consent to it.

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On the 19th January 1814, Sir Alexander Anstruther executed another deed, which contained this narrative, — "I, Sir "Alexander Anstruther," &c. "considering that Miss Catharine "Anstruther, my sister, some years ago purchased, in my behalf "and for my use, the lands and estate of Caiplie and Thirdpart, "and Barnes and others, lying in the parish of Kilrenny and "Crail, and county of Fife, the right and title to which was "taken and conceived in her favour and in her name, but for "my use, of all which lands and estate I afterwards executed a "deed of entail, with and under certain conditions, provisions, "and reservations, and with and under the burden," — [Here followed an enumeration of the provisions granted by the deed of 1810,] and a recital of the power of alteration reserved by that deed, — "and I, the said Sir Alexander Anstruther, having "resolved, and intending to alter the aforesaid deed of entail, "and will or deed of settlement in the particulars hereinafter "mentioned: Therefore, wit ye me, that I, the said Sir Alex-"ander Anstruther, do hereby alter, innovate, and in part "revoke the said deed of entail, and the said will or deed of "settlement, so far as," — [Here followed various alterations on the provisions in the deed of 1810.] — "And I hereby farther "innovate, alter, and in part revoke the said deed of entail, in "so far as relates to the persons to be called and entitled to "succeed to my said lands and estate, as heirs of entail, by "declaring and appointing, as I do hereby expressly declare "and appoint, that after my death, my said lands and estate "shall descend to my eldest son and heir, Robert Anstruther, "and the heirs of his body; whom failing, to my second son, "Philip Anstruther, and the heirs of his body; whom failing, "to my third son, Thomas Andrew Anstruther, and the heirs "of his body; whom failing, to my fourth son, George Buchan "Anstruther, and the heirs of his body; whom failing, to every "other son to be born to me of my present or any future mar-

" riage successively, according to their priority of birth, and to " the heirs of the body of each son successively; whom failing, " to my daughter Janet Catharine Anstruther, and the heirs of " her body; whom failing, to my daughter Louisa Ann " Anstruther, and the heirs of her body; whom failing, to each " and every other daughter to be born to me of my present or " any future marriage successively, according to priority of birth, " and to the heirs of the body of each and every such daughter; " whom failing, to the heirs of the body of my late brother, " General Robert Anstruther; whom failing, to my sister, " Catharine Anstruther, and the heirs of her body; whom " failing, to my sister, Elizabeth Anstruther, *alias* Campbell, and " the heirs of her body; whom failing, to my uncle, Colonel " John Anstruther Thomson, of Charlton, and the heirs of his " body; whom failing, to Sir Thomas Andrew Strange, Knight, " Chief Justice of Madras, and the heirs of his body; whom " failing, to the other persons called and entitled to succeed to " the estate of Balcaskie, under and by virtue of any deed of " entail which may have been made, or may hereafter be made, " of the said estate of Balcaskie by Sir Robert Anstruther, of " Balcaskie, Baronet, my father, in the order therein set down " and expressed as heirs of entail, under the said deed of entail " by me executed as aforesaid, and with and subject to all the " reservations, limitations, conditions, restrictions, powers and " clauses in the last-mentioned deed of entail so by me executed " contained; and I also hereby direct and appoint, that so soon " after my death as conveniently may be, upon the demand of " the tutrix and curatrix, or tutors and curators of my children, " or of any of them, the person or persons in whose name or " names the said lands and estate may then stand vested, may " execute all necessary surrenders, resignations and other deeds " and acts in law, and to and in the names of such persons as " may be proper for the purposes herein before stated; and I

" hereby declare, that the aforesaid deed of entail, and also the " aforesaid will or deed of settlement, bearing date the 22d day " of September 1808 years, in so far as the same are not altered " by these presents, shall still, *quoad ultra*, remain in full force " and virtue, hereby revoking all other dispositions of any part " of my property by me, at any other time, either before or " afterwards, up to this time made or executed, and I reserve " full power and liberty to myself, at any time of my life, and " even upon death-bed, to alter, innovate or revoke these pre- " sents, in whole or in part: But declaring that if I shall not " think proper so to do by a writing under my hand, these pre- " sents shall be valid and effectual, although found in my cus- " tody, or that of any other person, and undelivered at my " death, with the delivery whereof I have dispensed, and hereby " dispense for ever, consenting to the registration, &c.

The deeds before stated to have been made by Sir Alexander Anstruther, were executed by him while in India. In 1819 he left India for this country, but died on his passage.

At this time his eldest son Robert was a minor. In 1822, while Robert was yet in minority, the deeds of 1810 and 1814 were recorded in the register of entails, under a warrant obtained upon a petition presented in his name. On the 5th November 1822, he was served heir of line and of tailzie and provision to his father upon a claim which set out these two deeds; and on the 3d February 1823, a crown charter of resignation and confirmation, was expede in his favour, and of the parties called to the succession by the deed of 1814, under the limitations contained in the deed of 1810. This charter confirmed the original disposition to Catharine Anstruther, and proceeded upon a resignation made in virtue of the procuratory in her conveyance to Sir Alexander, of March 1808—" in favorem proque novo " infeofamento præmissorum faciend. dand. et concedend. dicto " Roberto Anstruther hæredibusque ex ejus corpore quibus " deficien. aliis hæredibus talliæ et provisionis supra script.

" secund. ordinem et cursum successionis antea mentionat." On 14th June 1823, infeftment was expede upon this charter: at this time Robert Anstruther was still in minority.

After he came of age he procured himself to be enrolled as a freeholder, in respect of his infeftment in the lands contained in the charter; he took the benefit of the act 10 Geo. III. for the improvement of entailed estates; and at different times he granted bonds of annuity, and other securities, over the lands in which the entail of 1810 was mentioned, and the effect of it preserved.

On the 17th October 1829, Robert Anstruther conveyed the lands to Maconochie and Paul in trust, to receive the rents and apply them in payment of his debts, and of the annuities secured upon the lands. This conveyance set forth the entail, and contained clauses for preserving its effect.

Afterwards he borrowed money to redeem these annuities, and Maconochie and Paul conveyed the lands to Renton in trust, by a deed which likewise recognized the entail.

On the 1st April 1836, Robert Anstruther accepted a bill for £183, 19s. 3d. drawn upon him by Renton, payable one day after date, and on the same day he gave him his promissory note for £1000, payable at the same time. As a creditor upon these documents, Renton brought action for adjudication of the entailed lands, but apprehending a difficulty of success in that action, by reason of the state of the titles, he brought an action of declarator and reduction, concluding to have it declared that no valid entail had ever been made, and that the lands were liable to be adjudged, as if the deeds of 1810 and 1814 had never been executed, or at least that no feudal title had been made up under the entail, nor the entail made real by infeftment, and in case it should be necessary, the title standing in the person of Robert Anstruther, should be reduced and set aside. The reasou on which this conclusion for reduction was founded was, " the said pretended charter, and the pretended resignation on

" which the same followed, and the infeftment taken thereon, " were without any legal or sufficient warrant, the same having " proceeded upon a procuratory of resignation, which gave no " warrant for any such charter and infeftment, or for any resig- " nation being made in favour of the parties in whose favour " they were granted and executed, or for the limitations, restric- " tions, and qualifications therein contained, and they are other- " wise irregular and inept." This action was directed solely against Robert Anstruther.

Dame Sarah Anstruther, the widow of Sir Alexander, and Philip his second son, obtained leave to sist themselves as parties, and they and Robert put in separate defences. Dame Sarah, and Philip Anstruther pleaded in defence, 1st, All the proper parties have not been called. 2d, The pursuer cannot maintain this action consistently with his own titles, character, and duty as trustee. 3d, The pursuer cannot maintain this action, because he is not a *bona fide* creditor of Robert Anstruther, but on the contrary, is acting in concert and collusion with him. 4th, The action is groundless on the merits, because Sir Alexander had a sufficient title in him to make the entail, and the titles have been effectually completed. 5th, The titles of Robert were completed under the entail before the pursuer became his creditor. The record was closed upon these pleadings.

The Lord Ordinary (Cunninghame) repelled the first defence, and ordered cases by the parties, and upon advising them, ordered them to be boxed to the Court, subjoining to his interlocutor the following note.

" *Note.* — In considering this case the Lord Ordinary has all the " inclination and leaning which the law has so often manifested to " liberate the proprietor in possession from the fetters of the entail, " if it has not been executed in a manner duly consistent with the " strictest rules of law and form. But, on the other hand, the Court

" must take care that no plea is sustained, in order to effect this, " which will put to hazard or unsettle any rules long understood by " parties and men of business as fixed in the law of title, and on " which innumerable parties and their families depend for the secu- " rity of their property. The Lord Ordinary entertains no ordinary " apprehensions that there is a risk of this from some of the pleas of " the pursuer. His views will be best understood from adverting to " the pleas of the pursuer in their order.

" I. It is said, that when Sir Alexander Anstruther executed the " first of the two deeds now in question in 1810, he was not *in titulo* " to grant any procuratory of resignation, as he was not infeft, and " did not validly assign the procuratory to which he then had right " in his sister's disposition of 1808.

" Now, as to this deed of 1810, though it certainly runs in the " name both of Sir Alexander and his sister, and was intended to be " executed by both, yet, as Miss Anstruther never signed it, it can " only be held as the deed of Sir Alexander alone. This the pur- " suer seems to admit. Nevertheless, *utile per inutile non vitiatur.* " The procuratory, as the deed of Sir Alexander, is not inept, because " the consent of a party was not adhibited, whose consent was not " necessary.

" Viewing this, then, as a procuratory of resignation by Sir Alex- " ander alone, was it in any respect ineffectual? He then had an " unquestionable personal right to the lands. He held the disposi- " tion of his sister, who had been infeft, setting forth, that the lands " had been acquired with his money, and therefore she disponed the " lands to him with procuratory and precept. He clearly, therefore, " had the right either to use Miss Anstruther's procuratory himself, " or to assign it to others, to be used under any conditions and limi- " tations that he thought fit. For example, he could have assigned " it to as many parties successively, in liferent, as he thought fit, and " to others thereafter in fee.

" If he could do this, there seems to have been nothing to prevent " him from transferring the procuratory to heirs and substitutes, " under the conditions and restrictions of an entail. The precedent

" of Napier and Livingstone, quoted in the defender's case, is suffi-
" cient to shew that it was decided both by this Court and the House
" of Lords, as an incontestable point, that a tailzie by a party holding
" only a personal right to lands is effectual. The question therefore
" is, if Sir Alexander Anstruther made his entail in the valid and
" effectual form which the state of his own title at the time required?

" Now, while the deed of 1810 was, in fact, a procuratory of resig-
" nation flowing from Sir Alexander himself, it contained also the
" usual general assignation of ' all and sundry writs, evidents, rights,
" ' title-deeds and securities, whatever, both old and new, made and
" ' conceived in favour of us,' &c. and the first, and indeed the main
" question raised by the pursuer is, whether Sir Alexander can be
" held under the general assignation of writs and evidents in the
" deed of 1810, to have validly assigned to the heirs and substitutes
" of tailzie the unexecuted procuratory in Miss Anstruther's disposi-
" tion of 1808? If this is decided affirmatively, much of the diffi-
" culty supposed to occur in these titles must disappear.

" The pursuers' argument on this head is founded, in a great
" measure, on the case of Graham of Gartmore and Don in 1815, in
" which it was found that the general assignation of writs and evi-
" dents, in a conveyance of lands and teinds, did not import the
" transference of a tack of teinds, to which the disponee had right at
" the date of the conveyance.

" But the Lord Ordinary views that as an entirely different ques-
" tion from the present. In fact, it is applicable to very few cases,
" except, perhaps, in questions of teinds, which are some time pos-
" sessed by parties under various peculiar rights very different from
" each other. In Graham's case, for example, the question came to
" be, whether it ought to be held, that when a proprietor made an
" entail of the fee of his lands and teinds, and assigned all writs and
" evidents in regard to these subjects, he could be held to have also
" entailed a tack of teinds held by him at the date of the tailzie?
' The Court, keeping in view the difference between rights of pro-
" perty and tacks, found that such a construction could not be put
" on the general assignation of writs and evidents in the estate of

" Finlayston. The import and extent of that decision was well ex-
" plained by Lord Glenlee in a late case, Hamilton *v.* Montgomery,
" 12 *Shaw*, 353, in which he said, — ' The Court held, that though
" ' the right in question was a tack of teinds which may be carried
" ' by assignation, yet the assignation to writs could only be used to
" ' support the right actually conveyed, but could not convey the
" ' tack itself.'

" This view of the ground of decision in Graham's case is also
" borne out by the argument of the successful party, as recorded in
" the Faculty Collection. ' The clause,' said he, ' assigning the
" ' writs and evidents, never had the force ascribed to it by the
" ' pursuer. It has been introduced merely in subserviency to the
" ' purposes of the disposition, and to carry to the disponee the par-
" ' ticular documents by which the rights conveyed may be com-
" ' pletely feudalized.'

" Now, apply these views to this case. The radical and actual
" right granted by Sir Alexander Anstruther in 1810 was a procura-
" tory of resignation. He must be presumed to have known that he
" could only grant such a procuratory as the holder and assignee of
" the procuratory of a previous proprietor feudally infeft, and there-
" fore it cannot be questioned in this particular case, that the assigna-
" tion of writs and evidents must be held to include and carry that
" prior procuratory under which alone he could give any operative
" or practical effect to the right which he then granted? It is
" thought the present case falls directly within the illustration put
" by the defender in Graham's case, of the instances in which the
" general assignation receives effect.

" The Lord Ordinary must own that he should consider the case
" of Graham as a precedent of most extensive and alarming applica-
" tion in practice, if it were held to rule such a case as the present.
" Perhaps there is no class of rights understood more universally to
" fall within general assignation of writs and evidents, than procura-
" tories of resignation. Many thousand charters have been passed,
" and are in daily progress on procuratories taken up under the
" general assignation clause, without any specific reference; and if

" this practice is now to be unsettled, or even if any doubt is to be " cast on titles and progresses so completed, the consequences cannot " be foreseen.

" But in what does the present case differ from those of most ordi- " nary occurrence? It is said that there was no conveyance of the " lands themselves here, but that the entail was in the form of a " procuratory by a party uninfeft. The entailer, however, gave no " disposition, because he was not infeft himself. Looking to the " state of his title if he had given a conveyance, the only clauses of " it which could have been feudally acted on, would have been the " procuratory and resignation of writs. But at present it is not very " easy to see on what principle effect can be refused to the deed of " 1810, which contains these clauses *per se*, in a separate deed.

" II. The next plea raised by the pursuer is, that the deed of " alteration executed by Sir Alexander Anstruther in 1814 was a " new entail, and that there was no assignation, general or special, of " Miss Anstruther's procuratory of resignation, at least in that last " deed. At present, however, the Lord Ordinary does not think " that this plea is maintainable.

" It has never been held in any case that a deed of alteration, or " of additional nomination of heirs, requires either a new conveyance " or a new procuratory or precept. On the contrary, in such cases " the prior rights or deeds, which form the basis of the title, are " taken up by the institute or heirs who have first occasion to use " them, for behoof of all interested in the destination, either as origi- " nally named or as afterwards altered and enlarged. The convey- " ance to, and possession by the first heirs, is a conveyance for " behoof of those afterwards brought in. This accordingly was one " of the points laid down by the great majority of the Judges in the " Duchal case, 1 *Shaw*, p. 9.

" In the present case, the deed of 1814 was merely a deed of " alteration, and in supplement of the deed of 1810. It did not " recal it, nor was it intended to subsist as an independent right. " On the contrary, the deed of 1814 expressly declared, that the

" deed of entail of 1810, 'in so far as not altered by these presents,
" ' shall still, *quoad ultra*, remain in full force and virtue.'

" III. The only other question is, whether there be any thing feu-
" dally inept in the titles, as completed in Major Anstruther's
" person during his minority?

" Here it is not enough to say, that as Sir Alexander Anstruther
" never completed a feudal title to the estate, a title might have
" been made up, which would have given the Major a right for a
" time in fee-simple, and so render it liable for his debts. The same
" might be done by every heir of entail if he ran the risk of forfei-
" ture. But if an heir be under a personal obligation to complete a
" title under the limitations of a tailzie, and does so regularly, can
" this be afterwards reduced?

" These are the proper questions here. From what has been
" already indicated, the personal obligation on the Major to complete
" a title under his father's deed of entail, and alteration thereof, does
" not appear easily disputable; and if so, the Lord Ordinary does not
" see what form of title could have been expede other than that
" which was done in the present instance.

" Miss Anstruther, the last infeft proprietor, was dead. The pro-
" curatory of resignation granted by her was unexecuted. It stood
" validly assigned, (as the Lord Ordinary assumes,) to the heirs of
" entail. Major Anstruther took up the personal right by a general
" service as heir of tailzie and provision, and he got a charter expede
" confirming Miss Anstruther's base infeftment, and giving a charter
" of resignation on her procuratory, as assigned by Sir Alexander to
" himself, under the conditions of both the deeds of entail. The
" Crown charter in favour of the Major affords evidence *in græmio*,
" that the title on which the resignation proceeded was correctly
" set forth in the instrument of resignation which preceded the
" charter, as required by the act 1693, and being so, the Lord Ordi-
" nary doubts extremely if there be any grounds on which it would
" be safe here to set it aside. J. C."

RENTON *v.* ANSTRUTHER. — 1st March, 1842.

On the 5th December, 1837, the Court, without having heard counsel, pronounced the following interlocutor: —" The Lords, " on report of Lord Cunninghame, Ordinary, having advised " this case, with the pleadings and proceedings — Sustain the " defences, and assoilzie the defenders from the conclusions of " the libel, and decern: Find Mr Philip Anstruther, defender, " entitled to his expenses: Allow the account to be given in, " and remit the account, when lodged, to be taxed by the auditor " in common form."

The appeal was taken against this interlocutor.

Mr Solicitor General and Mr Gordon for Appellant. — We do not raise any question as to the right of Sir Alexander Anstruther to make the entail of 1810; all we dispute is, the form in which it was attempted to be made. The real right to the lands was in Catharine Anstruther, at the date of her conveyance to Sir Alexander. He might have vested that right in himself, by executing either the procuratory or the precept in her conveyance, but he never did so. When, therefore, the deed of 1810 was executed, Sir Alexander had in him a mere personal right to the lands; the radical real right was yet in Catharine. Accordingly that deed was prepared with the view of her being a party to it, but, in fact, she never did execute the deed; the right, therefore, which was in her prior to this, and which was recognized by the deed as being in her, was not taken out of her by it. The deed was never intended to operate as a disposition, but was framed for resignation by Catharine, the party feudally vested, which she never was.

While then Sir Alexander was thus unconnected with the lands, and had in him a mere personal right, he executed the deed of 1810, containing a procuratory of resignation for new infeftment; but he could not himself have resigned in the hands

of the superior, as was done by vassals prior to the use of procuratories of resignation, seeing he was not the vassal, or a person whom the superior was in any way bound to recognize. As little then could he give authority for resignation being made by another as his procurator.

He might, no doubt, though vested only with a personal right, have executed a disposition, which, if it had contained the usual clauses, would have enabled the disponee to make up a title. That would have been, by virtue of the dispositive clause in such a conveyance, carrying the right that was in Sir Alexander, aided by the assignation of writs and evidents, which would have entitled the disponee to take up the procuratory and precept in Catharine's disposition of 5th March, 1808.

But the deed of 1810, if it could not operate as a transmission of the real right, by the means of resignation, as little could it be the foundation of a title, transmitting the personal right in Sir Alexander. It did not contain any dispositive clause or its equivalent. No doubt, it contained an assignation to writs and evidents, but that is a clause incapable of transmitting any right in itself, and is intended merely in fortification of the conveyance which must be found elsewhere; it carries every thing going to the security of the estate previously conveyed, but if there be no such conveyance, as in this case there was not, it is wholly inoperative to supply its place, Shanks *v.* The Kirk-Session of Ceres and Others, *Mor.* 4295; Strachan *v.* Whiteford, *Hailes*; Graham *v.* Don, 18 *F. C.*, 102; Hamilton *v.* Montgomery, 12 *S.* and *D.*, 349; Maitland *v.* Horne, *ante*, p. 1.

Moreover, if Catharine had executed the deed of 1810, and the procuratory in that deed had been used as was intended, the procuratory in the deed of 1808 would have been unessential to the title. If, on the other hand, Sir Alexander having only a personal right, had executed a disposition, the procuratory in the deed of 1808 would have been an indispensable link in the title.

In the first of these views it is plain, that the assignation in the deed of 1810, was not intended to carry the procuratory in the deed of 1808.

[*Lord Cottenham.* — If the party had assigned all his right, and likewise assigned the writs, would that have been sufficient?]

We submit not. The act 1693, cap. 35, says, that the procuratory shall be a warrant "for making resignations and taking "seisins," but does not give the procuratory any farther effect.

[*Lord Campbell.* — *Qua* Procuratory of resignation by a party having a mere personal right, it was clearly right, but might it not be used as evidence of the intention of the party as to the destination of the title?]

We apprehend, that even if it might, this would be unimportant in the conveyance of a real right.

Supposing the deed of 1810 to be *per se* inept as a deed of transmission, and to have left the real right untouched in the person of Catharine, and the personal right in Sir Alexander at his death, the general service of Robert, as heir of his father, vested in him such personal right, and entitled him to take up the procuratory in Catharine's conveyance of 1808, so as to enable him to vest in himself the real right; but that procuratory authorized infeftment in favour of Sir Alexander, and "his heirs "whomsoever, and disponees," whereas the resignation on which the charter was expede by Robert, was in favour of himself and the heirs of entail in the deed of 1814, and under the conditions of the deed of 1810, for which the procuratory gave no warrant. This resignation was sufficient to vest a fee simple title in Robert, but beyond that was simply void as without a warrant, and wholly inoperative as the means of perfecting a title under the supposed entail. It could only operate in this latter way on the supposition, that Sir Alexander, to whom he served heir of entail, was institute under the deed of 1810, but if the appellant is right in the first branch of his argument, that deed never conveyed any

right to Sir Alexander, or any one else, to be taken up by service.

But in any view, the deed of 1810 was altogether superseded by the deed of 1814. That was not a deed of nomination, under a power to that effect in the prior deed, but was one which "revoked the said deed of entail, in so far as relates to the per-"sons to be called and entitled to succeed," &c., under a reserved power of revocation and alteration. This prior deed, therefore, was destroyed, in so far as it could to any extent be a conveyance to Robert as one of "the heirs of the body" of Sir Alexander.

[*Lord Brougham.* — Does the second deed make Robert the institute.]

If it does not, then it is merely a testamentary deed expressive of the will of the maker.

The deed of 1814 contained no words of conveyance, but this is necessary in a deed revoking the destination in a prior entail, under a power to alter, and without it the deed is wholly ineffectual as a conveyance to the heirs mentioned in it, Stewart *v.* Porterfield, 2 *Wil.* and *Sh.*, 369; where the distinction was taken between a deed of nomination under a reserved power to that effect, and a deed of alteration and revocation. But, on the other hand, the revocation of the destination in the prior deed remains effectual, and cuts down any right in the heirs under the first deed, to found upon it as a title. The two must be taken as a *unum quid*; the second destination destroys the first.

If these views be correct, a personal right is in Robert Anstruther, by virtue of his general service, unaffected by either of the deeds of 1810 or 1814, and is attachable for his debts.

Mr Pemberton and Mr Anderson for the Respondent. — The appellant has left wholly untouched two of the grounds taken by the respondents in the Court below, 1st, — That Robert Anstruther, who is in truth the appellant, though nominally a respon-

dent, is barred, by his own acquiescence and acknowledgment, from questioning the entail; and 2d, That the appellant cannot, consistently with his own title, maintain such a challenge. Robert was not served heir to Catharine, but to his father, Sir Alexander, and as such he took up the procuratory in Catharine's deed, but subject to all the obligations upon his father. If, therefore, he had expede the procuratory, he would have been bound to execute the entail directed by the father's deed of 1810, and if that deed were ineffectual, then according to the destination in Sir Alexander's settlement of September, 1808. In that case, two resignations and two charters would have been necessary, whereas, in the course followed, only one of each was requisite, and that is the whole effect of what was done.

Having made up his titles, Robert conveyed to Maconochie and Paul, by a deed which was framed with a view to preserve the entail. He afterwards borrowed money to pay off the debts by which Maconochie and Paul's trust was created, and by his direction they conveyed to the appellant by a deed similar in frame to their own conveyance. The appellant, then, is a trustee to pay off creditors, and preserve the entail. In this situation the bill and promissory note are granted by Robert Anstruther to the appellant. The notion of Renton, in such circumstances, being a *bona fide* creditor, dealing on the faith of a fee simple estate in his debtor, is a mere juggle. Moreover, the debt of the appellant was positively denied by the defences, and no evidence has been led to prove it.

If Robert cannot question the entail, as little can the appellant. Before he can do so he must place himself in a position different from that of Robert; at present he is in the same position.

It is admitted, that a party not infeft may make a disposition, and that it will carry personal rights. It does so because it declares the intention of the maker, that the right shall pass, though the granter cannot himself convey the lands; all that it

does is to make an obligation on the granter to perfect the conveyance. The disposition operates not as a conveyance *per se*, but only as a declaration how the conveyance is to be made. What difference then can there be between saying, I dispone, and I oblige myself to infeft? The deed of 1810 shewed intention, *per verba de presenti*, that the estate should pass, and carried the procuratory which gives the title. What more then could be required?

[*Lord Brougham.* — Do you read the clause of assignation as giving "all right, title," &c.?]

Yes.

[*Lord Campbell.* — Sir Alexander could as little resign as dispone.

Lord Brougham. — A party having a personal right, by disponing does not affect to deal with the *ipsum corpus*; by resigning he does, by symbolical delivery.]

In the case of Graham *v.* Don no question was made as to dispositive words. In Napier *v.* Livingston, 5 *Bro. Supp.*, p. 885, the fetters are stated to have been in the procuratory, whereas, had there been a dispositive clause, they would have occurred in it. And in the Juridical Styles, a clause of assignation to writs is directed to be inserted in a procuratory for making an entail as auxiliary to it in the same way as in a disposition. But at all events, Robert, as heir of his father, was bound to make the entail good, and all that can be complained of is the mode in which he made up his title.

[*Lord Cottenham.* — Suppose he had made up his title as the appellant says he ought to have done, and so standing, a creditor had adjudged.]

We submit that the first procuratory did pass under the assignation of writs under the deed of 1810, and he could contemporaneously have entered as heir under the second procuratory.

The objection taken upon the deed of 1814 was not raised by

the summons, and the parties claiming under it were not before the Court. At all events, the respondents are not affected by that deed, and it does not therefore touch their case.

Before the counsel for the respondents had concluded, their Lordships consulted together, and then the

LORD CHANCELLOR said, — This is stated, on both sides, to be a question of great importance with respect to Scotch titles. It appears not to have been argued before the learned judge, the Lord Ordinary, who decided the case in the first instance. It was not even argued before the whole Court, and, unless the appellant objects to it, we think, from the importance of the question, that it is proper that it should be remitted to the Court below, with an intimation, that they should call in the assistance of the learned judges for the purpose of deciding the question. If the appellant objects, we must hear him, and then we must afterwards decide, whether or not, under all the circumstances of the case, we shall direct it to be remitted.

Mr Solicitor General. — My Lord, we shall offer no objection to any course which your Lordships may think right to adopt.

Lord Chancellor. — This has occurred to us in the progress of the cause, and we think it is the only safe course that we can pursue, considering the nature of the question.

Lord Brougham. — To remit the case upon the first point.

Lord Chancellor. — We had better remit the whole question in the usual manner, with an intimation, that they should take the opinion of the consulted judges; a direction in the usual mode.

Mr Solicitor General. — So I understand your Lordship.

Lord Chancellor. — The case must not be decided on papers only, but be argued *viva voce*.

Mr Anderson. — And the learned judges are to report to your Lordships their opinions upon the question.

Lord Chancellor. — Yes, we have, in the course of the argument, been satisfied that that is the only course that we should be justified in pursuing, considering the nature of the question.

Lord Campbell. — It certainly is very important that the deed in that case of Napier *v.* Livingstone should be examined, and other deeds executed under similar circumstances, where a person, having a personal right, has executed an entail.

Mr Anderson. — There will be no difficulty, my Lord, in getting the deeds, because they are all preserved.

Lord Brougham. — You have them all in the Registry of Entails.

Mr Gordon. — Yes, my Lord.

Ordered, that the cause be remitted back to the Second Division of the Court of Session, in Scotland, to review generally the interlocutor complained of, with an instruction to the judges of that division to order the same to be argued *viva voce* before the whole judges, including the Lords Ordinary, and to report their opinions thereon to this House; and this House does not think fit to pronounce any judgment upon the said appeal until after the said interlocutor shall have been so reviewed, and the opinions thereupon shall have been reported, according to the directions of this order.

ROY, BLUNT, DUNCAN, and JOHNSTONE — SPOTTISWOODE and ROBERTSON, Agents.