

[15th April 1835.]

Sir WINDHAM CARMICHAEL ANSTRUTHER of Anstruther and Carmichael, Baronet, Appellant. — *Sir John Campbell — Murray.*

Mrs. MARIAN ANSTRUTHER, Spouse of James Anstruther, Esq., Writer to the Signet, Respondent. — *Lushington — Bruce.*

Succession—Collation. Question remitted for farther consideration to the Court of Session, whether an heir succeeding to entailed estates as heir substitute by the death of a preceding heir is entitled, as one of the nearest of kin of the deceased, to participate in his moveable succession with another of the nearest of kin, without collating the entailed estates.

JOHN, third Earl of Hyndford, by a deed of entail, dated October 27th, 1757, and recorded in June 1762, entailed the estate of Carmichael and others upon himself and the heirs male of his body; whom failing, a variety of substitutes; “whom failing, Sir John Anstruther of Anstruther, baronet, only son in life procreated of the marriage betwixt the deceased Sir John Anstruther of Anstruther, baronet, and the also deceased Lady Margaret Carmichael, his wife, my eldest sister; whom failing, Philip Anstruther, eldest son of the said Sir John Anstruther, and the heirs male of his body; whom failing, John Anstruther, second son of the said Sir John Anstruther, and the heirs male of his body;” whom failing, a variety of substitutes.

2d DIVISION.

Lord Medwyn.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

The Earl of Hyndford having executed a trust deed, his trustees, by a separate deed of entail, dated in June 1791, and recorded in 1820, settled the lands and barony of Mauldslic upon Thomas Earl of Hyndford, then heir in possession of the estate of Carmichael under the Carmichael entail; whom failing, a variety of substitutes; whom failing, to Sir John Anstruther of Anstruther (the appellant and respondent's grandfather); whom failing, to Philip Anstruther, the eldest son of Sir John, and the heirs male of his body; whom failing, to John Anstruther (the appellant and respondent's father), second son of Sir John Anstruther; whom failing, to the other heirs substitute called by the Carmichael entail, and under the same limitations as contained in that entail.

Sir John Anstruther of Anstruther also, by a deed of entail, dated February 18th 1778, and recorded in March 1778, settled the lands and barony of Anstruther and others in strict entail upon himself in liferent, and Philip Anstruther, his eldest son, and the heirs male of his body, in fee; whom failing, John Anstruther (the appellant and respondent's father), and the heirs male of his body in fee; whom failing, a series of substitutes.

Sir John further executed two separate trust deeds in 1793 and 1794, by which he conveyed certain lands to trustees to pay off his debts, and to entail the residue of the trust estate upon the same heirs, and under the same conditions and limitations, as in the deed of entail of the estate of Anstruther. The trustees accordingly executed a deed of entail in 1811 and 1812, and recorded in 1813, by which they entailed the lands of Newark and others upon Sir John Carmichael Anstruther, the appellant's elder brother, and the heirs

male of his body ; whom failing, the appellant and the heirs male of his body ; whom failing, the substitutes called after them by the entail of Anstruther.

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

In consequence of the death of Sir John Anstruther in 1811, and the death of Lord Hyndford in 1817, and the failure of intermediate heirs, Sir John Carmichael Anstruther, the appellant's eldest brother, succeeded to the estates of Carmichael, Mauldslie, Anstruther, and Newark.

He died on the 28th of January 1818, and was succeeded by his son, a posthumous child, the late Sir John Carmichael Anstruther.

Sir John was born on the 6th of February 1818, and died in pupillarity on the 31st of October 1831, at Eton, where he had been placed at school. It was admitted that both he and his father were domiciled Scotsmen. He left, besides the entailed estates, a very large moveable succession, the greater part of which, amounting to more than 60,000*l.*, arose from the accumulated savings of the rents and profits of the entailed estates.

The appellant, Sir Windham Carmichael Anstruther, upon the death of his nephew succeeded and made up titles as heir of entail to the estates of Carmichael, Mauldslie, Anstruther, and Newark under the entails above mentioned.

He and his sister, Mrs. Marian Anstruther, were the nearest in kin of their nephew ; and a question having arisen as to the right of the appellant to participate in the moveable succession, Mrs. Anstruther and her husband presented a petition to the Court of Session, praying their lordships “ to sequestrate the “ whole funds and effects belonging to the said deceased “ Sir John Carmichael Anstruther at the time of his

ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.

“ death, arising from savings during his pupillarity,
 “ and, in particular, the whole property as specially
 “ detailed in the foregoing petition, with all interest
 “ due thereon, with the exception of a certain por-
 “ tion thereof invested in Government securities.”
 Their lordships accordingly awarded sequestration,
 and appointed a judicial factor on the 24th of De-
 cember 1831.¹ With the view of more fully vesting
 in the factor’s person a title to the executry funds, Mrs.
 Anstruther, with his approbation, obtained herself
 decerned and confirmed executrix dative quà one of
 the nearest in kin to her nephew, and granted to the
 factor an assignation of the whole funds so confirmed ;
 and with the same view the appellant disposed to the
 factor such of the executry funds as were vested upon
 real securities pending the nephew’s pupillarity. There-
 after the factor instituted a process of multiplepointing,
 to have the respective rights of the parties to the funds
 in his possession decided.

In this process the appellant claimed to be preferred
pari passu with his sister to the whole fund in medio, on
 condition of collating the heritage, including heirship
 moveables to which he had succeeded by fee-simple titles,
 but not the estates to which he had succeeded as heir of
 entail, particularly the estates of Carmichael, Mauldslic,
 Anstruther, and Newark.

In support of this claim he maintained that when the
 heir is also one of the next of kin, and the succession of
 the deceased consists partly of heritage and partly of
 moveables, the heir is entitled to the benefit of collation,
 or to draw a fair and equal portion of the executry along

¹ 12 S., D., & B., 165.

with the other next of kin, if he shall collate and throw into the executry, as a common fund, such of the heritage as he takes as heir of line of the deceased, whether he takes it ab intestato, præceptione hæreditatis, or under a disposition granted mortis causâ merely.

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

2. That in order to entitle the heir to the benefit of collation he is not bound to collate or throw into the common fund such heritable estate, though vested in the deceased, as was held by the deceased and is succeeded to by the heir under a strict entail executed by some third party; nor was he bound to do so even where the entailed destination coincides with the line of succession at common law. And,

3. That particularly the heir, in order to have the benefit of collation, is not bound to collate or throw into the common fund such estate, though vested in the deceased, as was held by the deceased and is succeeded to by the heir under a strict entail in favour of heirs male, or any other destination inconsistent with and exclusive of the ordinary line of descent at common law.

On the other hand the respondent claimed to be preferred to the whole of the executry of which her nephew died possessed, wherever situated or however constituted, unless the appellant should collate with her his interest in the entailed estates to which he had succeeded as heir of line and of tailzie.

The Lord Ordinary having reported the question on Cases to the Court, their Lordships pronounced this interlocutor: “ The Lords, on report of Lord Medwyn, Ordinary, having considered the Cases for the parties, and whole proceedings, find, That, in this process of multiplepointing, the claimant, Sir Windham Carmichael Anstruther, cannot claim any share in the

ANSTRUTHER “ executry of the late Sir John Carmichael Anstruther,
 v.
 ANSTRUTHER. “ without previously collating the heritage, to which, as
 15th Apr. 1835. “ heir of Sir John, he has succeeded : Find Mrs. Marian
 “ Anstruther and her husband entitled to expenses of
 “ process ; and remit to the Lord Ordinary to proceed
 “ accordingly.”¹

Sir Windham appealed.

Sir John Campbell for the Appellant:—This case involves a point which comes before your lordships for the second time. It was agitated in the year 1795 in the Scotstarvit case, and your lordships reversed the interlocutor of the Court of Session. By that interlocutor it was found that a person under circumstances somewhat the same as the appellant was bound to collate entailed property before he could take a share in personalty. When the case came to this House the judgment was rested upon a specialty, and therefore, as far as your lordships are concerned, the general question is quite entire ; nor until the year 1809 was there any decision upon it in the Court below that could be quoted against us.

We contend that when the heir is also one of the next of kin, and the succession of the deceased consists partly of heritage and partly of movables, the heir is entitled to the benefit of collation, if he shall throw into the executry, as a common fund, such of the heritage as he takes as heir of line, whether he takes it ab intestato, præceptione hæreditatis, or under a disposition granted mortis causâ. But we also contend that

¹ 12 S., D., & B., 140.

the heir is not bound to throw into the common fund such heritable estate as was held by the deceased, and which is succeeded to by the heir under a strict entail executed by some third party; and that this applies even where the entailed destination coincides with the line of succession at common law.

ANSTRUTHER
v.
ANSTRUTHER.
—
15th Apr. 1835.

The rule which is contended for on the opposite side is, that the heir of line must not only collate what he takes as heir of line, such as fee-simple lands or heirship goods, and such as he takes either by the bounty of the deceased in his lifetime or by the disposition of the law, but that he must collate his interest in the entailed estates, which he does not take as heir of line, but which he takes as heir of entail.

It is in short maintained by the respondent, that the appellant is bound to collate what he takes *quà* heir of entail, although it is allowed that if he were next of kin and were heir of entail he is not bound to collate, unless he were likewise heir of line.

This seems a very extraordinary doctrine, and would require very strong authorities to support it. Collation proceeds from equitable considerations, and the object is, not to make all who are to take equal sharers of the personalty, but to provide for an equal distribution of the property of the deceased among the next of kin. For that purpose you must take care that that which is brought into the common fund was the property of the deceased; you are not to take the property of a stranger which has come into the possession of any of the next of kin, because that would be to make inequality in the distribution of the property of the deceased. But where there is a strict entail the tenant in tail has not the property; nominally he is the *fiar*, because the

ANSTRUTHER fee cannot be in abeyance, but substantially he has a
 v.
 ANSTRUTHER. mere life interest; he is in the same situation as if
 15th Apr. 1835. there were a succession of life estates, and he cannot
 prevent the next heir substitute from taking under the
 entail. His creditor cannot adjudge the fee; he has no
 power over the fee either during his life or ex mortis
 causâ. Sir Windham Anstruther is the heir of entail;
 he is likewise the heir of line; but he has liabilities and
 he has rights in one capacity that are perfectly distinct
 from those he has in another. As heir of line he is
 entitled to the fee-simple lands of his nephew, to the
 heirship moveables; and if he seeks to have a share of
 the personalty as next of kin, he must bring these into
 the common fund. But his character of heir of entail
 is quite distinct; it is as heir of entail, and not of line,
 that he takes these entailed estates; he takes them per
 formam doni; not by any disposition of his nephew, not
 by blood, but by a singular title as a purchaser or as a
 creditor.

Now, as those entailed estates never were the property
 of the nephew, it does seem contrary to all equity, and
 to the principle of collation, to say, that in distributing
 the personal estate you should bring into the common
 fund that which never did belong to the nephew.

By the Roman, and also by the old law of Scotland
 which existed before the feudal law was established, all
 the next of kin, whether any of them were what has
 been since called heirs of line or not, were entitled to
 an equal share of the personal estate of the deceased.
 Collation is a burden superinduced upon the heir,—a
 character favoured by the law, and therefore the rule by
 which he is called upon to collate ought not to receive a
 very strict construction. If the heir of line be sole next

of kin he takes the whole of the personalty; therefore his being heir of line is no disqualification to claim as next of kin; but where there are two who are next of kin, one of them being heir of line, the heir has the same right in that case to a moiety as in the other case he has to the entirety.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

It has also been decided, that if the heir of line is not one of the next of kin he is not entitled to any share of the executry. That is laid down by Mr. Erskine in his Institutes, and was decided in the case of M'Can v. M'Can.¹ It is therefore not as heir of line that he takes a share of the executry, but it is in his character of next of kin. Indeed there is not only collation between the heir of line and the next of kin, but there is collation among the next of kin; for if one of the next of kin has been advanced by the deceased, then there must be collation. In like manner, as to collation between the heir of line and the next of kin, it is as next of kin that the heir claims a share of the personal estate, and collation is merely a condition imposed upon his right as next of kin, and it is in his quality of next of kin that he has a right to make the demand. If this be so, the foundation of the doctrine which was established by the Little Gilmour case utterly falls, for that decision proceeded entirely upon this foundation, that the heir of line had no right to claim a share of the personal estate quæ next of kin; that as heir of line he was cut off from all share of the personal estate, which was considered as the portio legitima of the younger children, while the portio legitima of the heir of line was the real estate, and therefore he could make no

¹ Morrison's Dict., 2883.

ANSTRUTHER claim as next of kin in respect of the personalty,
^{v.}
 ANSTRUTHER. which he must purchase by collating. But what we
 15th Apr. 1835. contend for is, that although the price is collation,
 it is collation of what he takes as heir of line, and not
 what he takes from a stranger under a will. He is to
 collate the heritage. But what is the heritage? The
 heritage is what he inherits as heir of line from his
 ancestor; that over which his ancestor had a control, of
 which his ancestor could have deprived him, to which
 he has succeeded by virtue of blood, or to which he is
 indebted from the bounty of his ancestor. But how can
 this apply to the interest he takes in an entailed estate?

We allow that every thing should be considered as
 heritage of the deceased which his creditors could after
 his death attach, but that nothing can be considered
 part of his estate in which he had no interest beyond
 his life, and which after his death is taken by others, not
 as his proper representatives, but under a right alto-
 gether independent of him.

But the heir of entail is considered a mere stranger
 to the person to whom he succeeds. He is not liable
 for the general debts of the deceased; he is liable only
 for the debts which attach upon the entailed estate. It
 is the property of the deceased which is to be distributed.
 But the entailed estate is not his property or heritage.

Take another view:—Collation may be considered as
 if it were waiving the law of primogeniture, and making
 the real estate equally divisible as if it were personal
 estate. Can the heir of line be called upon to do more
 than waive his right of primogeniture?

Such are the general principles upon which it seems
 to us that this case is to be decided; and until we come
 to the year 1795, when the Scotstarvit case was decided

by the Court of Session, I can find nothing in the law of Scotland, not in perfect accordance with those principles.

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

I now proceed to refer to some passages from the old writers, to show the distinction between heir of line and heir of entail; that the heir of entail, as such, is considered as a stranger; and that what was to be contributed was only what the heir of line took in that capacity. (He then referred, in support of the distinction between the heir of entail and of line, to 3 Stair 5. 8. and Dirleton's Doubts, voce Heirs of Tailzie.)

To prove what according to the old law of Scotland was considered to be the subject of collation, I refer to Balfour's Practices, p. 233, where he says, "Item, na
" person succidand as heir to his father or predecessour's
" lands and heirschip gudes aught and suld have ony
" part of ony remanent moveabil gudes or geir whilk
" pertained to his father or predecessour the time of
" his deceis, except he would cast in and confer his
" hail heirschip gudes with the rest of the said hail
" moveabil gudes and geir altogether, that equal partage
" might be made thereof betwixt him and the rest of
" the bairns." The "equal partage" is to be of the property of the father, and of what is taken as heir; clearly meaning as heir of line, such as heirship moveables; not what he takes from a stranger.

Lord Stair in his Institutes (B. 3. t.8. s. 48.) says:—
" Heirs are excluded from the bairns part, though in
" the family, because of their provision by the heritage,
" except in two cases: First, if the heir renounce the
" heritage in favour of the remanent bairns; for then
" the heir is not to be in a worse case then they, but

ANSTRUTHER v. ANSTRUTHER. “ they come in pari passu, both in heritable and moveable rights, which is a kind of collatio bonorum.”

15th Apr. 1835. By the term heritage we contend that Lord Stair means that which comes to the heir of line, and not what is taken per formam doni.

Sir George Mackenzie in his Institutes (B. 3. t. 9. s. 11.) thus lays it down :—“ But the heir has no share in the moveables, except he collate, and he consent that the rest of the children share equally with him in all that he can succeed to as heir.” But can there be the smallest doubt that Sir George Mackenzie here uses the term “ heir ” as meaning heir of line ? If the words “ heir of line ” had been here introduced, it would have been an express authority.

The next passage is from Dirleton’s Doubts, under the head “ Heirs of Tailzie.” “ Quæritur, if there be no heritable estate belonging to an heir of line out of which the executor may be relieved of heritable debts, will the heir of tailzie be obliged to relieve the executor of such deeds ? ” “ Ratio dubitandi heirs of tailzie are not properly heirs, but bonorum possessores, and liable to debts only in subsidium ; whereas the heirs of line and executors are properly heirs ; and the heir of line, if the executry be great, and more considerable than the heritable estate, may confer, (that is, collate,) which is not competent to the heir of tailzie or provision.”

Bankton (vol. 2. p. 385.) applies the doctrine of collation only to the heir of line. He says, “ Where the eldest son succeeds as heir he cannot claim any interest in the executry, either as a share of dead’s part or legitim, because in such case the succession divides, and the heritage goes to the eldest son with

“ the burden of the heritable debts, and the executry
 “ to the younger children with the burden of the
 “ moveable. But, as the eldest son is still one of the
 “ nearest in kin with his brothers and sisters, he may
 “ claim in that character a share of the whole execu-
 “ try with them, upon collation or contribution of the
 “ heritage, both what he succeeds to after his father’s
 “ death and what he got disposed to him before, per-
 “ ceptione hæreditatis, so as the whole subjects of the
 “ succession may be equally divided among them all ;
 “ and which holds in all cases where the heir is in the
 “ same degree of relation with the executors ; but other-
 “ wise he cannot be admitted, even though he were
 “ willing to collate, since he is not vested with the
 “ character of nearest in kin, and so cannot claim as
 “ such.” This is plainly confined to the heir of line,
 and to the case in which the heir of line takes in that
 capacity, and it is the property of the father which is to
 be collated, not that derived aliunde.

The last written authority upon the subject is
 Mr. Erskine. In book 3, t. 9, s. 3, where it is
 thus laid down :—“ It is only the legal heir, or the
 “ heir ab intestato, who is thus obliged to collate the
 “ heritage with the other next of kin, in order to have
 “ the benefit of the moveable succession.” By “ the
 “ legal heir, or the heir ab intestato,” he clearly means
 the heir at law—the heir of line. He then goes on :—
 “ Where, therefore, in the case of daughters only the
 “ heritable estate is settled on the eldest by entail or
 “ destination, she is entitled upon her father’s death to
 “ her first share of the moveables with the other daugh-
 “ ters without collating that estate ; for she succeeds to
 “ the heritage by provision of the father, who had

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER “ full power over it, and that provision can in no degree

v.

ANSTRUTHER. “ affect the moveable estate, which by the legal succes-

15th Apr. 1835. “ sion descends equally to her and her younger sisters.”

Now if it had been the ancient law of Scotland that the heir of line was obliged to collate, not only what he takes as heir of line, but what he takes as heir of tailzie, would there have been nothing of that kind to be found in Balfour, or in Bankton, or in Dirleton, or in Stair, or in Erskine? Yet there is not a trace of it to be found. All that they say is, that there shall be a collation by the heir of all which he takes as heir, for the purpose of regulating the succession of the property of the defunct. According to them, therefore, that which is to be brought into the common fund must have been the property of the defunct; and it is impossible to say that the entailed property ever was his.

Such being the text writers upon the subject, I will now bring to your lordships notice all the cases (and they are not many) which have been decided in the Scotch Court upon the law of collation.

[He then referred to the cases reported in the Dictionary under the head “ Collation,” till he came to the case of Scott.¹] This is the Scotstarvit case, a case in which this House reversed the decision of the Court below, and a case which is allowed by Lord Meadowbank, in the Little Gilmour case, to have been improperly decided in the Court below with regard to the doctrine of collation,—a case therefore entitled to no authority whatsoever; and till we come to the Little Gilmour case, (a case which I contend is not law, which was not appealed, which was merely the opinion of one Division

¹ 15 Nov. 1787, Mor. 2379.

of the Court of Session, without consulting the judges of the other,) there is no decision which can be considered as against us.

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

In the Scotstarvit case, the Court of Session, forgetting the well-known rule, that with regard to the succession to personal property the rule depends upon the law of domicile, held that it depended upon the place where the person died; and displacing the case of Ricarts, in 1720, decided, that “heirs alioqui successuri” or not, and whether ab intestato or provisione hominis, “must collate in order to claim any share of the moveable succession.”

There was an appeal by both parties. The question as to the general obligation of the heir of entail to collate was very learnedly argued in the papers on both sides, and I believe at your lordships bar. It was decided by Lord Thurlow, who made a speech upon that occasion. There is a traditionary account of it; but I do not feel at liberty to state the purport of it. Though we have been most anxious, and it would have been a most desirable thing for us, to obtain some notes of the speech of that learned lord, we have not been able. There were not at that period the very satisfactory means we now have of knowing what falls from the learned lords who advise your lordships House in the adjudication of appeals. We have not been able to obtain any account of Lord Thurlow’s speech; but this we know, that the appeal of the next of kin was dismissed, and that the decree whereby it was held that Miss Scott was not entitled to her share of the personal property in Scotland was reversed. Now I allow that an abundant reason for reversing must have struck Lord Thurlow the very moment the case was opened to this House, seeing the error which had been committed as to the law of

ANSTRUTHER domicile. It was necessary to go no farther than to see
 v.
ANSTRUTHER. that the Court of Session had proceeded on a wrong
 15th Apr. 1835. foundation when they made the distinction between the
 personal property of David Scott situate in England
 and the personal property of David Scott situate in
 Scotland, for they were both governed by the law of the
 country where he was domiciled.¹

The next case is that of M'Can v. M'Can², in which
 it was held, that an heir "cannot insist for collation if
 " he be not at the same time one of the nearest in kin."
 And this I make use of to fortify my position, that where
 the heir of line does claim a part of the personal estate,
 being next of kin, he does it in his capacity of next of
 kin, and not as heir at law.

The next case, and which was the last before the
 Little Gilmour case, was that of Crawford v. Stuart,
 which was decided in the year 1794³, the Scotstarvit
 case having been decided in this House in the year
 1793. In this case of Crawford it was decided, that
 " an heir of entail who is one of the nearest in kin, and
 " not the heir alioqui successurus, is entitled to a share of
 " the moveable succession without collating;" and I am
 surprised to find that this is a case the other side rely
 upon. I rely upon it; and do so very much; for there
 it was held, that an heir of entail being one of the

¹ The judgment of the House of Lords, as given in the Faculty Col-
 lection and in Morrison's Dictionary, is incorrect. The words of the
 judgment are these: " That the said Henrietta Scott is entitled to claim
 " her distributive share in the whole personal estate of her uncle, David
 " Scott of Scotstarvit, in Scotland, without collating his heritable estate,
 " to which she succeeded as heir, in so much as she claims the said share
 " of the said personal estate by the law of England, where the said David
 " Scott had his domicile at the time of his death." Journals of House of
 Lords, 11 March 1793; 1 Bell, 103.

² 28 Nov. 1787, Mor. 2383.

³ 3 Dec. 1794, Mor. 2384.

nearest of kin has a right to a share of the personal estate without collation."

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

These are all the decisions till we come to the Little Gilmour case¹; and although I might distinguish in several respects the present one from the Little Gilmour case, we certainly do deny the Little Gilmour to be law, and we call upon your lordships to overturn it. It is contrary to all the authorities, and to all the principles that have before prevailed in the law of Scotland; and it is entitled to the less weight for this reason, that although the case was of much magnitude it was decided by one Division of the Court, without the other judges being consulted. It was between near relatives, who might have a reluctance to continue the litigation, and it was acquiesced in. The facts were very few: "Walter
" Little Gilmour, of Libberton and Craigmillar, died
" intestate, leaving two infant children, the parties to
" this action. Mr. Gilmour's succession consisted of
" two large estates descending to the heir male under
" two old and very strict entails, of a small herita-
" ble property which had been vested in himself in
" fee simple, and a considerable moveable property.
" Upon his death it became necessary to try the
" question, whether the son was entitled to a share of
" the moveable property without collating the entailed
" estates." The entails are not set out. I believe that they were made by a direct ancestor of the claimant; and that circumstance your lordships will find seems to have influenced the opinion of the judges, although it appears to me quite immaterial whether the entail was made by an immediate ancestor, or whether it was by a collateral relation or a stranger. The case being argued, judg-

¹ 13 Dec. 1809, Fac. Coll.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ment was given by the Court. Lord Meadowbank first gives his opinion. He says that “the more he considered this case the more he was satisfied that it ought to be decided on what might be called popular principles.” Now I am wholly at a loss to understand what is meant by deciding a nice point of law on “popular principles.” I think this is a most inauspicious commencement of the learned judge’s argument. And he said, it ought to be decided on popular principles, “the more so that all the decisions of the Court upon similar cases had been decided upon similar principles.” (That is equally unintelligible to me.) “Whether they had all been rightly decided or not it was not necessary now to enquire. That with these views he would not search into the history of the law of collation, but would lay down the limits between four different situations in which such questions might occur, which would point out the decision which ought to be pronounced.” Now in a case where the law was to be solemnly settled for the first time I do think it would have been extremely desirable that the learned lord should have entered into the law of collation, for it would have been important to lead to the knowledge of what ought to be collated. He then goes on to say, “That, by the common law of Scotland as it had been long established, there was a difference between the heir and the rest of the executors; that the portion of the heir at common law, or, as it might be called, the portio legitima, was all the heritable property of the deceased, and the portion of the younger children was the moveable property.” I believe Lord Meadowbank was the first Scotch lawyer who ever said that the heritable property shall be considered the portio legitima of the

heir ; and he does not tell us what is to become of col-
 laterals, when you have not the elder son and the chil-
 dren. He then says, “ That those estates were totally
 “ separate and distinct in questions of succession. That
 “ by the common law the heir had no more right to the
 “ share of the younger children, to any part of the
 “ portio which the law assigns them, than they have to a
 “ share of what is peculiarly appropriated to the heir.
 “ That this was the most natural view of the case.”
 (Again I ask, What is meant by the “ natural view of the
 “ case?”) “ That on feudal principles the heir was the
 “ favorite of the law.” If so, the heir is very hardly
 used here, for although he is one of the next of kin he
 claims a share of the personal property without collating
 what he takes under the entail : it is no great favoritism
 to compel him to collate what he takes as heir of entail.
 His lordship then says, “ That it naturally followed
 “ from this favor which was shown to the heir or eldest
 “ son, that if the heritage was less valuable than a share
 “ of the moveable property would be he should get a
 “ share of the moveable property, if he chose to demand
 “ it, in order, at all events, to prevent his being left in a
 “ worse situation than the younger children. That
 “ this proceeded, not from any idea that in neglecting to
 “ collate he surrendered his share of the moveables, for,
 “ strictly applied, the law would have given him more,
 “ but entirely from the favor which the feudal institu-
 “ tions have always shown to the eldest son. But at
 “ the same time, as he thereby encroached upon what
 “ was the share of the nearest of kin, it was but right
 “ that he should in return give them a share of his own ;
 “ but in doing so it was only the portio legitima which
 “ he was bound to collate ; not any property which

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.

“ he might have acquired from other quarters. That
 “ this being the general principle of the law, the next
 “ enquiry was, in what manner was that principle
 “ affected by particular destinations of property. And,
 “ first, as to this his lordship thought that in general,
 “ where there was both an heir and nearest of kin, and
 “ the heir took the estate by particular but simple des-
 “ tination from the ancestor, then, whatever might be
 “ the destination of the estate, still the heir must collate,
 “ if he claims a share of the moveable succession ; for
 “ this plain reason, that he is asking a share of the portio
 “ legitima appropriated to the executors, and that if he
 “ avails himself of the favor which the law allows him
 “ he must pay the price which the law requires. This
 “ was the first and simplest case of collation.”

“ Secondly,” his lordship said, “ that where there was
 “ no heir male, or no only daughter, but several heirs
 “ portioners, a different rule would necessarily take
 “ place. In such a case the eldest daughter is no fa-
 “ vorite of the law.” (It is very odd that the eldest
 “ daughter, being no favorite of the law, is not bound to
 “ collate, but that the eldest son, being the favorite of
 “ the law, is bound to collate.) “ Both heritable and
 “ moveables are thrown into one mass, and both form
 “ the common portio legitima of all the daughters.
 “ Accordingly, where the eldest daughter has received
 “ an estate destinatione, she has rightly been found not
 “ bound to contribute any share of it when she claims
 “ her equal share of the remainder, because what re-
 “ mains is the common portion, and it cannot be
 “ argued, on her receiving by destination from a person
 “ entitled to bestow it an estate to which she had other-
 “ wise no exclusive right, that she should therefore lose

“ what she would have otherwise had a right to as her
 “ legal portio. She takes what is specially bequeathed
 “ to her as a stranger would; not as a male heir, that
 “ takes what would at any rate have been his own
 “ exclusively. That perhaps, however, on more subtle
 “ views, it might be maintained that one was bound to
 “ collate to a certain extent, but not in the same mea-
 “ sure as an heir male alioqui successurus.” (His lord-
 ship evidently has the case of Riccart or Riccart in
 view, in which it was held, that the eldest daughter,
 taking a share of the moveables, was entitled without
 any collation.) “ Thus, if there are three heirs por-
 “ tioners, and one of them gets the whole of the heri-
 “ table property destinatione, while the moveable estate
 “ remains subject to the common operation of the law,
 “ in such case it might be argued, that if she claimed
 “ a share of the moveables she must collate one third
 “ of the heritable property, because to that extent she
 “ was the heir alioqui successurus, while, as to the other
 “ two thirds, which she received tanquam quilibet, she
 “ could not be bound to collate them. That this
 “ would perhaps be the most nice and subtle view of
 “ the case; but the plain and obvious answer would
 “ be that already noticed, which was given in the case
 “ of Riccart, that the eldest daughter is as well entitled
 “ to take the whole tanquam quilibet, if the ancestor
 “ chooses to give it her, as a stranger would have been,
 “ if he had given it to him, which he might have
 “ done, and that the remainder of the property just
 “ continued to be what it had always been, the portio
 “ legitima of the whole of the heirs portioners, and as
 “ such subject to division among the whole.” Here
 again his lordship relies upon this notion, which was

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER
v.
ANSTRUTHER.
—
15th Apr. 1835.

certainly only his own notion, that entail property was the portio legitima of the heir at law, or that the real estate taken by the heir of line is the portio legitima of the heir, and accordingly this formed the argument in the case of Riccart, an argument which does not apply in the case of a male heir of line, because the moveables are not part of his portio legitima. He then proceeds—“ We are not bound ex lege to produce an equality among the heirs, but only to give effect to what is clearly the meaning of the law. On the other side they seem to contend that the object is to create an equity among the heirs, and not merely to make distribution of the property of the deceased. The eldest daughter in the case supposed, which was just that of Riccart, was entitled to say that she could not be forfeited of nor bound to collate her own third, merely because a person who had a right to do so had given her more than her own share ; just in the same manner as if the dead’s part had been left to the heir, in which case he would take it tanquam quilibet, and could not on that account be compelled to renounce a share of the heritage. But this don’t touch the present question, which is not the case of an heir taking tanquam quilibet, but directly the converse.”

His lordship then goes on to say, that “ a third case was, where an heir had succeeded to the heritable estate by singular titles. That our predecessors, in Murray v. Murray, found that an heir was bound to collate what he got from the ancestor whose moveables were in question, because it was a part of the estate which he would have succeeded to ex lege ; the one was in some measure the price of the other, and unless he collated he could claim no share of the

“ moveables. That though it was clear that a man who
 “ gets an estate from a stranger by singular titles
 “ could not claim a share of his moveables, on an offer
 “ to collate, still it would never follow that a man who
 “ gets his own estate by singular titles should thereby
 “ be deprived of his natural and inherent right to col-
 “ late it, if it should appear to him to be most advisable
 “ to claim a share of the moveables. That therefore the
 “ case of Murray was rightly decided.” (So far I
 readily assent to the reasoning of the learned judge.)

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ Fourthly,” his lordship said, “ that the last case was
 “ the case now under consideration, where a man gets
 “ an estate, not only by singular titles, but under tram-
 “ mels imposed by his ancestors, which, if matters had
 “ been left to the common operation of the law, would
 “ have descended to him in fee simple from his own
 “ father, whose moveable succession is disputed, but
 “ which trammels he must submit to, under the pain of
 “ incurring a forfeiture, or of being found liable in
 “ damages. His own ancestors have imposed these re-
 “ strictions.” (Here the learned judge seems to rely
 upon the peculiarity of the case, that the Liberton estate
 and the Craigmiller estate had descended from the im-
 mediate ancestors of the claimant, and that the entail
 was not by a stranger.) “ There may,” he continues,
 “ in one view be a hardship; but if he can get his
 “ estate upon no other terms, is he entitled to complain
 “ that he is not put into a better situation than he
 “ would have been in if they had not been imposed,
 “ and to put his sister in a worse situation than she
 “ would have been, in consequence of restrictions and
 “ prohibitions directed, not against her, but against
 “ himself? He has got his own portio legitima, the

ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.

“ portio which the law would have given him if it had
 “ been left to its own operation ; and must he not con-
 “ tribute that if he asks a part of the portio legitima
 “ of his sister ? That the burdens on the estate may be
 “ a hardship on the heir in one sense, but that if they
 “ are so, at any rate they are beneficial hardships, for
 “ they have secured it to him. They have not taken it
 “ away ; it is still the heir’s portio legitima ; and if he
 “ refuses to contribute it, burdened as it is, he expressly
 “ admits that it is more valuable than that which he is de-
 “ manding from the executor ; and therefore it would be
 “ most unjust to listen to his claim, which would clearly
 “ be at variance with the original view of the law in
 “ introducing the practice of collation. That, in short,
 “ it was impossible to see the principle upon which the
 “ heir of an estate, who is absolute fiar, even where he
 “ does receive it under burdens, can pretend to hold it
 “ on a principle radically different from what he would
 “ hold any other estate. That on these grounds the
 “ heir of an entailed estate which would have been his
 “ ex lege if there had been no entail, that is, the heir
 “ of line of the last possessor, was bound to contribute
 “ that estate if he wished to take a share of the move-
 “ ables.” (All this reasoning proceeds upon the sup-
 position, that, according to the destination, an entailed
 estate is always to go to the heir of line ; but it may
 go according to any other devolution.) “ That the
 “ argument which the claimant maintained, that he
 “ had no power to collate, was one of no force what-
 “ ever ; that if he really could not collate, then he
 “ could not perform the only condition on which
 “ he could claim the moveables ; and the restric-
 “ tions of the entail were meant to fetter him, and

“ not the executors. But that in truth there was
 “ nothing to prevent him from collating; that he might
 “ collate the value, or he might collate the rents; that
 “ the latter might be evicted, and why could they not
 “ be collated?”

“ That the answer made by the heir, that he did not
 “ take as heir of line, but in virtue of a gift from the
 “ predecessor, was also insufficient. It is very true that
 “ it does so; but upon the principles of the law of col-
 “ lation, already explained and illustrated, still the estate
 “ which he takes is his portio legitima.” The learned
 judge comes at last to grapple with that objection, that
 the heir did not take as heir of line, but in virtue of a
 gift from his predecessor. How does he grapple with
 it? He allows the premises, but he says, “ still the
 “ estate which he takes is his portio legitima.” So that
 the learned judge says,—for that is his notion,—that an
 entailed estate may be the portio legitima; but that is
 only his own notion, for which there is no ground. “ It
 “ is the price (he says) which the law commands him
 “ to pay if he takes a share of the portio legitima be-
 “ longing to the executors.” That is a gratis dictum of
 the learned judge; he does not state any one text of a
 single writer or any decision for this principle. He then
 goes on: “ And unless he chooses to sacrifice the one,
 “ such as it is, he cannot be permitted to touch the
 “ other. That neither could a man get out of the
 “ difficulty by lying out unentered in the entailed estate.
 “ He was not entitled to do so. He must convey his
 “ right in his own legitima portio to the executors, be
 “ it what it may, before he can claim any part of the
 “ executry, which the law declares to belong exclusively
 “ to them. On these grounds his lordship was for

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER “ deciding in favor of the executors, and concluded
 v.
 ANSTRUTHER. “ his remarks by observing, that he had no difficulty in
 15th Apr. 1835. “ saying that the case of Scotstarvit was wrong decided
 “ in this Court, even independent of the specialty which
 “ had produced the alteration by the House of Lords ;
 “ for Miss Scott was an heir portioner, and as such
 “ would not be bound to collate any part of the heritable
 “ estate, which she acquired either *tanquam quilibet* or
 “ as *heir alioqui successurus*.” Therefore Lord Meadow-
 bank himself shows that the Little Gilmour case is the
 very first in which the point was ever decided in the
 Scotch Court, for that the Scotstarvit case, which was
 contrary to Riccart’s case, was improperly decided,
 and consequently this is the only case against which I
 have to contend.

What then is the ground Lord Meadowbank takes ?
 Does he lay down any principle, except that of *portio legitima*, in which I say he is mistaken ? Does he bring forward any argument to support the proposition for which he contends ? I say, with all respect for the memory of that very learned and respectable judge, his reasoning is unsatisfactory. He talks of proceeding on “ popular principles ;” he talks of the estate being the natural estate of the heir, and in language to which no lawyer can affix any definite idea.

The other opinions were delivered very shortly. The Lord Justice Clerk, Hope, who had been counsel for Sir John Stewart, said, “ that though the claimant “ took the estate as heir of entail, still it was his own “ natural estate to which he succeeded.” Now, what is the meaning of this ? According to this, if the Liberton estate and Craigmillar estate had not been entailed by the immediate ancestor of the claimant, but

by some stranger, and there had been some natural estate which had been long in the family, it would seem, according to this learned judge, that though it had been entailed, yet, being the family estate, it was natural there should be collation as to that; but that with regard to lands taken by the bounty of a stranger, as those were not the estate of the claimant, there should be no collation whatsoever. It is impossible to say here that the Carmichael estate was the natural estate of the Carmichael family. It belonged to the earls of Hyndford; they are to be considered as strangers with regard to the Anstruther family; and if the rule applies to the family estate only, I say that here there ought to be no collation. His lordship then goes on to say: “ He was
 “ also heir of line ab intestato to his father in the same
 “ estate; and it was perfectly clear that the same
 “ opinion had been entertained by the judges who
 “ decided the case of Rae Crawford, for the inter-
 “ locutor of the Lord Justice Clerk, M^cQueen, to which
 “ the Court adhered, would not have contained the
 “ qualification which it does in any other view of the
 “ case,— ‘ in respect that Mrs. Rae Crawford was not
 “ ‘ heir of line, but only heir of provision;’ and that if
 “ this had not been the meaning of the Court the first
 “ member of that sentence would not have been in-
 “ serted. But the meaning which I attach to those
 “ words, ‘ in respect that Mrs. Rae Crawford was not
 “ ‘ heir of line, but only heir of provision,’ is, that this
 “ was not an estate she held as heir of line; that she
 “ was only heir of tailzie; she held the entailed estate;
 “ for that reason she was not bound to collate.

“ Lord Newton concurred both in the opinion of
 “ Lord Meadowbank, and in the remark on the case of

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

“ Rae Crawford made by the Lord Justice Clerk, and
 “ said that this proposition was most satisfactorily made
 “ out, that the claimant as heir of line to his father
 “ must either collate his portio legitima, or abandon his
 “ claim to a share of the moveables, because, burdened
 “ or not, he had gratuitously received that estate which
 “ the law had declared to be the legal price of any such
 “ share.” Now, where has the law declared that the
 collation of an entailed estate is the legal price that
 is paid for the privilege of claiming a part of the
 personal estate? I can find such an expression no
 where but in the mouth of Lord Meadowbank. Lord
 Newton then proceeds:—“ That there would be no
 “ difficulty in collating; that it was quite consistent with
 “ the rules of the law to collate the value of a pro-
 “ perty; that it could be easily ascertained; that heirs
 “ of entail were in the practice of selling their life-
 “ rents; that liferent rights might be adjudged; that
 “ tacks secluding assignees were collated, and that
 “ there was nothing in the nature of an entail to
 “ prevent a similar collation, if the heir found it for his
 “ interest to do so.” The rest of the Court coinciding
 in opinion, this interlocutor was pronounced:—“ Find
 “ that Walter James Little Gilmour, heir of entail and
 “ provision to his father in the entailed estates of
 “ Craigmiller and Libberton, being also heir of line to
 “ his father, cannot claim a share of his moveable estate
 “ along with his sister without collation.”

Now, with great respect for the opinions of those
 three learned judges, I ask, are those reasons which they
 give satisfactory? Is this case to be decided on popular
 principles, or on the ground that this is the natural
 estate of the claimant, and that the entailed estate is the

portio legitima of the heir? Those are the only reasons given, and there is no authority from any text writer, or any decision, and no principle laid down upon which that decision can be rested.

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835

The respondents, being, I suppose, very confident in the reasoning of the judges in the Court below, have given to your lordships, in the appendix to their case, the opinions pronounced after the present case had been argued; and one would suppose from what Lord Cringletie says, that the judges had taken infinite pains,—that they had consulted all the other members of the bench,—that they had done what Lord Meadowbank said he would not do,—had studied the law of collation, and the law as it is to be found in the civil law of other countries in Europe, and that this was a very profound judgment. Now, I will read all that passed upon that occasion. “ The Lord Justice Clerk.—I have perused
“ the papers with all due attention, which argue the
“ case on both sides remarkably well. I highly
“ approve of the manner in which the case is argued
“ on the part of Mrs. Anstruther. In the paper
“ drawn for Mrs. Anstruther and her husband all the
“ points of the case are ably and clearly discussed,
“ and, considering it altogether, I am decidedly of
“ opinion that Sir Windham Carmichael Anstruther
“ is not entitled to share in the executry without
“ collating his interest under the entails under which
“ he now possesses the estates. Looking to the case of
“ Gilmour, which in my opinion involves every point
“ of importance to the decision in this case, I must say,
“ that, from the manner in which it was decided,—from
“ the satisfactory opinion delivered by the late Lord
“ Meadowbank, and assented to by the whole Court,

ANSTRUTHER v. ANSTRUTHER
 15th Apr. 1835.

“ I cannot think of interfering with that solemn and deliberate judgment. Considering the whole authorities, and the whole stream of the decisions quoted to your lordships by the other side, I have not the slightest doubt of the correctness of the judgment then pronounced in the case of Gilmour; and the more deliberately the case is considered, the more conclusive must be the opinion which your lordships must entertain upon that judgment. I shall say no more in regard to the claim of Sir Windham Carmichael Anstruther, than that he is bound to collate before he can claim one sixpence of this executry; and here there would be no difficulty whatever as adopted in the case of Gilmour,—no difficulty in Sir Windham contributing the rents of the estates, making them a common fund, and then claiming as next of kin; being heir of line and heir of entail he is bound to collate before he can claim in the executry.”

Now, that is the whole of the judgment of the Lord Justice Clerk, and I must say, with great deference to that very distinguished judge, that it is not one of the most favourable specimens of judicial reasoning.

“ Lord Glenlee.—I am of the same opinion as your lordship. The case is the same as that of Gilmour. Sir Windham Carmichael Anstruther must collate his life interest in the heritable estates before he can claim in the executry fund.”

“ Lord Cringletie.—It appears to me to be quite unnecessary to add any thing to what has already been so well said. I entirely concur in the opinion expressed, that Sir Windham cannot share in the executry till he collates.”

“ Lord Meadowbank.—If there is any point solemnly

“ and deliberately laid down in the law of Scotland, I
 “ am of opinion that this is; and it would be paying no
 “ compliment to the decision given in the case alluded
 “ to, to attempt to shake the principle established by
 “ saying one word more on the subject.”

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ The Dean of Faculty trusted that their lordships
 “ would find his client entitled to expenses.”

“ The Lord Justice Clerk said, in his opinion
 “ there could be no doubt whatever. He would remit
 “ to the Lord Ordinary to proceed accordingly, and
 “ find the claimant Sir Windham Anstruther liable in
 “ expenses.”

That is the whole which passed.

Now, I venture to say, that neither in giving judgment in the Little Gilmour case, nor in giving judgment in this case, do the learned judges grapple with the difficulties of the case. They give no reason whatever why the heir of entail, being likewise heir of line, should be compelled to collate the entailed estates, which he would not be compelled to collate if he were only heir of entail. I find no dicta nor decisions to fortify that which is the foundation of the judgment, that the entailed estate is the portio legitima of the heir of entail; and if that were, let my learned friend answer this question. Lord Meadowbank says, that the entailed estate is the portio legitima of the heir of entail. If it were so, why should he, having his portio legitima in the entailed estate, encroach on the portio legitima of the children—the personal estate, even under the condition of collating it? That shows that the entailed estate is not the portio legitima; I contend that a judgment which rests upon such a foundation cannot stand.

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

Mr. Murray followed on the same side, arguing the general principles and commenting on the cases. On coming to that of *Rae Crawford*, he proceeded thus:— Here I wish to call your lordships attention to the observations which were made when the case of *Rae Crawford* was decided. That case is of peculiar importance, because it was decided in December 1794, after the case of *Balfour v. Scott* had been reversed in this House. It was therefore determined after there had been considerable discussion, and came under the view of the Court only about a year after the judgment of this House had been pronounced. In that case *Mrs. Rae Crawford* succeeded to an estate of a considerable value under a strict entail which had belonged to her elder brother. There was another brother who was heir of line, and collated, and also another sister who claimed *Mrs. Rae Crawford's* share, and wished to exclude her unless she collated the entailed estate. The Court held that under these circumstances she was not bound to collate the entailed estate. Why? Because she was not heir of line. We say, as it is thus clear that if another person had been heir of line he would not have been compelled to collate, so we cannot be in a worse position, because we stand in the character of heir of line. The observations of the judges on the bench are important to this point. They say *Mrs. Rae Crawford* is a stranger to her brother's heritable succession, being neither his heir at law, nor taking any thing under any deed of his, and therefore the law of collation cannot in any shape apply to her. She succeeds to the estate of *Milton* under a strict entail executed by their common ancestor, and not as representing her deceased brother who himself was only an heir of entail, and

it is no reason for excluding her from a share of his moveables that she takes an estate to which, in consequence of the destination of the tailzie, he was a prior substitute to her.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

Lord Brougham.—How would it be, supposing instead of being heir of entail, she was heir under a devise, as heir provisional by force of the settlement?

Mr. Murray.—I apprehend that we must separate the two characters, and if I give up every thing I succeeded to as heir of line, I am entitled to take in the stranger character of heir male. [He then commented on the case of Gilmour, and particularly on a statement by the respondents, that one of the estates did not flow from a direct ancestor, and referring to the printed pleadings, he proceeded.] Now so far as that might be supposed to make any difference in the case, or to have led to a more enlarged view of the legal question, it was not under the consideration of the Court; for though the case is reported at very great length in the Faculty Decisions, and is fully argued in the Informations, there is no allusion in either of them to any such distinction in respect of the estates, which was absolutely necessary to bring out the full extent of the legal question.

Lord Brougham.—I have read with great care the judgment of Lord Meadowbank. It is a very able judgment; but what I do not understand is, that he decides on popular principles. Instead of a popular view, it is a highly learned and technical view he takes of the subject. I apprehend he means to refer to the portion taken by the heir instead of confining himself to what is his natural right,—natural or feudal principles; he does not use the word natural in its popular sense, but his natural right, assuming the feudal views to

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

be the law of Scotland (which is the most unnatural law that ever existed). But he says such is the right according to such principles; that is what he means by popular principles, that there is a sort of crude equity governing the case; and by legitima portio he means to say in popular language, that the real estate is the legal estate of the heir, while the moveable estate is the legal estate or legitima portio of the younger children.

Mr. Murray.—I apprehend that what his lordship referred to as popular and natural principles were, that the estate had descended from father to son, as it would have done according to the common and popular rules.¹

Dr. Lushington for the respondents.—The question which is now mooted at your lordships bar is one that is admitted to have been decided in the year 1809 by the Court of Session in Scotland, a decision from which there was no appeal, notwithstanding it involved a very considerable property; but after the expiration of twenty-six years the appellant seeks to impeach the validity of that decision, and to show that the principles on which it was founded are not tenable according to

¹ In the course of Mr. Murray's speech the following observations were made as to referring to living authors on law. Mr. Murray said: there has been reference made in the respondent's case to the authority of living writers, but I apprehend that the work of a living author ought not to be quoted.

Lord Brougham.—There cannot be a stronger expression of that than that your illustrious kinsman, Lord Mansfield, would not allow Mr. Justice Blackstone's Commentaries to be quoted. He said, "I hope the day is far distant when it will be regular in any way to quote Mr. Blackstone's Commentaries," meaning after his death. They used to quote, and I have done it myself, "a certain book" upon shipping, before the learned author, who at that time became a learned judge, but we never called it "Abbot on Shipping," and he always said there were two good arguments against quoting it, one, that it was good for nothing, and another, that the author, whoever he was, was still alive.

the law of Scotland. I think that the very first observation which must occur to your lordships is, that those who in a question of this particular kind bring forward this appeal after such a lapse of time, and after a decision of so much consideration had remained undisturbed, have a very heavy onus cast upon them; because, unless your lordships be perfectly satisfied that that decision was erroneous, nothing could be more dangerous than to disturb the course in which property to so large an amount has hitherto flowed; for I need not tell your lordships, that if there be any principle more established than another, it is that with relation to the succession of property; for when once you find that a course has been established, it is not competent to dip into antiquity for the purpose of giving reasons why a contrary course ought to have taken place, or by ingenious reasoning to endeavour to show that any other form of succession would have been more advantageous to people at large.

Lord Brougham.—I observe that the judges in deciding this case merely express their concurrence in the somewhat more expanded statement of the Lord Justice Clerk, but they rest their judgment almost entirely upon the authority of the Little Gilmour case. Are we not then to suppose the Little Gilmour case to be as much under appeal, though not as regards the effect of it, but as regards the ratio decidendi, as if that case were now before us?

Dr. Lushington.—I conceive that the judges thought the case exhausted by the Little Gilmour case, and that the judges in that case had said all they would have wished to have said; and that not only all the arguments

ANSTRUTHER
v.
ANSTRUTHER.
—
15th Apr. 1835.

ANSTRUTHER at the bar were exhausted, but that every thing which
 v.
 ANSTRUTHER. could be said was to be found embodied in the opinion
 15th Apr. 1835. of Lord Meadowbank.

In regard to the case of Scotstarvit, I hold it a most important one, and an authority for the decision of the Little Gilmour case, and also of the present case; and as to the reversal by your lordships, that depended on totally different principles, and does not in the slightest degree destroy the application of the case of Scotstarvit to the present; for the result of that judgment was, that entailed property ought to be brought into collation, and the reversal in no way affected that decision. The appellant has contended that there is no authority in the law of Scotland supporting the decision in the case of Little Gilmour, and he appears rather to attribute that decision to Lord Meadowbank's indulgence in his own invention, and to his having taken up a system of law not known in the law of Scotland. But we maintain that all the authorities which have been cited support the principle so laid down. It is true that no case is to be found in which it was specifically decided that an heir of entail, being at the same time heir of line alioqui successurus, was bound to collate his entailed property. On the other hand there is not any case, or the dictum of any text writer, impugning the doctrine adopted by the Court in the case of Little Gilmour; and unless that doctrine is palpably erroneous, I submit that, in the absence of all authority, the doctrine laid down by that case is not to be shaken on very slight grounds. [Dr. Lushington then stated the facts of this case generally; and afterwards proceeded thus.] A good deal of argument on the

other side has depended on using expressions not applicable to the existing state of facts ; what we contend is this, that the heir of line being also heir of entail of property, of which the intestate was possessed, and next of kin also, cannot claim a share of the personalty without collating not merely the estate he received ab intestato, but also the entailed estate.

Lord Brougham.—A man takes an estate by devise or disposition as absolute fiar to which he was alioqui successurus. Now supposing no disposition had been made in his favour, I apprehend in Scotland, at least in England, he would take an estate by descent and not by purchase. In that case I can perfectly understand how, in order to have the benefit of the executry, he must collate the corpus of that estate ; but if instead of taking a fee-simple by disposition or devise, he takes a fee-tail, or rather an estate for life, (for, although you call it a fee in Scotland, he takes a life estate, or, as you call it, a succession of fees, but which are limited as to enjoyment, and bound as to descent, and which he cannot part with or burthen,—so that he truly takes a life estate, to which you still call upon him, on the same principle, to collate ;) what is he to collate ? Not the corpus, for he has not that to collate ; but you call upon him, by analogy to the corpus, to collate so much as he takes,—so much of the corpus as is common to both situations, both to his tailzied title, and to that he takes alioqui successurus ; and you say that he must collate that life interest. That is what I understand to be your argument. The question is, can that argument be supported upon principle, he not having succeeded properly ? This is the argument which presses upon my mind against

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER *v.* ANSTRUTHER. the Little Gilmour case, and which I wish you to deal with.

15th Apr. 1835.

Dr. Lushington.—That is the view of the case which presents the greatest difficulty, but I hope to satisfy your lordships that, according to the principles of entail law, where the heir is also heir of line, he is just as much heir of line as if the estate was not entailed. It may be true that according to the substance the heir of entail may simply take a life interest, but your lordships must look to what was the view taken by the law of Scotland as to succeeding to an entailed estate in ancient times; and it will be found, according to the view of that law, that he was considered absolute fiar, except to the extent of the restrictions imposed upon him. I can show your lordships, by authority, that an entailed estate is not to be considered as a succession of liferents, but a succession of absolute fees, except so far as there are particular burthens imposed by the effect of the entail; and if that be the real case, it will never do to resort to any rules of equity as to what ought to be the way in which matters of this kind were arranged. It must be considered with reference to legal principles existing at the time the rule was introduced; and I think I shall be able to show that the very rules which apply to an estate received ab intestato apply to an estate taken by entail. I apprehend it cannot be denied that where the same person happens to be heir of line to an entailed estate, as well as heir of tailzie, it is not correct to say that his character of heir of line is excluded by his character of heir of entail, and that the character of heir of line, to some purposes at least, remains unaffected, and not destroyed in consequence of his

character of heir of entail. I do not accede to the argument, that it is not a matter of importance to consider what was the nature of the tenure of real property at the periods those authors which have been referred to wrote, and when the law of collation was introduced into Scotland. At what particular period the law of collation was introduced into Scotland, perhaps, it is impossible now to ascertain; but this is a proposition incapable of being denied, that from the very earliest times the law of collation has prevailed in Scotland. Lord Bankton lays down the proposition, that collation was permitted to the heir of line, that he might never be worse off than the next of kin; that, in consideration of his taking the real estate, he was distinctly deprived and excluded (to use the words of Lord Stair) from any share of the executry, but, as a matter of favour, he was permitted, being heir, to have a share of the executry, provided he collated the whole of the heritage he received on the death of his ancestor.

Mr. Erskine, (Book 3. tit. 9. s. 3.) in speaking on the subject, says, “Where the estate of the deceased consists partly in heritage and partly in moveables, the proper heir in heritage has no share of the moveable estate if there be others as near in degree to the deceased as himself. Thus in the line of descendants the eldest son gets the whole heritage, and all the other children, whether sons or daughters, divide the moveable estate among them in capita. Thus also in the collateral line, that brother who as heir at law is entitled to the whole heritage is excluded by his other brothers and sisters from any share in the moveable succession.”

My friends have contended that in point of fact the

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER ^{v.} ANSTRUTHER. 15th Apr. 1835. heir at law, according to the law of Scotland, had an original right precisely the same as the other next of kin, but that that original right was taken from him by reason of his being heir at law; and it then imposed on him the necessity of collating his heritage to enable him to come into succession. Our case is that the heir at law, by reason of the feudal system, whereby the whole of the heritage would descend to him on the death of his ancestor, never had any right, though next of kin, to the personal estate; but when the system of collation was introduced, it was done for the express purpose of conferring on the heir at law a benefit, viz., a title to share in the executry on condition of collation, he having ab origine no right whatever to share in the executry.

Mr. Erskine proceeds: “ But where the heritable
 “ estate of the deceased is so inconsiderable, in pro-
 “ portion to the moveable, that the heir finds it his
 “ interest to renounce his exclusive claim to the
 “ heritage, and betake himself to his right as one of the
 “ next of kin, the law allows him to collate or com-
 “ municate the heritage with the other next of kin, who
 “ in their turn must collate the executry with him, so
 “ that the whole estate belonging to the deceased is
 “ thrown into one mass, and distributed by equal parts
 “ among all of them; and even though the heir be not
 “ one of the next of kin, if he be a grandson by the
 “ eldest son of the deceased, he seems entitled to the
 “ privilege of collating with the deceased’s immediate
 “ children, for since he succeeds to the heritage as
 “ representing his father, who was one of the next of
 “ kin to the deceased, he ought to enjoy all the
 “ privileges which would have been competent to his

“ father as heir, had he survived the grandfather.
 “ Where the deceased leaves only one child, he is both
 “ heir and executor without collation; for where the
 “ right of the whole estate, heritable and moveable,
 “ descends to the same person, there is no room for
 “ collating the one with the other. This kind of col-
 “ lation is admitted, not only in the succession of
 “ descendants, but of collaterals; so that a brother who
 “ succeeds as heir to the deceased, if he judges the
 “ moveable succession to be the most profitable of the
 “ two, may collate with his younger brothers and
 “ sisters, and so come in as equal sharer with them in
 “ the whole succession.” It is remarkable that to such
 an extent has the doctrine been carried to compel the
 heir at law to collate the whole estate, that it is applied
 to cases of foreign heritage; and in the year 1825, after
 argument, it was decided in the Court of Session, where
 an heir at law had an estate in the island of Jamaica,
 before he could be permitted to share in the executry,
 he must collate that foreign heritage. Mr. Erskine
 states finally as a reason:—“ For as collation was
 “ admitted into our law that the heir might in no event
 “ be in a worse condition than the other next of kin, that
 “ reason has equal force in the succession of collaterals,
 “ and of descendants. It is only the legal heir, or the
 “ heir ab intestato, who is thus obliged to collate the
 “ heritage with the other next of kin, in order to have
 “ the benefit of the moveable succession.”

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

Now, if collation took place according to the law of
 Scotland at a very early period of the Scottish history,
 I apprehend that at that time nearly the whole of the
 real estates must have been held by titles very different
 from those titles which exist at present. When collation

ANSTRUTHER first took place, the whole of the real estate to which
 v.
 ANSTRUTHER. the heir of line succeeded on the death of his prede-
 15th Apr. 1835. cessor descended to him in the nature of a strict entail;
 because, for a very long period of time antecedent to
 the passing of certain statutes, it was clear that upon
 the death of the predecessor the heir at law took nothing
 but a life estate property,—I mean in point of extent of
 power over the whole estate. He had no power of
 gratuitous alienation, and was incapable of exercising
 that power which statutes from time to time have con-
 ferred upon the vassals and owners of land in Scotland.
 Mr. Erskine says (Book 2, title 7, s. 5.), “ By the
 “ genuine principles of the feudal system no vassal had
 “ a power to transfer the right of his feu to another
 “ without the superior’s consent; for, in rights merely
 “ gratuitous, the grant, together with all its conditions
 “ and limitations, must depend entirely on the grantor’s
 “ pleasure, and agreeably to those rules the superior
 “ was not bound to receive any person in the lands
 “ other than the heirs to whom he himself had limited
 “ the descent by the investiture, though the greatest
 “ sum should have been offered him in the name of
 “ entry. Hence Craig with reason affirms that no
 “ entail is effectual without the superior’s consent,
 “ because the fee is thereby made to devolve on a
 “ different order of heirs from that which was contained
 “ in the original grant; and where the lands are made
 “ over in the superior’s grant to the vassal and his
 “ assignees, the superior is obliged to receive the
 “ assignee only while the right continues personal,
 “ namely, before sasine be taken upon it, but not after
 “ perfecting it by infestment; for the word assignee in
 “ a feudal grant ought to be applied only to personal

“rights.” Now, supposing at that period a man had died, leaving four children, his heir at law would have taken the real estate, and that estate he must have brought into collation. But what would have been brought into collation? Nothing but a life estate merely. He had no power of disposing of that heritable property, and no power of bringing the whole fee as it were into collation; he could bring only that which he was entitled to, and that was a life interest (though it might be called a fee), as it is in the case of an entailed estate.

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

Lord Brougham.—How would a person be who took an estate from another without the resolute clauses: would it operate merely as a simple destination? Notwithstanding the prohibition he could alienate the estate. Now, in that case would he have been obliged to collate his life estate or the corpus?

Dr. Lushington.—Mr. Clerk, who argued the case of Little Gilmour, and against the decision, puts that case and says, that perhaps in that case he might be called upon to collate. He seems to be pressed by that argument, and adverts to it; and your lordships presently will see, when I come to comment on what occurred in that case, the argument used by Mr. Clerk on that occasion.

Your lordships are aware that it is by a series of statutes the landed property of Scotland has become capable of alienation, first by a statute in favour of creditors, and next by other statutes which entirely set free (except in cases of entail) real property held by individuals in Scotland. This view is exceedingly important, because the law must be founded not on the state of things as they exist at this present moment, but

ANSTRUTHER ^{v.} ANSTRUTHER. as the law itself with respect to collation has subsisted
 15th Apr. 1835. for an extensive period, and long anterior to the passing
 of these statutes. We must consider that the law of
 collation prevailed at that period when the whole pro-
 perty in Scotland was held as of the nature of entailed
 estates, and it was considered as no possible impediment
 to the heir at law's collating, though he had neither
 more ample nor more extensive rights than those which
 an heir of entail has at the present period. [He then
 proceeded to comment and argue on the authorities
 referred to by Sir John Campbell, contending that they
 all demonstrated that the heir of line, where he succeeds
 to an entailed estate, does not lose his character of heir
 of line even with respect to that estate itself.] He then
 went on thus: Balfour says, "No person, succeeding
 " heir to his father's or predecessor's lands and heirship
 " goods, ought and should have any part of any
 " remaining moveable goods or gear which pertained
 " to his father or predecessor at the time of his de-
 " cease, except he would cast in and confer his whole
 " heirship goods with the rest of the said whole move-
 " able goods and gear altogether, that equal partage
 " might be made thereof betwixt heirs and the rest of
 " the bairns."

Mackenzie uses these terms:—"The heir has no
 " share in the moveables except he collate, and be
 " content that the rest of the children shall share
 " equally with him in all that he can succeed to as heir,
 " or in case there be but one child, for then that child
 " is both heir and executor without collation." Now I
 grant that these are ambiguous terms, and it is said that
 this must mean heir at law, and nothing else. But if it
 had been the intention of Sir George Mackenzie to

have expressed any exception to the general rule, the great probability is that he with his accuracy would have stated in more explicit terms that it was only that to which he succeeded as heir at law, and that it did not include what he might also take in the character of heir of entail. But your lordships will not find in any one of those authorities the slightest intimation whatever that it was the intention of any of those writers to make any difference whatever with respect to the heir of entail; on the contrary, the whole of them used the most comprehensive terms, which would include the heir of entail. Thus Lord Stair says, “Heirs are excluded from the bairn’s part, though in the family, because of their provision by the heritage.” “Exclude” is the word used by Lord Stair, except in two cases; first, “If the heir renounce the heritage in favour of the remanent bairns, for then the heir is not to be in a worse case than they, but they come in *pari passu* both in heritable and moveable rights, which is a kind of *collatio bonorum*.” Secondly, “It was found, if there be but one child in *familiâ*, and so both heir and executor, that child hath not only the heritage, but the whole bairn’s parts, and abates the relict’s parts and dead’s part, without collation of the heritage.” Now my learned friend commented on the term “heritage” as if it necessarily meant every thing which was directly inherited from the ancestor *ab intestato*, and did not include all the property which, in consequence of the death of an immediate predecessor, had been acquired of an heritable nature. But the case of which Lord Stair is speaking must be a case in which the immediate ancestor (respecting whose succession we

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER ^{v.} ANSTRUTHER. 15th Apr. 1835. are inquiring) was a person possessed of that kind of property which we are now contending the heir is bound to collate ; and I submit the true meaning of the passage is, that every benefit derived in consequence of the death of that ancestor by a person being heir at law to him is intended to be collated, being of an heritable nature, to entitle the heir of line to that benefit which he had no right to at common law, and which he was only entitled to take on condition of performing the obligation imposed upon him.

Lord Bankton writes at very considerable length upon the subject, and he says, “ Where the eldest son succeeds as heir he cannot claim any interest in the executry, either as a share of dead’s part or legitim, because in such case the succession divides.” How? One part of our inquiry throughout the whole of this case must be whether my Lord Meadowbank is justified in the use of the terms in which he expressed himself. Bankton says, “ The succession divides,” (that is in substance what Lord Meadowbank had said before,) “ and the heritage goes to the eldest son with the burthen of the heritable debts, and the executry to the younger children with the burden of the moveable. But as the eldest son is still one of the nearest in kin with his brothers and sisters, he may still claim in that character a share of the whole executry with them upon collation or contribution of the heritage, both what he succeeds to after his father’s death, and what he got disposed to him before, perceptione hæreditatis.” It is not unimportant, in tracing the law, to show that collation does not depend on succession ab intestato. On the contrary, the law contemplates that

the whole of the property which was at any time held by the intestate should be collated, even that acquired during the life of his predecessor by disposition, marriage contract, or otherwise, thus showing that the obligation to collate was intended to extend as far and as comprehensively as possible.

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

Many of the cases which have been referred to appear to be entirely foreign to the present one. All the cases prove that the heir of line must collate, and your lordships will also find that there is not the slightest intimation of a contrary notion in any one of them.

Lord Brougham.—Is the heir of line bound to collate, though he pays 10,000*l.* for the estate?

Dr. Lushington.—No, my lord; there he does not take in the same mode.

Lord Brougham.—But there are many cases in which he may take as an heir tailzie with a consideration in money, or he may take in the form of a gift, or by a settlement, or under a marriage contract—the highest consideration known in the law. How are those two positions different? That is my difficulty. How would it be if he takes by purchase; if he pay 5,000*l.* to be made heir entail?

Dr. Lushington.—To the extent perhaps he might be liable.

Lord Brougham.—That is, I suppose, you mean beyond the 5,000*l.* But it is not enough to grind a little law as you go on; show me that it is so?

Dr. Lushington.—Your lordship is aware that this is a branch of the law that is very much in difficulty, even with the most learned persons.

Lord Brougham.—I feel that as much as you do.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

Dr. Lushington then commented on the case of Jack in 1763, contending that it established the distinction between the case of an heir alioqui successurus and heir portioner; that it was quite clear that if it had been the case of a son and two daughters it could not have been disputed that the son must have collated the estate. He then adverted to the cases of the Duke and Duchess of Buccleuch against the Earl of Tweeddale, and Murray against Murray, after which he proceeded thus:—

Then there is the case of Riccart against Riccart, from which very important information is to be collected. Indeed, as we descend downwards, all the cases become more important; they are reported at greater length, and we have a better insight to what was the intention at the time.

Lord Brougham.—I do not think so; not for a hundred years; I think for a century there are no useful reports at all; they give the decision of the judges, but they give only the arguments of counsel. I defy any human being, in a case of difficulty where you want to apply it, to know on what reason the judgment was given. You have an argument that might have been made by a steam engine, abridged perhaps from the pleading, and then that the lords found so and so.

Dr. Lushington proceeded to state the case of Riccart, after which, and on alluding to the Little Gilmour case,—

Lord Brougham said,—One thing has pressed on my mind through the whole of the argument, and in such a case I should like to have had the benefit of consulting the judges. But was not Little Gilmour a case of first impression, so to speak, for it is only the judgment of the Second Division? and just see what a disadvantage

one is under when you consider that at that time the President of the First Division was so very eminent an individual in all branches of the law, but in none more than in real property—I mean the Lord President Blair. It would have been highly expedient to have had the whole matter laid before all the judges. My great difficulty very likely arises from my English law habits, and from not having looked into the Scotch law cases. You may remove them, but if they are not removed I shall not call on Sir John Campbell or Mr. Murray to reply. Not that I have made up my mind one way or the other; quite the contrary; but I should send the case back to their lordships. I do not mean to say any thing which in the slightest degree may be considered as drawing an invidious comparison between the two great branches of the Court, consisting of that which lies within the wall and that which lies without the wall; they are both eminent and learned branches; but it is impossible for me to shut my eyes to one consideration, that in the outer branch of that Court I find such men (and there are no such men, except in the Inner House, to be found anywhere in Scotland,) as Lord Mackenzie, Lord Corehouse, Lord Moncrieff, Lord Jeffrey, and Lord Fullerton. That is a prodigious temptation to my mind in settling so important a branch (and this will settle for ever this branch of the law) to take the highest and the best means to remove any doubts upon so venerable authority as that of Lord Meadowbank and his coadjutors, Lord President Hope and others, who decided that case.

Dr. Lushington.—My lords, I have the advantage of having near me a gentleman who is principally in-

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER *terested, and he authorizes me to say that to that course*
v.
 ANSTRUTHER. I should offer no objection.

15th Apr. 1835. *Lord Brougham.*—This appears, my lords, to be a case of very grave importance, and I think it will be expedient, that before remitting, which seems to be the most satisfactory course for all parties—before remitting the case to the consideration of the Court below, it appears highly expedient that, in order that the remit should be accompanied with all the good effects that can naturally be expected to grow therefrom, I take leave humbly and shortly to state to your lordships my view of the whole of this case. It will be more convenient that I should state that view at present, when we are at the close of the argument which we have in part fully heard for the appellants, and which is partially begun on the part of the respondent. But it will be more satisfactory to my mind, perhaps, if I do not give these learned persons the trouble to come again; but if the parties will come back at four o'clock I shall then be prepared to give my view of the case, and I will reduce into writing such view as presses on my mind, and which I think should be pressed on the Court below, valeat quantum.

Dr. Lushington.—I was going to draw your lordship's attention very particularly to the case of Balfour and Scott, in order to show that the character of heir at law is not entirely sunk in that of heir in tail, to Lockart and Dunmore, Dictionary, 15,047; Mackenzie against Mackenzie, Dict. 15,053; the case of the Duke of Argyle and the Earl of Dunmore, Dict. 15,068; and the case of Stewart and M'Norton, on the 2d December 1824, in the second volume of Shaw and Dunlop.

LORD BROUGHAM.—My lords, the present question, confessedly one of great importance, and of which I regard the difficulty as not inconsiderable, arises out of that provision of the Scotch law which enables the heir, who, but for his inheriting the real estate of his ancestor, would have taken a share in the personal property as next of kin, to take that share as one of the children or other heirs in mobilibus at his election, but only upon paying the price by bringing in his inheritance as part of the whole fund or succession, and letting it be divided with the heirs in mobilibus. The law regards the succession in all cases as twofold — heritable, which goes to the heir, excluding the other next of kin — and moveable, which goes to the other next of kin, excluding the heir. But, as the heir is the person peculiarly favoured by the law, and as this preference might operate to his detriment rather than his advantage, were he confined in all cases to the real estate, an option or election is given him, by which he may be no worse off than the other next of kin, though he shall not be better off than they, if he elects to interfere with their fund, and so must let them share his land if he is to share their gear. Nothing can, therefore, be more just or fair than this fundamental principle upon which the doctrine of collation rests, always assuming that the heir is to have the preference as regards real estate, which excludes the other next of kin from any election as against him, while it gives him his option as against them. The equitable view of the subject, which gave rise to this doctrine, has been carried so far as to require an heir claiming his share of personalty to collate even real estate to which he succeeds in another country. This point was first considered in 1817, in the case of Robertson v. Mac-

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER ^{v.} ANSTRUTHER. 15th Apr. 1835. rean *, where the Court, after two opposite judgments by two Lords Ordinary (Balgray and Alloway), held it clear that a party claiming legitim in Scotland must collate the Jamaica estate to which he had succeeded from the same intestate that left the moveables. This seems to be a considerable stretch of the principle, and it was admitted to be then first decided. Would it not follow from the rule thus recognized, that if a youngest child in Scotland succeeded to lands of the tenure of borough English in Middlesex, he must bring those lands into the common fund before he could take his legitim or legal provision; for though quoad personalty he is a younger child, yet in England, where the land lies, he is quasi eldest — he is heir — for heir is nomen juris, and does not designate one child more than another. Does not this show the difficulty of holding that land situated in a foreign country, and dealt with and descending according to a foreign law, is to be regarded as if it were under the control of the Scotch law? Notwithstanding this rigour, however, in applying the principle, and making the heir pay the price, it never was contended that equality is to be worked out between him and the next of kin at all hazards, and that whatever the heir has, and however it may have come to him, he must bring it into the common stock. The real estate coming to him from the father or other ancestor, whose personal property is in question, is all that he can be required to collate; and I presume, upon a principle of presumed intention, that the father, who might have otherwise disposed of his personal estate, died intestate, and left the law to dispose of his sub-

* 18th Feb. 1817. F. C.

stance, believing the heir would take the land and the rest the gear ; but that, had he supposed the heir would claim upon the gear, he would have made another arrangement of his property. This, too, accounts for the collation being confined to intestate succession, and for the rule admitted to be settled, that if the heir takes nothing by inheritance, he needs not collate what comes to him from a remoter ancestor, even, it is said, where the immediate ancestor who left the personalty behind him was life-renter of the land, so that his death opened the succession to the heir. This principle it is that raises my first difficulty as to the provision, supposed by the judgment to exist in the law, as regulating the present question ; for if the heir, taking nothing in land from the last ancestor, owner of the personalty, needs not collate, merely because he takes nothing in land from that ancestor, why should he collate in a case where confessedly he takes just as little, namely, where he succeeds, but succeeds, not as heir of line, but as heir of tailzie, has no privity with the last heir of tailzie, could in no way be either helped or hurt by any thing that his predecessor could do, and takes, as regards him, by a title altogether as singular as if he had received the estate from a stranger ; in which case, it must be admitted, no question at all could have arisen upon collation whether the estate was entailed or not. It may indeed be said that the ancestor's presumed will as to the personalty is here the ground of requiring collation to be made by the heir of tailzie. But why is there more presumed intention in this case than in the last one put, namely, that of a tailzied estate coming to the heir through the last ancestor, owner of the personalty, and coming by the fact of his decease ? Surely he may

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

be supposed to have had this advancement in fortune also in his eye, and it may be said, that had he thought the heir would claim on the gear, he would have willed it away to the younger branches, because he knew full well that the same event which left the goods and chattels to them left the land to the eldest branch; and indeed the same argument would apply to the case of real estate coming from a mere stranger, but which the immediate ancestor, owner of the gear, knew would so descend upon and provide for his heir. The next difficulty which I have felt pressed by is akin to the former. The law has undoubtedly laid down that estate coming to one, though by conveyance, must be collated, provided it be such as but for the conveyance would at all events have come to the heir,—estate to which he was alioquin successurus. Now, granting that this is settled in the case of one taking the fee by destination to which he would have succeeded at any rate by descent, and granting even the more general proposition, that whatever interest, whether fee-simple or fee-tail, or any other more restricted interest, a person takes by singular title, he must collate, provided he would have taken it by inheritance in the event of no such destination having ever been made in his favour; still I do not see that this proposition (and it is a pretty large one) can cover the case of a person taking under a tailzie, as heir of tailzie, the estate which, but for there having been a tailzie, he would have taken as heir of line. We seem here to be confounding two very different things. We suppose the capacity of the heir of tailzie to be lost and merged in that of heir of line, because the same individual is clothed with both characters; and we also suppose that, because the estate which

is tailzied is also the estate which, but for the entail, would have descended upon the heir of tailzie as heir of line, therefore the same tailzied estate is in the same person in both his different capacities; in other words, that he takes in one way only what he would have taken in another, had there been no entail to interfere with the succession. If, indeed, this were true, no doubt the principle of collation would apply, and all the grounds that can be assigned for it would exist here; but it is neither true nor any thing like the truth. The heir of tailzie as such may be the same person with the heir of line, but, as regards the estate tailzied, he stands in a perfectly different position, and the estate tailzied and which he enjoys under the entail is not at all that which he would have taken by succession. By succession he would have taken the fee-simple, with all its incidents of absolute liberty of enjoyment, of dealing with it during his life, and leaving it after his death. By the tailzie he only takes the estate tied up in every way both as to enjoyment and as to succession; he takes the fee from one who might have given it as he chose; he takes the entailed estate from one who was himself tied up, supposing him to be only heir of entail; he takes the fee from the immediate ancestor; he takes the tailzied estate from some one else. Admitting that he must collate whatever he takes, to which he was alioquin successurus—here he was not alioquin successurus to the same thing which he took under the entail, but to another and a very different thing; he takes a tailzied fee by the entail, and he would have taken a fee-simple by succession. Is he bound to collate exactly what he would have taken by descent?—then let him collate the fee which he would have taken had there been no en-

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

ANSTRUTHER tail; but the fee he cannot collate, for he has it not:
 v.
 ANSTRUTHER. Does not this show the difficulty of applying the rule
 of alioquin successurus to this case? But a subtle kind
 of argument appears to be raised in order to meet this
 difficulty. It is said that the heir of tailzie takes a
 portion of the fee which he would at any rate have
 succeeded to, and that such portion being common to
 both his capacity of heir of tailzie and heir of line, he
 must collate to that extent as alioquin successurus.
 Thus it is considered that he was alioquin successurus
 to a thing composed of two parts, the life-rent and the
 fee; that by the tailzie he takes one of those two parts,
 the life-rent, and that therefore he must, as alioquin suc-
 cessurus, collate to this extent. Now, though I will
 not deny the force of this observation, I must observe its
 repugnancy to the doctrine of a Scotch entail, resembling,
 as the observation does, and very closely, our English
 doctrine of remainders and particular estates. For a
 Scotch entail is a succession of fees to be successively
 enjoyed; not a carving out of one estate or interest
 into a number of portions to be vested immediately, but
 to be successively enjoyed; and therefore, consistently
 with this Scotch law doctrine, you can hardly hold that
 the heir was alioquin successurus, unless the kind of
 fee which he took under the tailzie was exactly the same
 with that which he would have taken by inheritance.
 Perhaps, indeed, the best support of the present deci-
 sion, and of the case of Little Gilmour, is to be found
 in the principle of the heir of tailzie taking a fee only
 restricted in so far as he is tied up. But again he takes
 not a fee-simple to which he is alioquin successurus, but
 a fee-tail to which he never could have succeeded by
 inheritance. Let us now consider strictly the case of an

15th Apr. 1835.

heir of tailzie under a simple destination — one holding by a tailzie without the fencing clauses. He takes no fee, that is, no fee-simple, nor any thing like it, but a feodum talliatum,—as both the old law of England and of Scotland term it,—a fee-tail. He is not validly prohibited, it is true, from converting it into a fee-simple: as in England he may do so by fine and recovery, and the conveyances substituted of late for that proceeding, so in Scotland by conveyance he may convert his right into a fee, or in Scotland he may, without any such process, validly deal with it as a fee in most particulars; but until he does so, until he suffers a recovery here, or otherwise affects it in Scotland,—that is so long as he does nothing but enjoy it,—he has only a fee-tail. Now shall he be called upon to collate the whole corpus of this estate, or only the portion which he takes by force of the entail, that is, the fee-tail? So, were collation the English law, would the tenant in tail with us be obliged to suffer a recovery for the purpose of vesting the fee in the common fund, and dividing it with the personalty? This is one difficulty; but another is akin to it. Suppose him to have done something to affect the remainder over in England, or in Scotland to burden the estate, and evict or otherwise injure the succeeding heirs of tailzie, I ask what is he to collate—the estate tail as he has made it, or the estate tail as he received it from his ancestor, or through his ancestor, owner of the fund? This is a question of some nicety, and I do not see how it is to be dealt with upon the principles which have governed this decision; for surely it would be going a great way to hold that he must collate, not only what he got under the entail, but what he made of that since he came to it, and which no

ANSTRUTHER
v.
ANSTRUTHER.
—
15th Apr. 1835.

ANSTRUTHER ^{v.} ANSTRUTHER. power on earth could have compelled him to make of it, namely, a fee-simple. Again, what shall be said of one who takes an estate by purchase for a valuable consideration? Suppose the heir buys the estate to which he was alioquin successurus, it is agreed on all hands that he is not to collate that; and yet how can an heir of tailzie, in contemplation of law, be said to be other than a purchaser? But the value given is said to make the difference; value, however, in law, is not merely money or land exchanged. Marriage is just as binding a consideration, and one just as valid to exclude claims of subsequent onerous creditors, as money price or excambion. Then, suppose the heirs of tailzie and provision to take under a marriage contract estates to which they were alioquin successuri, why are they to collate more than the heir who gave value in money? They may not have given the consideration themselves, but their parents or other ancestors who contracted the marriage upon the faith of the settlement gave value,—they executed the highest and most binding consideration known to the law. Nay, we may put the case of a settlement by which the father on his son's marriage makes him heir of tailzie and provision, failing himself—the common case—then the son must collate this, though he had given just as high, if not a higher, consideration than if he had paid a sum of money, in respect of which his father had executed an entail, making him institute. I have stated these difficulties without pretending to say that they weigh against the decision under review, so as to make me think it erroneous; but they make me anxiously desire farther light upon its principles than I can find in the reasons of the learned judges by whom it was pronounced. Their lordships rely entirely upon the Little

Gilmour case in 1809, which is entitled to very great deference, no doubt, both as having been most ably supported in argument and as having now stood for above a quarter of a century unimpeached by decision, though how far approved and how far acted on in practice we are not informed. The able argument of Lord Meadowbank in that case, full on many points, does not give me the light I desiderate upon the points to which I have adverted, and which I deem the main difficulties that encumber the question. Nor can I close my eyes to the manner in which a very high authority, Mr. Erskine¹, treats the subject, and which, though he gives no very explicit opinion upon the general question, and refers chiefly to the case of heirs portioners, and the decision in *Ricarts v. Ricarts*, yet so expresses himself as to leave no manner of doubt in my mind that the rule in the Little Gilmour case would have been to him a great surprise. Lord Meadowbank, in his able and ingenious commentary on the case of *Ricarts v. Ricarts*, does in no way meet the authority of Mr. Erskine, nor his reason for that decision, namely, that the heirs portioners succeeding to the heritage by the father's entail or destination takes from one having full power over that heritage as well as over the moveables,—a reason just as applicable to a son upon whom the father entails lands to which he was *alioqui successurus*. It is certain that the learned judges have stated the Little Gilmour case to give only the same law with former decisions. I have examined these older cases without being able to satisfy myself clearly and fully that it is so. The case of *Murray v. Murray*, in 1678², comes the nearest to it without touching it, while the case of

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

¹ 3 Ersk. 9, 3.

² 23rd July 1678; Mor. 2374.

ANSTRUTHER *Rae Crawford v. Stuart*¹ is far from going to that ex-
 v. tent in my apprehension. As for the *Scotstarvit* case²,
 ANSTRUTHER. or *Balfour v. Hay*, it goes much further if we take it
 15th Apr. 1835. to the full extent, and further than I can conceive any
 one would think of holding to be law; for it sanctions
 the position that there is collation wherever the heir
 takes, whether *alioqui successurus* or not. On the
 points themselves, however, and on the question whether
 or not the case of *Little Gilmour* was one of the first
 impression, I have no occasion now to decide. I only
 was desirous that in sending back this important and
 difficult question to the Court below for the benefit of
 a further consideration than it has as yet received, either
 now or in 1809, and by all the learned judges, the light
 in which its merits have appeared to me should be accu-
 rately known.³

It is declared by the House of Lords, That the House (by consent of parties) forbears *hoc statu* to pronounce any decision upon the matter of the said appeal; but it is ordered and adjudged, That the said cause be remitted back to the said Second Division of the Court of Session, with an instruction to the Judges of that Division to order the matter of law in question in this cause to be heard before the whole judges, including the Lord Ordinary, and to pronounce judgment according to the opinions of the majority of such whole judges.

SPOTTISWOODE and ROBERTSON—RICHARDSON and
 CONNEL,—Solicitors.

¹ 3rd Dec. 1794; Mor. 2384.

² *Balfour v. Scott*, 15th Nov. 1787; Mor. 2379 and 4617; Hailes, 1032 and 1048.

³ On the remit to the Court of Session the case was heard in presence of all the judges, and the following opinions delivered:

Lords President, Balgray, Gillies, Mackenzie, Corehouse, and Fullerton.

“ The question remitted by the House of Lords for the reconsideration of

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

this Court is, whether the heir at law, taking the heritage of the predecessor by succession, or, what is equivalent, præceptione hæreditatis, can be admitted to a share of the moveable estate, as one of the next of kin, without collating the heritable estate, when it is holden under the fetters of a strict entail? This question, occurring in the simplest and most abstract form, was decided in the negative by an unanimous judgment of the Second Division of the Court in the case of Little Gilmour, Dec. 13, 1809,—a judgment which has ever since been considered and acted upon as having settled the law. But in pursuance of the remit, it is proper, in the first instance, to lay that judgment out of view.

We think it unnecessary to engage in any inquiry as to the origin of the law of collation between heir and executor, at what period or on what account it was introduced, and, in particular, whether it arose from the collision of the consistorial and the feudal law. There are no materials in our records to throw light on the subject; our earliest law writers, as Craig and Hope, are silent with regard to it; and we should not have known that the privilege of collation existed before that time, had it not been for a single decision in 1555 shortly noticed by Maitland and Balfour. Instead of resorting to conjectural history, therefore, for a principle to guide us in this case, it is safer to confine our attention to the rules laid down by our institutional authors of acknowledged authority, or expressly sanctioned by the decisions of this Court.

With regard to the persons who are entitled or bound to collate, the following propositions are indisputably established:

1. If the heir at law claim a share of the moveable estate as one of the next of kin, he is bound to collate the heritage. This is the general and fundamental rule.

2. If the heir at law is himself next of kin, and if there are no kindred in the same degree, there is no place for collation, for he is both heir and executor.

3. In the case of heirs portioners being themselves exclusively next of kin, there cannot be collation, for they are all heirs and all executors.

4. Heirs portioners being in the same degree of kindred with others not heirs portioners, the former, claiming a share of the moveables, are bound to collate with the latter.

5. One of the next of kin, not being heir at law, may take his share of the moveables, and is not bound to collate, though he should succeed to the whole heritable estate by destination.

6. The heir at law, not being one of the next of kin, is not entitled to collate.

Proceeding next to the subject of collation, it is established on similar authority that the heir who shares the moveables, and who is bound to collate, must collate the heritage vested in the predecessor, and transmissible by succession; and therefore, conversely, that he is not bound to collate what is not heritage, what is not vested, and what is not so transmissible. The rule is laid down to this effect, and in unqualified terms, by all the text writers, and in none of them is there an allusion to any distinction arising from the subject being holden under a destination or under no destination; and if under a destination, from the nature of the destination, as whether it be to heirs whatsoever, to heirs

ANSTRUTHER
 v.
 ANSTRUTHER.
 ———
 15th Apr. 1835.

“ male, to heirs of tailzie, to heirs of provision, or to heirs of a marriage.
 “ If any such distinction existed it was unknown to Stair, to Stewart, to
 “ Bankton, and to Erskine, for if it had been known to them it was too
 “ important to have remained unnoticed.

“ Let us consider, then, the grounds on which the appellant contends
 “ that the estate now in question, which was heritage vested in the person
 “ of the defunct, and which has passed to the appellant by succession,
 “ should be exempted from the general rule, to which none of the text
 “ writers knew of any exception.

“ In an early stage of the cause the appellant maintained that collation
 “ takes place only in the case of intestate succession, understanding by
 “ that term, it is thought, what the heir succeeds to by the act of the law,
 “ independently of any deed or conveyance executed by the defunct or
 “ his predecessors. That position is plainly erroneous, and is now admitted
 “ to be so. He is bound to collate, without distinction, property which
 “ has not been made the subject of destination, as heirship moveables, a
 “ personal right to land under a minute of sale, and the like, and property
 “ which is holden under the most express destination in the investiture.
 “ Thus he must collate an estate conveyed by the defunct to himself and
 “ his heirs whatsoever; or to himself, whom failing, to his eldest son
 “ nominatim, and the heirs of his body; whom failing, his heirs what-
 “ soever. If the completion of a feudal investiture in the ancestor, con-
 “ taining a destination, were to bar collation, there are few estates in
 “ Scotland which would not be exempted from it. The distinction be-
 “ tween intestate succession and succession by destination is therefore
 “ plainly untenable.

“ Afterwards the appellant's argument took a different form, and it
 “ was maintained that the subject of collation is that to which the heir
 “ succeeds in the character of heir at law exclusively, or that which it is
 “ said he inherits in fee-simple. Some misapprehension seems to have
 “ arisen here from the use of an ambiguous term. In the law of Scot-
 “ land ‘ fee-simple ’ has two significations. Sometimes it means a
 “ fee destined to heirs at law, in opposition to a tailzied fee; for example,
 “ a fee taken to heirs male, heirs of a marriage, or other heirs of provision.
 “ Sometimes it means an absolute fee, in contradistinction to a limited
 “ fee, that is, a fee holden under conditions or fetters. If the term is
 “ employed in the first sense, it is inconceivable how it should form the
 “ ground of any distinction in the question of collation. Whether the
 “ eldest son, for example, takes an estate, being an absolute fee, as heir
 “ at law of his father or as heir male of his father, his situation in
 “ reference to that estate, and his rights over it, are identical. In
 “ either case the investiture may have been framed by the father him-
 “ self, or it may have been framed by an ancestor more remote; but
 “ in both it is to his father to whom he succeeds, and to whom he
 “ must enter heir. His powers and liabilities, after he has entered,
 “ are the same in both; he may gift, he may sell, he may burden, he
 “ may alter the investiture at his pleasure, and by the very same means.
 “ In both he takes by an universal and not a singular title, and in both
 “ the effects of his representation are the same. It is not necessary
 “ with us, as it is in England, to convert the fee tail by fine and recovery,

“ or by any act whatever, into a fee-simple, that the heir may enlarge
 “ his powers over it, nor is it possible for him to enlarge his powers
 “ by any such act. If he dies without disposing of it otherwise, it
 “ goes to his heir male, just as if he dies without disposing of a fee-
 “ simple; otherwise it goes to his heir of line, or his heir of conquest,
 “ as the case may be. He cannot alter the succession of the tailzied
 “ fee on deathbed, but neither can he alter the succession of the fee-
 “ simple. Then why should he not collate what he takes by the force of
 “ an investiture in the one case as well as in the other; the thing which
 “ he has taken being absolutely the same as to use, disposal, liability, and
 “ every other conceivable attribute of ownership? And the case is the
 “ same whether the fee is tailzied to a man and the heirs male of his body
 “ alone, or to a hundred extraneous substitutes in the male line. What
 “ is said of a tailzie to heirs male applies to every other species of
 “ tailzie, the destination being unfettered, and the heir general suc-
 “ ceeding under it; for example, a tailzie to heirs whatsoever, excluding
 “ heirs portioners, to the children of a particular marriage, excluding other
 “ children, or, what is quite competent by the law of Scotland, a tailzie
 “ to a series of individuals, excluding the heirs of every one of them.

“ As a tailzied fee, unfettered, is indisputably a fee-simple as to every
 “ right in the person of the heir, so it presents as little difficulty in ap-
 “ plying the rules of collation as a fee standing to heirs whatsoever. Thus,
 “ if the heir of tailzie claims a share of the moveable succession, no con-
 “ veyance, nor any other act on his part, is requisite to enable the
 “ next of kin to obtain a share of this estate. Though he refuses
 “ to execute a disposition, by simply taking a part of the executry, he
 “ incurs a debt to them, which they may render effectual by a decree of
 “ constitution and a charge to enter, followed by an adjudication. It
 “ may be added, that the very same steps would be necessary on the part
 “ of the executors, if the estate, instead of being destined to heirs of
 “ tailzie, were destined to heirs whatsoever, and if the heir, with a view
 “ to avoid collation, should refuse to make up titles, and to dispone.

“ But it is needless to enlarge upon this point, which seems to have
 “ created some difficulty in the House of Lords, because it is distinctly aban-
 “ doned by the appellant himself. He admits that whatever is the form of
 “ the title,—whether the investiture stands to heirs whatsoever, or whether
 “ it contains a special destination to heirs of provision,—yet, if the deceased
 “ had the full power of disposing of it during his life, it must be collated.
 “ ‘ Where the deceased,’ he observes, ‘ has held an estate in fee-simple,
 “ ‘ and over which, during his life, he had the full power of disposal, the
 “ ‘ heir-at law must collate it, though the investiture may have been one
 “ ‘ of special destination, instead of leaving the succession to be regu-
 “ ‘ lated by the mere operation of law. But this peculiarity, namely,
 “ ‘ where the heir at law must take in form as an heir of provision an
 “ ‘ estate which the ancestor held in fee-simple, and which, without ad-
 “ ‘ verting to the particular form of the investiture, he has allowed to
 “ ‘ descend to his heir at law, is just one example of the more general rule,
 “ ‘ that the form of the title makes nothing against the truth of the case,
 “ ‘ and the rights of parties thence arising.’ (Appellant’s case, p. 7.) This

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ is in some measure to reverse the argument, as it was put at first, holding that the subject of collation is the heritage which does not descend ab intestato to the heir, but which he takes in virtue either of the express or implied will of the deceased. If the deceased has made an unfettered investiture under which his heir general takes in the first instance, it is admitted to be of no moment whether that investiture be conceived in favour of heirs general or heirs of tailzie or provision. And, in like manner, if he allows an investiture made by a remoter ancestor to remain unaltered when he had the power of altering it, which gives the estate, in the first instance, to his heir of line, this is said to be equivalent to a donation by himself to his heir of line, it being the indirect expression of his will to that effect. The admission is very material; it discards from the argument all pleas resting on the form of the destination, as whether it is simple or tailzied, and on the circumstance whether it was framed by the deceased or by a remoter ancestor; and puts the case on the point, whether the deceased had or had not the power of disposing of the property, which on his death has devolved on his heir at law as in his right. Stating the question in this general and abstract form, it is plain that it must be answered unfavourably for the appellant. There are many well known instances in which the deceased has no power to alter the investiture, whether standing to heirs general or heirs of tailzie, in which collation undoubtedly takes place. The investiture may have been framed by a remote ancestor, and the deceased, who succeeded and made up his titles, may have died in minority, or he may have been insane from the time he succeeded till his death, or he may have succeeded while he was on death-bed. In all these cases the heir takes independently of the will of the defunct. In some of them the defunct is incapable of having any will upon the matter; and in others his *enixa voluntas*, distinctly expressed, may have been, that the heir at law should not take. Thus, if the late Sir John Carmichael, who died in minority, had held any lands as in absolute fee, whatever might have been the destination, the law holding that he could express no will with regard to them, would have allowed them to descend in terms of the Earl of Hyndford's or of Sir John Anstruther's investiture; and if Sir Wyndham took them as heir under that investiture, he must have collated. It is in vain, therefore, to contend that the criterion of collation is, whether the estate was or was not taken by the express or implied will of the ancestor.

“ These preliminary observations have been thought necessary to clear the case of much irrelevant matter which has been introduced into it, and to raise the question of law on which parties are properly at issue, namely, Whether the estates in question are not subject to collation, because they are not absolute but limited fees? If the case of Little Gilmour is not to be held a precedent, this question requires very careful consideration.

“ The general rule of law, as already stated, being, that all heritage in the person of the deceased is subject to collation, and that rule being laid down by every authority, without qualification or exception, it is incumbent on the appellant to show why the lands in question, which,

“ though strictly entailed, were heritage in the person of the deceased,
 “ should not fall under it. He attempts to do so on various grounds.
 “ First, he maintains that heritage, in the sense of the text writers, is
 “ heritable property; but that an estate holden under the fetters of a
 “ strict entail is not the property of the heir, because he has no power
 “ to alienate, burden, or alter the order of succession. The criterion of
 “ ownership, he says, ‘ is the liability of the estate for the proprietor’s
 “ ‘ debts;’ and, as the heir in possession of the entailed estate cannot
 “ affect it with his debts, therefore it cannot be considered as his
 “ estate.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ If there be any point undoubtedly settled in the feudal law of Scot-
 “ land it is this, that the heir of an entailed estate, however strictly
 “ limited or fettered, as soon as he completes his titles, becomes the
 “ proprietor of that estate. Before he enters, the fee is in the hæreditas
 “ jacens of his predecessor. He takes it up by special service, the mode
 “ by which feudal property is transmitted from the dead to the living, or
 “ by some equivalent form. The inquest declare that the predecessor
 “ died vested and seised as of fee, and that the claimant is the next heir,
 “ and entitled to be infeft. When he is infeft he becomes the vassal,
 “ not by a singular but by an universal title. If he refuses to enter, the
 “ superior can compel him to do so by means of a charge of horning
 “ under the statute. In consequence of his entry all the rights of a
 “ vassal open to him, all the obligations of a vassal are incumbent upon
 “ him, and all the feudal incidents fall in his person. Were it other-
 “ wise, the fee of a strictly entailed estate might remain in pendente for
 “ centuries, contrary to an axiom or fundamental principle of the feudal
 “ law. When we say that a strictly entailed estate is a limited fee, we
 “ do not mean that it is limited as to its integrity, for all and every part
 “ of the fee is in the heir who has entered. No fraction or shadow of a
 “ real right is vested in any of the substitutes, who are merely personal
 “ creditors, having power in that character to enforce the conditions of
 “ the grant. It is in respect of those conditions that the fee is said to
 “ be limited; for if the heir does not comply with them, he exposes him-
 “ self to the danger of forfeiting his right, that is, of being divested of
 “ the whole fee, which before was wholly in him. In the words of the
 “ revised case for the Marquis of Chandos, now at avizandum before the
 “ Second Division of the Court¹, ‘ The title by which the estate is held,—
 “ ‘ the powers which may be exercised in regard to it,—the legal provi-
 “ ‘ sions that are payable out of it,—the mode of constituting securities,
 “ ‘ whether legal or voluntary, over it,—its liabilities for the debts of ap-
 “ ‘ parent heirs,—the operation against it of the statutory certification on
 “ ‘ a charge to enter heir,—the application of the law of treason in
 “ ‘ regard to it,—and the manner by which it descends to, and the title
 “ ‘ by which it must be taken up by, the next successors; in not one of

¹ This case involving the same question of collation, arising out of the succession to the estates of the Marquis of Breadalbane, had a similar result as the present one, and has been appealed.

ANSTRUTHER
v.
ANSTRUTHER.
—
15th Apr. 1835.

“ ‘ these particulars is there the shadow of distinction in point of principle’
“ ‘ between an estate held under the strictest entail and the present’
“ ‘ instance of an estate in fee-simple. Both estates may be restricted
“ ‘ and qualified in various respects by burdens, and there may be a cer-
“ ‘ tain degree of peculiarity in that special class of burdens which more
“ ‘ immediately form the characteristic of an entailed estate. But in all
“ ‘ that relates to the essence of the matter—in all that enters radically
“ ‘ and fundamentally into the constitution of the estate itself, or in any
“ ‘ respect touches the inherent character of the right and title of its
“ ‘ proprietor, or of those succeeding to him, there is not so much as an
“ ‘ iota of difference.’

“ All this is so familiar to every one acquainted with the feudal law
“ of Scotland, that the statement of it here may be thought superfluous,
“ and the proof by authority or precedent would certainly be inexcusable.

“ That the *jus disponendi*,—that is, the power to alienate or burden,—is
“ no test of ownership, is a point equally clear. On the contrary, it is ex-
“ cluded by the very definition of that right in the law of Scotland, as
“ well as in that of Rome. ‘ Property,’ says Erskine, (Book ii. tit. 2. sec.
“ 1.) ‘ is the right of using and disposing of a subject as our own, except
“ ‘ in so far as we are restrained by law or paction;’ and this is exactly
“ the language of the civilians, who define dominium to be ‘ *jus in re*
“ ‘ *corporali ex quo facultas de ea disponendi, eamque vindicandi, nascitur,*
“ ‘ *nisi vel lex, vel conventio, obsistit.*’

“ In the case of a strict entail there is a convention between the en-
“ tailer who frames it, and the institute or heir who takes under it, that
“ the latter shall not have power to alienate or contract debt,—that is,
“ the entailer disposes it under these conditions, and the institute or
“ heir, by his entry, accepts the estate under these conditions, and becomes
“ bound to comply with them. This convention, express or tacit, is
“ authorized and rendered effectual against third parties by the statute
“ 1685, and consequently the right of the heir, notwithstanding the re-
“ strictions to which it is subject, comes under the express legal definition
“ of the right of ownership.

“ But the argument is put by the appellant in a form at first sight
“ more plausible, and it is the ground on which he now chiefly, if not
“ exclusively, relies. He says, granting that the heir of a strict entail,
“ when entered, is the proprietor of the entailed estate in point of form
“ and in correct legal language, nevertheless in substance and reality he is
“ nothing more than an usufructuary; in equity, therefore, he ought not
“ to be called on to collate his interest under the entail, on the same prin-
“ ciple that he does not collate heritage, which, under the disposition of
“ the ancestor, he holds in life-rent. In illustration of this principle, he
“ refers to the case of *præceptio hæreditatis*, when the heir is forced to
“ collate what he has acquired, not by a universal but by a singular title,—
“ what he has not succeeded to by a deed *mortis causa*, and in consequence
“ of the predecessor’s death,—in reality, what he has not succeeded to at
“ all, but what was conveyed to him by a deed *inter vivos*, and while the
“ ancestor was alive. In that case, it is said, the substance and not the
“ form of the right is regarded, that the executor may get equity from the

“ heir in opposition to the strict rule of law, and therefore he must give
 “ equity to the heir in the present case on the same principle.

ANSTRUTHER
 v.

“ To begin with the illustration,—the appellant’s inference would have
 “ had some colour if the doctrine of preception had been introduced into
 “ the law of Scotland for the sole purpose of equalizing the interests of
 “ the heir and executor in the case of collation, for it might then have
 “ been considered as an interposition of equity to remedy the defect of
 “ the general and strict rule of law. But that is not its origin. The
 “ doctrine of præceptio runs through the whole law of succession; for if
 “ the real estate or any part of it is propelled by the ancestor during his
 “ lifetime to his heir alioqui successurus, without a valuable consideration,
 “ the subject so taken shall be accounted inheritance, and to a certain
 “ extent shall infer representation and liability for debt. The heir receives
 “ it by a universal, not a singular title; it constitutes a succession, and
 “ not a gift, and is no contravention of a prohibition to alienate under
 “ which the ancestor may have been laid.” In accordance, therefore, with
 “ this rule of universal application, and without any reference to equity in
 “ the particular case of collation, the heir must communicate what he has
 “ taken præceptione.

ANSTRUTHER.
 —
 15th Apr. 1835.

“ The doctrine of præceptio, therefore, though affecting collation, as
 “ well as every other department of the law of succession, affords no
 “ analogy for holding a limited fee as equivalent to a life-rent, though in
 “ some, but indeed in very few respects, they may be similar. In truth,
 “ the common law of feudal succession uniformly resists the intervention
 “ of equity to temper or modify its rules. Thus, if a brother dies infest
 “ in lands, his sister-german succeeds; if he has omitted that ceremony,
 “ his brother consanguinean takes the estate. Thus, in the case of heirs
 “ portioners, if one dies infest, her sister-german is preferred to the other
 “ heirs portioners, being consanguinean only. Thus, if an heir portioner
 “ dies, leaving a child who dies uninfest, his aunts, the other heirs por-
 “ tioners, succeed; but if the child has been infest, the estate does not go
 “ to them, but to the child’s brother or sister consanguinean, if he has
 “ any, and if he has not, to his father; or, failing him, to his father’s heir
 “ general, however remote. What is it that sends the succession into
 “ channels so widely different, in these instances, contrary to every feeling
 “ of equity and every principle of natural justice? Nothing but the
 “ mere ceremony of passing an infestment, which may be done without
 “ the knowledge or consent of the heir, and sometimes, as in the case of
 “ an infant, when he is incapable either of knowledge or consent. But
 “ if the mere ceremony of infestment produces such extensive and im-
 “ portant consequences in all the ordinary cases of heritable succession, is
 “ it surprising, in the case of collation, that the circumstance of being
 “ seised or not seised in the fee should produce similar effects?

“ The doctrine of collation itself affords many remarkable instances of
 “ the strict exclusion of equity in applying the rules of feudal succession,
 “ as to which there is now no dispute. If the defunct, though in pos-
 “ session for more than three years, and therefore capable, under the
 “ statute, of burdening the estate with his debts, shall remain unentered,
 “ his eldest son and heir at law, making up a title to the lands, may take a

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

“ share of his moveables without collation ; but if he has passed an in-
 “ feftment, his heir at law is bound to collate. It is in vain to say
 “ that in the one case the defunct is proprietor of the estate, and in the
 “ other that he is not. That is true, but it is the very same circumstance
 “ which imposes the obligation on the heir of entail having completed his
 “ titles, and by so doing having rendered himself proprietor. If equity
 “ were to interpose to relieve the heir of entail from collation, e converso
 “ it should interpose to make the successor of the apparent heir liable to
 “ that burden. A distinction resting on the naked ceremony of infest-
 “ ment alone ought not to be adhered to in the one case and abandoned
 “ in the other.

“ So also, had equity been regarded, a younger son succeeding to the
 “ whole heritage of the defunct by destination would at least have been
 “ equally bound with his elder brother, the heir of line, to collate.—
 “ Here, in like manner, it is in vain to argue that there is an analogy
 “ between the younger son and the heir of entail, because they both
 “ inherit, not by the act of the law, but *provisione hominis*. It has been
 “ already observed, that although the heir at law takes an unlimited fee
 “ by a deed of provision not made by his immediate predecessor, who
 “ from circumstances might never have possessed the power of altering it,
 “ he is nevertheless bound to collate. The analogy, therefore, entirely
 “ fails, while the strict rule of law, contrary to every equitable view,
 “ bestows a privilege on the younger child which it withholds from the
 “ elder, the heir *alioqui successurus*.

“ Another illustration of the danger of resorting to equity may be
 “ found in the case of a grandson by the eldest son deceased representing
 “ his father, and coming into his place, who has not the privilege of colla-
 “ tion which was competent to his father. Here the equity is so mani-
 “ fest, that even Mr. Erskine was led to hazard an opinion, in the absence
 “ of precedent, that the grandson was entitled to the privilege ; but the
 “ Court soon after decided otherwise.

“ But even if equitable considerations were admissible, or, in the words
 “ of the appellant, if the substance and not the form of the right were
 “ to be regarded, it would not avail him. The right of an heir in pos-
 “ session of an entailed estate is generically different from that of a life-
 “ renter, to which the appellant resorts for an analogy. When the heir of
 “ entail has completed his title, as already observed, he is *fiar* in every
 “ respect ; but no infestment which the life-renter can take, no ceremony
 “ which he can perform, will vest a fee in him, or any thing of the nature
 “ of a fee. His powers are different from those of a *fiar*—his liabilities
 “ are different—his life-rent is incommunicable *inter vivos*, and intrans-
 “ missible by succession. In the language of the civilians, *inhæret ossibus*
 “ *usufructuarii*.

“ The appellant pleads, that, since it is conceded that the fee of an heir
 “ of entail is limited, on that ground alone he should be exempted from
 “ the burden of collation, which he assumes to exist in the case of absolute
 “ fees exclusively. But there is no ground for that assumption. The
 “ reverser, the wadsetter, the appraiser before the legal has expired, the
 “ owner of every other redcemable right, the *fiar* burdened with a life-rent

“ or any other incumbrance, or with a clause of pre-emption, or an obligation of real warrandice, are all vested with limited fees; not absolute proprietors, but subject to restrictions more or less extensive, according to the nature of their respective rights; yet all these fiars are indisputably bound to collate. Nay, it has been decided that a tenant under a lease for years, who, according to modern ideas, has no feudal fee in him at all, whose right is not only limited as to duration, but restricted to one among all the various uses of property, if he, being heir at law, take the lease by succession, is bound to throw it into the fund of division before he can obtain a share of the executry;—a decision resting on the general canon of the law of collation, so often referred to, the lease, though not a fee, being heritage in the person of the defunct.

“ Next, it is said that the heir of entail is not the heir of his predecessor who last entered under it, but of the remoter ancestor who framed the entail, and that he does not take by legal succession but *provisione hominis et secundum formam doni*; and then again, not very consistently, that he does not take as an heir at all, but as a purchaser, and by a singular title.

“ But an heir of entail does not enter by his service to the maker of the entail, except in the solitary case when the maker is his immediate predecessor. The statute 1685 expressly declares that he shall serve himself heir to the heir who died last infeft in the fee, and did not contravene, that is, whose right was not evacuated by forfeiture. By service he necessarily becomes an universal and not a singular successor, for it is a contradiction in terms to say that a right transmitted by service is not a right of inheritance, but a right by purchase. By his service he represents the deceased, to whom he succeeds in all his rights and all his obligations, in so far as those obligations are not prevented from attaching upon him by the act of the law itself. In other words, he must fulfil every obligation of the deceased which is not prohibited and declared to be null by the entail, a prohibition and irritancy which the statute has rendered effectual. He is not liable *ultra valorem* for obligations not prohibited, for the same reason that the heir of a simple destination is not liable *ultra valorem*, if he enter *cum beneficio inventarii*, or on a precept of *clare constat*; but under the protection of the statute he is the heir of the person last infeft, therefore he does not take by a singular title. To say that he takes *provisione hominis et secundum formam doni*, is to say nothing more than that he takes in terms of the investiture, in the same manner as the heir whatsoever, or any other heir of a simple destination, takes in terms of the investiture. The heir *alioqui successurus* succeeding, not by virtue of an investiture to heirs whatsoever, not in the character of heir at law, but by virtue of a deed of provision, by a service as heir of provision, *et secundum formam doni*, in terms of his deed, is nevertheless bound, if unfettered, to collate. That was explicitly admitted in the case of Little Gilmour, and is as explicitly admitted here. But if the fetters of an entail create no distinction in this matter any more than any other incumbrance on the fee, or any other limitation of the

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER
v.
ANSTRUTHER.
15th Apr. 1835.

“fiar’s right, as we think we have satisfactorily shown, it is plain that the
“combination of these two pleas, aided with the groundless assumption
“that the heir in possession is the heir, not of his immediate predecessor,
“but of the maker of the entail, must be entirely unavailing.

“Great weight is laid by the appellant on another view of his case,
“presented sometimes by itself, and sometimes in support of the pleas
“which have been already considered. Granting, it is said, that the
“substitutes under a Scotch entail have neither the fee nor any portion
“of it vested in them, in which respect their situation is altogether dif-
“ferent from the remainder-man of an English fee tail, still they have
“a right of credit to the estate, not feudal indeed, but personal, which
“entitles them to demand that the entail shall be recorded, to insist
“in declarators of irritancy, and to take other steps for enforcing the
“fetters; and that right is not derived from their predecessor, but con-
“ferred upon them directly by the entailer. Further, it is a right which is
“frequently not gratuitous, but purchased with a price; for example, the
“execution of the entail may have been stipulated in a marriage contract,
“marriage being confessedly an onerous consideration. If the son pur-
“chase the estate from his father, or from a third party, for a sum of
“money, and obtain a disposition to it, he is not bound to collate it; and
“therefore, by parity of reason, it is said he ought not to be required to
“collate in the case supposed. This view seems to have occasioned con-
“siderable difficulty in the House of Lords.

“But the law of Scotland affords an obvious, and, it is thought, an in-
“vincible answer. The substitute, as already mentioned, has no right to
“the fee; his right is to succeed to the fee as an heir, and therefore
“under the obligations which attach to an heir. As a personal creditor
“he is entitled to nothing but to enforce the conditions of the grant;
“and unless he actually obtain a decree of irritancy the heritage remains
“in the defunct, and as heritage, therefore, must be collated. No per-
“sonal claim which the heir can have against his father can prevent col-
“lation of what he takes from his father by inheritance, although it may
“indirectly and ultimately render the subject which he has collated less
“valuable. An heir so situated must collate the estate under its burdens,
“and so does the heir of entail when he collates his fee, which is a limited
“fee. It is true the heir is not bound to collate a subject which he has
“purchased from his father, if by the terms of the purchase it is to be
“conveyed to himself. But if he has not purchased the subject, but only
“a right to succeed to the subject, as heir of his father, and when, there-
“fore, it is not to be conveyed to himself, but to his father in fee, whom
“failing, to himself, such purchase is no bar to collation. So it is in the
“case of a marriage contract, in which, for example, the father of the
“bridegroom, being a party, binds himself to the bride and her relations
“that he shall execute an entail of his estate in favour of himself; whom
“failing, of his son; whom failing, the heirs of the marriage, in considera-
“tion of the marriage, and of the portion of the bride, conveyed to the
“married pair. This was stated to be a settled point as early as 1678,
“in the case of Murray (Mor. 2374), and it was not disputed on the
“other side of the bar. The question arose in the case of præceptio, the

“ father having put forward a tenement to his son ; but it is said that ‘ it
 “ ‘ is ordinary for fathers in their sons’ contract of marriage to infest them
 “ ‘ in their whole heritable estate, whereby there remained no heritable
 “ ‘ succession, and yet they were never admitted to partake of the
 “ ‘ moveables, but were excluded as heirs per præceptionem hæreditatis.’
 “ Thus in the à fortiori case, where the father, an obligant in the contract
 “ of marriage, and bound to make a provision for his heir, instead of
 “ leaving the heir to succeed to that provision, actually put him into the
 “ fee in fulfilment of his obligation, no doubt was entertained, for it was an
 “ ordinary case that the son was bound to collate. There is another case
 “ in 1680 where the same principle is recognized: ‘ By contract of mar-
 “ ‘ riage the lands being provided to the heir by the first clause, and the
 “ ‘ conquest to the bairns in a subsequent clause, the lords found the heir
 “ ‘ had a share in the conquest (though it was most part executry), without
 “ ‘ collation, because he was also a bairn.’ (Brown, July 21, 1680, Mor.
 “ 2375.)

“ In that case collation was excluded, not because the heir had a jus
 “ crediti to the lands under the marriage contract, which, if the appellant’s
 “ argument were well founded, would of itself have been conclusive, but on
 “ a totally different ground, namely, that by another clause of the con-
 “ tract the father had bound himself to give the children, and therefore the
 “ heir, being one of the children, the conquest of the marriage, which was
 “ chiefly moveable. A father has at all times the power of excluding
 “ collation ; but he does so by conveying to the heir a share of the moveables,
 “ which, unless so conveyed, would have gone to the executors ; and it
 “ is plain from the ratio decidendi that if the father had left personal estate
 “ which was not conquest of the marriage, and therefore not falling under
 “ the second clause of the contract, the heir could not have claimed a share
 “ of it without collating his lands.

“ Thus, it appears that a jus crediti in an heir (even although it be not
 “ acquired by gift, but for an onerous consideration,) to succeed to his
 “ predecessor’s heritable estate, does not relieve him from the obligation to
 “ collate ; nor is he relieved though the predecessor, in fulfilment of his
 “ obligation, chooses to propel the succession by a deed inter vivos.

“ It has been said that the heir is not bound to collate a fee strictly
 “ entailed, because he cannot alienate the lands to the executors without
 “ the risk of incurring an irritancy. If it were so, the consequence would
 “ be, as is well laid down in the Little Gilmour case, that he would never
 “ get a share of the personal property at all, because he could not comply
 “ with the condition under which exclusively he is entitled to that share.
 “ But it is undoubted law that the heir collating is not bound to convey to
 “ the executors an absolute fee. He must share the heritage with them, sub-
 “ ject to all the burdens under which he himself has taken it. There is
 “ nothing to prevent him to convey to them a right to the lands or to their
 “ produce, defeasible in the event of his own death, or of a decree of
 “ irritancy being obtained against him. This is no contravention, if the
 “ decision in the case of Nairne, (Feb. 15, 1810,) and the ordinary
 “ practice of the Court in dealing with entailed succession, can be relied
 “ upon. If not, certainly there is no impediment to his sharing the pro-

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

“ duce of the tailzied estate with the executors ; and if they consent to
 “ hold that as collation, it is enough. It is a case à fortiori in their
 “ favour, that he is not able to pay all the price which ordinarily they
 “ receive for a communication of their right to the moveable succession.
 “ We are of opinion, therefore, that the general principles of the law of
 “ Scotland afford no ground for holding a fee limited by strict tailzie, more
 “ than any other limited fee, to be exempted from collation, or for suppos-
 “ ing that it forms an exception to the rule laid down by the institutional
 “ writers, in absolute terms, as applicable to all heritage whatever in the
 “ person of the defunct, descending to the heir alioqui successurus. Neither
 “ do the decisions of this Court, or of the House of Lords, exhibit a trace of
 “ evidence that such an exception was ever recognized. The cases of
 “ Murray and of Brown, on the contrary, as we have just seen, negative
 “ the plea that heritage, because it is taken in virtue of a deed of provision,
 “ or because the heir who takes it has a jus crediti to the succession, is
 “ exempted from the rule. The case of Scotstarvit shows that lands
 “ holden under a special destination or tailzie fall under it. And in the
 “ case of Rae Crauford (Dec. 3, 1794), where the estate was strictly
 “ entailed, it follows, by plain inference from the interlocutor of the
 “ Court, that if the lady had been heir of line, which she was not,
 “ but only heir of provision, which by itself imposed no such obligation,
 “ she would have been bound to collate.

“ That neither the case of Rickarts nor that of Scotstarvit can afford aid
 “ to the appellant is, in our opinion, sufficiently obvious. In the former,
 “ it was impossible that there could be collation, because the succession did
 “ not divide into separate channels. All the daughters were heirs at law,
 “ and all of them were executors. The fundamental principle of the law
 “ of collation is, that the heir who is excluded from the moveables shall
 “ purchase a share of them by throwing the heritage into the common
 “ fund. But in the case of heirs portioners, each, de jure, has a share of the
 “ moveables, and therefore the eldest has no occasion to purchase that right.
 “ And this was only a repetition of the judgment pronounced in the case of
 “ Jack many years before, where the Lords found that there was no colla-
 “ tion to be made by the law of Scotland but only in the case of moveables,
 “ which, according to Gosford’s report, was looked upon ‘as a constitute
 “ ‘ custom, without all controversy or debate.’ The case of Scotstarvit, so
 “ far from giving any countenance to the appellant’s plea, affords a direct
 “ precedent against one of his arguments ; for the Court held that an
 “ estate taken by the heir at law provisione hominis, and that provision
 “ made not by the immediate but a remoter ancestor, was liable to be
 “ collated equally as if the investiture had stood to heirs whatsoever. It
 “ might be inferred from the report that the eldest heir portioner was
 “ found by the Court liable to collate, not only with her cousin Mr. Hay
 “ Balfour, but with her sisters, the other heirs portioners ; but that was
 “ not the case. It appears from the session papers that the action was
 “ raised at the instance of Mr. Hay Balfour alone against Miss Scott,
 “ and though her younger sisters were directed to be made parties, they
 “ withdrew from the contest.

“ An ingenious view was thrown out by Lord Meadowbank, in the

“ case of Little Gilmour, as to the extent of the subject which Miss Scott
 “ was bound to collate with the Balfours, the other executors. His lord-
 “ ship observed, that she was undoubtedly bound to collate that portion
 “ of the inheritance to which she was heir alioqui successura; but that
 “ it might be questioned whether she was bound to collate the other two
 “ thirds to which her sisters were heirs, for those two thirds were given
 “ to her by destination alone; and with regard to them, that she did not
 “ seem to have been in a different situation from a second son, or any
 “ other heir alioqui successurus who is not bound to collate what he takes
 “ by destination; and he states the ground on which he holds it was
 “ successfully maintained that the collation should extend to the whole
 “ subject. It may be thought by some, on reading this part of the
 “ report, which is somewhat obscure, that his lordship has been more
 “ successful in raising the doubt than in solving it. Be that as it may,
 “ that point in the case does not touch the present in the remotest degree.
 “ This is not a case of heirs portioners, where no one is heir alioqui
 “ successura exclusively; nor is it a case where the executors are con-
 “ tending, not with an heir, but what may be called an aliquot part of
 “ an heir. Here the appellant, as in the ordinary case, has the whole
 “ character in himself, and he is at issue with those who are exclusively
 “ executors. It is likely that Mr. Erskine, the learned author of the
 “ Institute, might not have approved of this decision, in so far as the
 “ last-mentioned point is concerned, or in so far as it was plainly
 “ erroneous in holding moveable succession to be regulated by the *lex rei*
 “ *sitæ*; but in so far as it found that the heir must collate though he
 “ takes *provisione hominis*, it is in strict concurrence with what he him-
 “ self lays down, what all his predecessors laid down, what the Court
 “ considered as settled in the case of Murray, and what, as Sir Wyndham
 “ Anstruther is now compelled expressly to admit, is the established law
 “ of Scotland.

“ The views which we have taken might be illustrated and enforced by
 “ much additional argument and a citation of various other authorities
 “ and decisions; but we consider this to be unnecessary, as the question
 “ is in our opinion ably argued in the respondent’s appeal case, and still
 “ more fully and elaborately in the revised case for the Marquis of
 “ Chandos and others, now at avizandum before the Second Division of
 “ the Court, to which we beg leave to refer.

“ Having, in obedience to the remit from the House of Lords, treated
 “ this as an open question, we must now advert to one consideration
 “ which, in our humble but very decided opinion, ought alone to set the
 “ matter at rest. We allude to the decision in the case of Little Gilmour,
 “ pronounced, as already mentioned, by the Second Division of the Court
 “ in December 1809. That decision was as solemn and deliberate as the
 “ forms of this Court allow. It was unanimous; it was acquiesced in
 “ by the parties; it has been subsequently followed by one other decision
 “ at least to the same effect, and one other case at least of great impor-
 “ tance has been extrajudicially settled upon the faith of it. To disturb
 “ such a precedent would, in our apprehension, be contrary to principle,
 “ and might be attended with the most disastrous consequences. It is no

ANSTRUTHER
 v.
 ANSTRUTHER.
 —
 15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.

“ impeachment of the authority of that judgment, that it was pronounced
 “ by a Division of the Court, and not by the whole Court. Many thou-
 “ sand decisions have been pronounced since the judicature act in 1808,
 “ when the separation took place, by one Division, without any communi-
 “ cation with the other. Those decisions are all the country has to rely
 “ on as the established law of Scotland in the matters to which they
 “ relate, and on them the country does rely. Still less is it an objection
 “ that the judgment in Gilmour’s case was never sanctioned by an
 “ affirmance of the House of Lords. Were that essential, considering
 “ how extremely few cases comparatively are appealed, it would go near
 “ to upset the whole common law of Scotland. In questions of inter-
 “ national law, such as that we have just alluded to in the case of Scots-
 “ tarvit, namely, whether the succession of moveables should be regulated
 “ by the law of situs or domicil, if the Court of Session err, it is the pro-
 “ vince and duty of the House of Lords to set them right, and that
 “ although the judgment may have been again and again repeated; for
 “ it is not the law of Scotland, but the *jus gentium*, which the House of
 “ Lords has there to administer, and as to which the Court below is not
 “ equally authoritative. The same thing may be said of some questions
 “ in the law merchant, which it is expedient should be uniform through-
 “ out the empire, indeed throughout commercial Europe. But if a
 “ point occurring purely and exclusively in the municipal law of Scotland
 “ cannot be ruled with authority by a judgment of this Court, in either
 “ of its Divisions, especially when confirmed by subsequent judgments,
 “ and regarded and acted upon as settled for a quarter of a century, the
 “ people of Scotland would be deprived of what they have been taught to
 “ consider as the safeguard of their most important rights.

“ *Lord Moncreiff.*—I concur in the foregoing opinion. I certainly
 “ cannot think that it is an open question; because I have long considered
 “ it as settled by the case of Gilmour, and can never think that no point
 “ of municipal law can become settled unless it has been determined in
 “ the House of Lords. But if the question were open, I agree in every
 “ word of the above opinion, and should be prepared to deliver the same
 “ judgment if it were a case of first impression. I think that the prin-
 “ ciples laid down are in all points sound; and the exposition of the
 “ manner in which these principles are to be applied to the present case
 “ appear to me to be clear and satisfactory: I could only express my
 “ own opinion by writing the same thing in other words. I beg leave,
 “ however, only farther to observe, that the argument of the appellant has
 “ been brought almost directly to an avowal of a principle, that the
 “ interest of an heir of entail, in possession of a Scotch entailed estate, is
 “ little better than a life-rent, and that the entail of a Scotch estate does
 “ differ in substance from a trust, with a succession of life-rents; and
 “ that, if the case does at all depend on any such assumption, I can only
 “ say, that it is contrary to all the principles and fixed rules of the law of
 “ Scotland, as they have been uniformly recognized both by this Court
 “ and by the House of Lords. But, whether the argument be pushed
 “ so far as this or not, I am of opinion that it is a point of settled law,
 “ and that, if it were not settled, it ought to be settled in the same
 “ manner.

“ *Lord Jeffrey.*—If I could consider the question as entirely open, I
 “ should have some hesitation about concurring in the preceding opinion,
 “ and certainly could not bring myself to regard it as so clear and simple
 “ as it is there represented.

ANSTRUTHER
 v.
 ANSTRUTHER.

15th Apr. 1835.

“ The difficulty of the case I take to be this:—The fundamental
 “ principle of the whole law of collation being that the obligation (or
 “ right) attaches only to heirs of line, it seems to follow, almost as a
 “ necessary conclusion, that they should collate only what they take in
 “ that character. Certainly they can be called upon to collate nothing
 “ that was not vested in the ancestor to whom they stood in that relation,
 “ and nothing that has not come to them on a proper title of succession
 “ to that ancestor; and this being the case, it seems difficult to suggest a
 “ reason why they should ever collate more than has actually descended
 “ to them in virtue of that relation. If the whole question were open,
 “ therefore, I conceive there could be little doubt that this is the rule by
 “ which it should be governed. But it seems to have been long settled
 “ that collation may be required in many cases, where the heir of line
 “ takes the heritage which was in his ancestor, not by a service in that
 “ character, but as heir of provision or investiture, and by the act of a
 “ predecessor in the fee; and it is said that the case of an heir of entail
 “ is not substantially different.

“ There is no doubt that those cases are exceptions to the literal or
 “ peremptory application of the rule; but it appears to me that they
 “ may still be reconciled to its principle; and that, except only in the
 “ case of a strict entail, there are grounds upon which it may be held,
 “ though perhaps not without some aid from hypothesis and construction,
 “ that what is thus collated is always truly taken in the character of heir
 “ of line.

“ Where a fee is taken simply to a man and his heirs whatsoever, it is
 “ entirely at the disposal of the fiar in possession; and if he makes no
 “ disposition, it will go to his heir of line: not, however, it is conceived,
 “ upon any view of public policy, but *ex presumpta voluntate* of the
 “ defunct, and on the supposition that such heir is the person he most
 “ inclined to favour. But if this be the ground of the heir of line’s right
 “ of succession where the fee in the ancestor was altogether unlimited, it
 “ is easy to see that it may be held to be the same where it was only
 “ limited in such a manner as to leave him the full right and power of
 “ disposal. If he have power to change an existing investiture, under
 “ which the fee would be carried, in the first instance, to his own heir of
 “ line, then his not exercising that power may be held to be exactly
 “ parallel to his not making any disposition, in the case of a fee absolutely
 “ unlimited; and the heir of line may be held to take the succession, in
 “ both cases, *ex presumpta voluntate* of his predecessor, and truly in his
 “ character of heir of line, because in consequence of the favour which
 “ the law holds to attach to that character. The predecessor, in short,
 “ may be held, in both cases, to have adopted and made his own the
 “ destination, of the common law in the one, and of an earlier ancestor in
 “ the other, out of love and affection for his natural heir; and he may
 “ therefore be regarded as owing his succession, in the latter case as well
 “ as in the former, to his possessing that character.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

“ But if the other cases of apparent exception may be reconciled in
 “ this way to what I cannot but consider as the principle and natural
 “ rule of law, it is plain that such an explanation will not serve for that of
 “ a strict entail, where the heir in possession has no power whatever
 “ either to defeat or confirm the succession of the other substitutes. The
 “ cases of personal or accidental incapacity, as from minority, insanity, or
 “ individual paction, do not seem to have any application. There the
 “ inability to alter arises, not from the quality of the right, but from the
 “ circumstances of the persons. As fiars, they have full power, though,
 “ as individuals, they may be disabled from exercising it.

“ The case of heirs of a marriage is more perplexing, and certainly
 “ comes nearest to that of a strict entail. Yet it is not exactly parallel;
 “ since the fiar, though under a personal obligation not to disappoint the
 “ succession of such heirs, is not absolutely disabled, by the quality of
 “ his right, from so doing. He may accordingly sell or burden the
 “ settled lands, though he will be answerable in his general estate for the
 “ value.

“ But though doubts may be thus raised, and plausible distinctions
 “ suggested, if the question as to heirs of entail could really be considered
 “ as open, I am bound to say that I have no such confidence, either in the
 “ grounds of doubt or the sufficiency of the distinctions, as would induce
 “ me now to depart from such a precedent as that of Gilmour, and that
 “ upon this point I entirely agree with the other judges. Whether I
 “ should have concurred in that judgment at the time it is impossible for
 “ me to say; but it seems to me plain, that by now adhering to it no
 “ clear or consistent principle or rule of practice in the law of Scotland
 “ will be violated, or any thing, indeed, effected by altering it, but the
 “ substitution of one solution of a nice and perplexing question instead of
 “ another. It being quite settled that heritage, not taken on the proper
 “ title of an heir of line, is yet liable to collation, it was not perhaps an
 “ unwise course to disregard subtle distinctions between particular cases,
 “ and to decide generally for such liability, wherever an heir of line took
 “ by succession the heritage vested in his predecessor. At all events this
 “ was the course adopted, certainly not without the greatest possible
 “ consideration, in the case of Gilmour, nearly thirty years ago; and I
 “ cannot think it safe or advisable now to disturb it upon speculative
 “ doubts and difficulties. It is matter of notoriety that it has ever since
 “ been regarded, and acted upon, as settling the law.

“ *Lord Cockburn.*—I concur in the foregoing opinion.

“ *Lord Justice-Clerk.*—In obedience to the order of the House of Lords,
 “ pronounced in this case, the question of law was most fully and ably
 “ argued before the whole judges; and as the judgment ordered to be
 “ reviewed had been pronounced by this Division, we thought it right to
 “ require the opinions in writing of the judges of the First Division and
 “ permanent Lords Ordinary, in order that judgment may, in terms of
 “ the order, now be pronounced, ‘ according to the opinions of the major-
 “ rity of such whole judges.’

“ Those opinions are now before the Court, and they unanimously
 “ concur in holding, in substance, that the judgment of this Division of
 “ the 28th of November 1833, finding, ‘ that Sir Wyndham Carmichael

“ ‘ Anstruther cannot claim any share in the executry of the late Sir John
 “ ‘ Carmichael Anstruther, without previously collating the heritage to
 “ ‘ which, as heir of Sir John, he has succeeded,’ is well founded, and
 “ ought to be adhered to; so that, even if all of us present were now of a
 “ contrary opinion, such must be the deliverance of the Court.

ANSTRUTHER
 v.
 ANSTRUTHER.
 —
 15th Apr. 1835.

“ Directed, however, as we all were by the House of Lords, to have the
 “ matter of law deliberately argued, I have, in common with your lord-
 “ ships, paid every attention to the able arguments of counsel, and the
 “ various authorities referred to by them. But, so far from being shaken
 “ in the opinion I had formerly entertained upon the case, I have been
 “ more and more confirmed in it by all that I have heard from the bar,
 “ and since read in those most able and elaborate pleadings that have been
 “ laid before us in the important question, embracing the same point, that
 “ has arisen between the Marchioness of Chandos and her brother the
 “ Marquis of Breadalbane, relative to the succession of their late father,
 “ and which also stands for judgment in this day’s roll.

“ I am not at all surprised that the argument for Lady Chandos has
 “ attracted the marked attention of the judges, who have favoured the
 “ Court with a full opinion in this case, because it does contain a most
 “ masterly and satisfactory examination of the whole principles of law that
 “ are applicable to this question, and which are expounded in a way to
 “ remove, in my opinion, all room for doubt or hesitation as to the man-
 “ ner in which it ought to be determined, if the law of Scotland is to rule
 “ the decision.

“ Concurring, therefore, as I most entirely do, in the luminous expo-
 “ sition which is given in the opinion of the Lord President and the
 “ other judges who concur and subscribed it along with him, I should
 “ consider it as an unpardonable and useless encroachment on the time of
 “ the Court were I to attempt to state in more imperfect language those
 “ views of the case which I entertain, and which in that opinion are so
 “ clearly and admirably expressed.

“ But as some notion seems to have been entertained, that in pronoun-
 “ cing our judgment in this case in November 1833, we proceeded
 “ merely upon the authority of the case of Gilmour, I shall, in my own
 “ vindication, now read the notes of the opinion which I then delivered,
 “ as deliberately formed, and to which I now adhere in every respect,
 “ after all the investigation that the case has since undergone. These notes,
 “ which are now before me, are in the following terms:—‘ Upon consi-
 “ ‘ dering these cases, in which the Lord Ordinary has taken this cause to
 “ ‘ report, (and which are drawn with great ability, and particularly that
 “ ‘ on the part of Mrs. Anstruther,) raising the question whether an
 “ ‘ heir of tailzie, who is at the same time heir of line of the deceased,
 “ ‘ is bound to collate his interest under the entail before he can claim
 “ ‘ a share of the executry of the deceased, as one of his next of kin, I
 “ ‘ have formed a most satisfactory opinion, that, according to a fair
 “ ‘ review of the whole authorities in our institutional writers and
 “ ‘ decisions, that question must be answered in the affirmative.

“ ‘ The question indeed was so fully discussed, both by the bar and
 “ ‘ the bench, in the case of Gilmour v. Gilmour, 13th December 1809,

- ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.
- “ ‘ when the whole train of authority and decision was most thoroughly
 “ ‘ sifted, and a most elaborate opinion delivered by the late Lord Meadowbank, embracing the whole law of the case, and grappling with
 “ ‘ every sort of distinction that could be drawn as to the application of
 “ ‘ the principle of the judgment which was there solemnly and unani-
 “ ‘ mously pronounced against the heir of tailzie and of line who refused
 “ ‘ to collate, that it appears to me wholly unnecessary to enter at any
 “ ‘ length into the discussion. That decision has not been altered by
 “ ‘ a higher tribunal. No contrary decision has since been pronounced,
 “ ‘ but, on the contrary, the law, as there expounded, has been held as
 “ ‘ settled and finally fixed. It would therefore have been on no light
 “ ‘ grounds, and certainly on no thin or fanciful distinctions as to the
 “ ‘ circumstances of particular destinations of entails, that I, for one,
 “ ‘ would have been disposed to depart from that judgment.’
- “ ‘ But upon full consideration, however, of the argument in those
 “ ‘ cases, I have seen no reason to doubt of the soundness of the decision
 “ ‘ in the case of Gilmour, which establishes that the doctrine of collation
 “ ‘ does attach to an heir of entail, and who is also heir of line of the de-
 “ ‘ ceased, claiming, as one of the nearest of kin, share of his executry.
 “ ‘ I must therefore be for preferring Mrs. Anstruther to the whole fund
 “ ‘ here in medio.’
- “ ‘ I abstained at that time from enlarging more on the grounds of my
 “ ‘ opinion, because I held then that in the arguments and opinions in the
 “ ‘ report of the case of Gilmour, every thing was to be found that was
 “ ‘ necessary for the sound decision of the cause. And upon reconsidering
 “ ‘ that report, with the admirable opinion of the late Lord Meadowbank,
 “ ‘ in which the Lord President, the late Lords Polkemmet, Newton, and
 “ ‘ Robertson concurred, not to mention the high authority of my brother
 “ ‘ on my right hand (Lord Glenlee), I do maintain that there is to be
 “ ‘ found in it the basis of every thing that has since been urged in the late
 “ ‘ elaborate discussion of the question, taxed as the abilities of the bar and
 “ ‘ the bench have been in regard to it.
- “ ‘ If, then, a case, after having been argued by the first counsel at the
 “ ‘ bar, so well considered and so solemnly determined as that of Gilmour,
 “ ‘ and which has universally been ever since held to have settled the law in
 “ ‘ that department, and has been repeated, as it certainly was by us in the
 “ ‘ case of Straiton, as I find from my notes, and so long acted upon by
 “ ‘ the country at large, is to be departed from and overturned, merely
 “ ‘ because the whole Court was not then consulted, or an affirmation of it
 “ ‘ pronounced on appeal, it may well be asked, Where is there security for
 “ ‘ any of the legal rights of the people of Scotland ?
- “ *Lord Glenlee.*—I am one of the number of the judges who concurred
 “ ‘ in the decision in Gilmour’s case ; and if I was satisfied of the soundness
 “ ‘ of that decision then, I am still more so now, from the able argument
 “ ‘ that has since been laid before us. I am clear as to the propriety of
 “ ‘ adhering to our former decision.
- “ *Lord Meadowbank.*—As I, upon a former occasion, stated my opinion,
 “ ‘ it would be a waste of time to enter into the matter now. I concur in
 “ ‘ the opinion of the consulted judges ; but I would not be doing justice

“ to myself if I were not to add, that I never read a more able and satisfactory argument, or one which more exhausted the subject, than in the case for the Marchioness of Chandos.

ANSTRUTHER
v.
ANSTRUTHER.

15th Apr. 1835.

“ *Lord Medwyn.*—I am in the peculiar situation of not having previously had an opportunity, as all your lordships have had, of giving any opinion in this case. I reported it at once from the Outer House, without even hearing counsel in the cause, as I was told it was intended to argue the point upon principle, to contest the decision of Little Gilmour’s case, and call for a judgment in the last resort. Your lordships, along with my predecessor in the Inner House, Lord Cringletie, pronounced the decision which was appealed from, and then delivered your opinions. When the case came back for the opinions of the whole Court, I had in the meantime become a member of the Division, and not being one of the consulted judges, had it not in my power to join in their deliberations nor subscribe their opinion, but was under the necessity of studying the case, and forming my opinion alone, and unassisted by those mutual consultations which take place on these occasions. I accordingly studied the case in the vacation, and drew up my opinion before I had seen the opinion of the consulted judges, or even knew of their unanimity. Upon seeing that opinion, as I concur in every word of it, I was much inclined to content myself with simply announcing that I acquiesce in it, and indeed for some time I had determined to do so; but, on farther reflection, lest it should be supposed that I assented merely from the weight of authority, without due consideration, or the necessary study in a case remitted from the House of Lords for the deliberate opinion of the whole Court, I am induced to request permission to occupy somewhat of your time, when I submit the opinion I have come to (and I am sorry to say I have not been successful in making it a brief one), after a very patient examination of the authorities; and I only hope, seeing I profess my entire assent to every word in the opinion of the great majority of the consulted judges, that nothing that I may say shall diminish the effect which that opinion ought to have in the ultimate decision of this case.

“ The parties have, in their pleadings, discussed at some length the origin of collation between heir and executor, and its introduction into our law. But, like other points in our legal antiquities, the materials for elucidating the inquiry are few, and some of doubtful authenticity; and, in truth, any such inquiry is of little practical value as a guide for the decision of the present question, nor if it were *hujus loci* to discuss it am I competent to do so; but it may reasonably be assumed that the privilege of collation is a consequence of the law of primogeniture, and that primogeniture was introduced among us along with the feudal system. We may conjecture, that prior to this the Saxon laws which prevailed in the southern district of Scotland were gradually introduced into other parts of the country, and that land was then divided equally among the sons, to the exclusion of the daughters, as it was in England by the Anglo-Saxon law. The feudal law did not exist in England in a complete state till the conquest; and it was probably received among us, and gradually extended throughout the country, from the example

ANSTRUTHER
 v.
 ANSTRUTHER.
 ———
 15th Apr. 1835.

“ of our neighbour ; for it sprung up among us with that peculiar feature,
 “ unknown to the feudal law of Lombardy and the other feudal states
 “ of Europe, which had been adopted in Normandy, and transplanted at
 “ once into England,—the law of primogeniture, by which the eldest son
 “ succeeded to the whole feudum, which he held of the superior for the
 “ performance of the feudal services, to the exclusion of the other sons.
 “ (Giannone Ist. di Napoli, L. 11. c. 5. § 1. Craig, L. ii. D. 13. § 31.;
 “ Hallam, vol. i. p. 186. 197. 201.) At first, probably, and till this
 “ right was fully recognized as the privilege of the eldest son, we may
 “ conjecture that what is stated to be ‘ *consuetudo in burgis Scotiae de*
 “ ‘ *quo non extat memoria in contrarium* ’ was the rule throughout the
 “ country at large, that the eldest son had the same portion of the move-
 “ able goods of his father as the other children, with the addition of the
 “ heirship moveables. (Ll. Burg., c. 124. 125.) But when it came to be
 “ firmly settled that the eldest son took the whole heritage, custom seems
 “ to have introduced it as a reasonable and equitable consequence (for we
 “ have no statute either for the one or the other), that the moveables be-
 “ came the portion of the younger children, which it will be afterwards
 “ seen came to be the rule in burghs also ; so that finally, if the heir was
 “ named executor, he was considered in the same light as a stranger, and
 “ had the privileges of such. (Stair, b. iii. t. 8. § 53.) As with us, not
 “ merely the landed proprietor’s or baron’s eldest son was his heir, but
 “ the beneficed clergyman and the burghess enjoyed the same distinction,
 “ it would probably happen in so poor a country as Scotland was in ancient
 “ times, that in the case of the two latter classes, rather than in the suc-
 “ cession of the baron, the eldest son would sometimes find his a less
 “ lucrative succession than if he shared his father’s succession equally with
 “ the younger children. To obviate such an inequality, the doctrine of
 “ collation was introduced by the Church Courts, and perhaps first in the
 “ succession of churchmen, from considerations of equity, in the same way
 “ as in other instances they adopted rules of equity to soften the strict
 “ provisions of the common law ; for the churchmen, in their judicial
 “ capacity, were the great masters of equity in those times. Of course,
 “ the same privilege would be extended to heirs of barons and burghesses
 “ also, and hence it came to be a rule of our law, that the heir, being one
 “ of the next of kin also, was permitted, in the case of intestate succession,
 “ to claim an equal share in the moveables, provided he contributed or
 “ collated the heritable estate, to which he succeeded as heir to his father
 “ or predecessor, to whom he and the other children were alike next of
 “ kin, and in which estate his said father or predecessor was vested. This
 “ was early the rule with us, and perhaps it may be illustrated by refer-
 “ ring to a statute of Robert III. c. 35. in an analogous case, *de collatione*
 “ *hæreditatis divisæ inter plures sorores*, the earliest notice of the term
 “ collation, I believe, in our law. The discussion related to the division
 “ of heritage among heirs portioners, where a daughter had got a portion
 “ of land from her father in his lifetime ; and as collation had been intro-
 “ duced by the Church Courts in questions within their cognizance, that
 “ is, the moveable succession, and was merely consuetudinary, as it had
 “ probably not previously occurred to be considered in the Civil Court how

“ far it was applicable to any other case, the controversy, arising of
 “ course under a brieve of division, was therefore referred for determina-
 “ tion to the King, who thus states the argument for the party wishing
 “ to exclude the necessity of collation:—‘ Quod non est de hæreditate
 “ ‘ patris sui; unde pater suus non fuit saisitus tempore mortis suæ.’
 “ Hence we may conclude that it was then admitted law that the father
 “ being infest at the time of his death, and the heir then taking up the
 “ succession from him, was the criterion which rendered the heir bound
 “ to collate, when he claimed a share of the moveables.

ANSTRUTHER
 v.
 ANSTRUTHER.
 —
 15th Apr. 1835.

“ But the obligation to collate has not been confined to the heir of
 “ line when he takes the estate by service in that character; and it is
 “ admitted, that to obtain a share of the moveable succession with the
 “ other next of kin, the heir of line must collate, although he holds the
 “ estate præceptione hæreditatis, or as disponee mortis causa, or although
 “ he succeeds in virtue of an unaltered destination by the deed of a remote
 “ ancestor, or under a marriage contract. It is contended, however, that
 “ if the heir of line succeeds to and takes a strictly entailed estate, he can
 “ claim a share of the moveables without being obliged to collate, on the
 “ ground that he has not succeeded, has taken nothing by the death of
 “ his predecessor, but succeeds by the will of a remote predecessor, whose
 “ heir of line he may not be, at all events does not take in that character;
 “ for it is said to be highly anomalous, and irreconcilable with any sound
 “ principle, to call upon one who takes no benefit as heir of line, but who
 “ succeeds in another character altogether, to bear a burden applicable
 “ only to the heir of line. But it is obvious that this difficulty does not
 “ affect the case of an heir under a strict entail alone; it applies equally
 “ to the case of an heir male taking the estate under a simple destination.
 “ He also takes in virtue of the deed of the original granter of the dis-
 “ position; he owes nothing to any act of the immediate predecessor to
 “ whom he serves heir, and it may be equally said that it is in form only
 “ that he can be considered as his heir. Yet, as already observed, in this
 “ case it is not disputed that collation applies. It may be difficult to
 “ assign a sound principle, or any principle at all for this; and perhaps
 “ we must rest satisfied with the fact itself, and the probable reason which
 “ engrafted it upon our practice. Mackenzie (Works, vol. ii. p. 488.) in
 “ his Treatise on Tailies, says, that in the noted case of the Earl of Cal-
 “ lander v. Lord John Hamilton, ‘ The Lords thought that the heirs of
 “ ‘ tailie were una et eadem persona cum defuncto,’ which is also Craig’s
 “ opinion (Lib. 2. D. 13. § 27.) as well as that of Stair and Erskine,
 “ (Ersk. b. 3. t. 8. § 51.) as to a feudum novum seu masculinum; and
 “ accordingly on this principle it was held that ‘ heirs of tailzie and pro-
 “ ‘ vision are liable universally, in suo ordine, for the debts of the deceased,
 “ ‘ and not barely to the extent of the succession.’ Indeed, with our
 “ feudal notions and preference of male succession, this was natural enough.
 “ In the direct line a destination to heirs male gave the estate to the heir
 “ of line, and even when it carried the estate past the heir of line to
 “ a hæres factus, it was natural enough that he should be viewed in
 “ the same light as the heir he had superseded. Now, this being the
 “ light under which such heirs were viewed, when it happened that

ANSTRUTHER
 v.
 ANSTRUTHER.
 —
 15th Apr. 1835.

“ there was no heir of line to limit and qualify the effects of this uni-
 “ versal representation, and when they themselves had the character of
 “ heir of line, and would have taken the succession as such, is it at
 “ all to be wondered at that they should have been held liable to fulfil
 “ this condition of collation in favour of the younger children, if they
 “ claimed any of the privileges of heir of line? The heir male, by suc-
 “ ceeding to the heritage, is excluded from any share of the moveables,
 “ and if he claims a share, he uses a privilege competent to him as
 “ heir of line, and it is natural that this should be subject to the same
 “ burden as in the case of one having the character of heir of line, and
 “ no other; and the circumstance mentioned by Mackenzie (vol. ii. p. 484.),
 “ that ‘ tailzies in favour of heirs male are now more ordinary than
 “ ‘ tailzies in favour of heirs whatsoever,’ probably confirmed our
 “ judges in applying this burden in the case of the heir of line, who
 “ took the estate not in that character, but as heir male or of destination,
 “ from the evident hardship upon the younger children, if they were
 “ obliged to surrender a portion of their scanty funds to their elder
 “ brother, who was already amply provided by his succession to the whole
 “ landed property of their father. But whether this be the reason or
 “ not, it is admitted that collation applies to the case of an heir under
 “ a simple destination to heirs male, when he is also heir of line and
 “ one of the next of kin.

“ Now if, instead of succeeding under such a deed, the heir of line
 “ succeeds to his father or predecessor as heir under an entail, which effec-
 “ tually prohibits alienation and the other modes of disappointing his
 “ succession, why should this have any influence on the privilege of the
 “ younger children to call upon the heir to collate, if he claims a share of
 “ the moveable succession?

“ It does not appear that when the act 1685 sanctioned strict entails,
 “ so as to secure the estate of a father to his son free from the claims
 “ of creditors or purchasers, it could be contemplated that it was in any
 “ other way to affect the interest of the heir, and still less of the younger
 “ children, either to deprive the heir of his right to participate in the
 “ moveable succession, if he found it for his interest to do so, or, on
 “ the other hand, to authorize him to claim a share without collating
 “ or contributing, if not the estate as a fee simple, at least the value
 “ of his succession. That the predecessor had only a restricted right in
 “ the estate, and not the fullest powers of property in it, does not de-
 “ prive him of the character of proprietor: he is vested in the estate—
 “ he is infeft as fiar, and not as life-renter—his right in it can be ad-
 “ judged from him only by an adjudication of the lands themselves,
 “ not of his life interest in them—on his death they fall into the estate
 “ of his hæreditas jacens, till they, the lands themselves, are taken out
 “ of it by the service of the heir to him; and the heir further proceeds
 “ to vest himself with the estate in the same manner as if it were an
 “ estate in fee simple, that is, by service to the person last infeft. In
 “ so far, then, as the heir takes these lands, he takes them by succession
 “ to his father or predecessor, to whom he is heir; and there seems to be
 “ no principle for any distinction as to collation between the case of the

“ predecessor having the power of disappointing the succession, or not
 “ having such power. Collation was fully recognized when the proprietor
 “ had no such power. It was necessary even in 1672 to provide that the
 “ superior was bound to receive an adjudger as vassal, and a voluntary
 “ purchaser could not compel this till 1748. A proprietor dying minor
 “ cannot alienate his estate, and the heir must succeed and would succeed
 “ as heir of investiture; it may be in virtue of the deed of a remote ances-
 “ tor, whose heir of line he may not be, yet collation would be necessary
 “ before such heir could claim a share in the moveable succession of the
 “ minor with the other next of kin.

“ In the case where the proprietor might have altered the destination,
 “ but has not done so, it does not seem to be the ground why collation
 “ applies, because it may be held that the estate comes to the heir by the
 “ forbearance or implied will of the predecessor: no such reason is assigned
 “ in any of our law books, and the law has not said that the heir is to
 “ collate only what devolves upon him by the will or forbearance of his
 “ predecessor, but what comes to him by succession on the predecessor’s
 “ death, and in which he was vested, what, in short, ‘ he succeeds to as
 “ ‘ heir’ to him.

“ Hence the heir claiming the moveables may not be the heir of line of
 “ the original vassal, or of the maker of the destination, or of the entail;
 “ it is enough that he is the heir of line of the person last vested with the
 “ estate, and, succeeding to him as heir by service, claims to share his move-
 “ ables with the other next of kin. For nothing but the entailing clauses
 “ prevent an heir of entail from being liable by representation for the
 “ debts of the preceding heir, and if the ceremony of recording be omitted
 “ the entailing clauses will not protect him from this liability to the cre-
 “ ditors of the preceding heirs, (Earl of Rosebery, 22d June 1765,) at
 “ least in valorem of the estate, (Baird, 15th July 1766,) so that it seems
 “ of no consequence that he succeeds independent of the will of his pre-
 “ decessor: he takes in the character of his heir, and must be liable in
 “ that character as his representative, wherever the entailing clauses do
 “ not protect him.

“ It must not be supposed that any difficulty arises from the circum-
 “ stance that the Court, in the case of Baird, 16th July 1766, did not hold
 “ the heir of tailzie liable universally, but only in valorem of the estate,
 “ adopting the doubt of Dirleton and opinion of Stewart, instead of the
 “ opinions of Craig, Mackenzie, Stair, and Erskine; for still the heir of
 “ tailzie, when effectually fettered, is considered as eadem persona cum
 “ defuncto, although not liable universally, proceeding on Stewart’s view
 “ of his character, that it is similar to that of an heir entered cum bene-
 “ ficio, a privilege recently introduced in favour of heirs, the estate itself
 “ being held equivalent to the inventory. So that he still represents his
 “ predecessor as his heir, although the effect of the representation is
 “ limited; and the same reason exactly applies in this case, for making
 “ such an heir, who is also heir of line, collate, as if the representation
 “ were universal. His representation as heir still affects the estate which
 “ he is called upon to collate, although it does not go beyond it.

“ In truth, it arises from the view of this character of an heir of entail

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.

“ taken by our law that the clause as to making up titles, upon declaring
 “ an irritancy of the heir by contravention, was introduced into the act of
 “ 1685. The heir pursuing an irritancy, or succeeding on an irritancy
 “ being declared by a substitute, although he succeeds, in the strictest
 “ sense of the word, in virtue of the entail, and neither by the will nor for-
 “ bearance of his predecessor, yet, if he made up titles by service to the
 “ contravener which, by feudal forms, he must have done, would have
 “ been liable for his debts and deeds as heir served to him, had not the
 “ statute authorized him to serve to the person last infeft, who did not
 “ contravene. There was no other mode of preventing that representation
 “ and its consequences, incurred by an heir of entail serving heir to his
 “ predecessor in virtue of the original deed of entail, when he is not pro-
 “ tected by the entailing clauses. Now, what is the protection these
 “ clauses were either intended or can possibly be supposed to afford to the
 “ heir? they are to protect the estate from the claims of creditors and
 “ purchasers or disponees; and how can they then be extended so as to
 “ affect the interest of the younger children, and deprive them of their
 “ right to insist on the heir collating? The law must always favour that
 “ claim where the heir is insisting to share with the younger children that
 “ from which his inheritance as heir excludes him, and the entailing clauses
 “ are in no respect directed against any act of the heir necessary for ful-
 “ filling this condition of collation. Indeed, in applying the doctrine of
 “ collation to the case of an entailed estate, I have never thought it an ar-
 “ gument of any weight, in his favour at least, that an heir of entail
 “ cannot collate or contribute the estate itself. It might afford a good
 “ objection against his participating in the moveables, since he could not
 “ fulfil the requisite condition by contributing his share of the father’s suc-
 “ cession; but surely this cannot exempt him from collating as much as
 “ he can, if the law shall hold that to be sufficient. He can always con-
 “ tribute, I will not say his life interest in the estate, but the value of his
 “ succession, the yearly rents; or, on the principles of annuities, the value
 “ of this may be computed at once; and to call upon him to collate this
 “ value is giving him all the advantage he can claim as succeeding to an
 “ entailed estate. And I know of no sufficient interest in the younger
 “ children to maintain that they will not be satisfied with this, but must
 “ have the heritable estate carved out into portions and given to them. In
 “ truth, there can seldom be any practical difficulty. The heir has as
 “ little occasion to communicate the estate itself to the younger children,
 “ provided he contributes its value, as in ancient times the heir of a feu-
 “ dum or burgage tenement had. The heir is always to benefit, otherwise
 “ he has no interest to collate. He is to get a portion of the moveables,
 “ in addition to the heritage; so the collation of the heritage is in many,
 “ perhaps in most cases, effected by a simple arithmetical computation;
 “ and there can scarcely exist any interest in the executors to insist on an
 “ actual transference of any portion of the real estate. That the heir will
 “ retain pro tanto, whether he can alienate it or not, and he will obtain
 “ the surplus from the moveable estate to make his share of the succession
 “ equal to that of the other children.

“ It is said, and it is true, that an heir of entail succeeds by the will and

“ destination of the maker of the entail. But what is the entailer’s will?
 “ not to constitute a series of life-renters, whose interests expire at their
 “ death, and are not taken up and inherited by their successors—who are,
 “ in short, independent of each other, and dependent solely on himself.
 “ The law of Scotland gives no such power to a proprietor. Wherever
 “ there is a life-rent there must be a fee somewhere. But the law has
 “ allowed the entailer, and his will in the present instance has been, to
 “ constitute a series of heirs, each holding the fee of the property in suc-
 “ cession, and each in succession taking it by service as heir to the one
 “ last infest, and of course representing him in every act and deed con-
 “ nected with the estate, except in so far as protected by the entail. In
 “ succeeding, therefore, though by the will of the entailer, he must be
 “ liable to all the legal consequences of the exercise of that will in his
 “ favour; he takes up the fee that was in his predecessor, and is subject
 “ on that account to the same liabilities as any other heir of provision,
 “ which the prohibitions of the entail do not exclude. Indeed, if it be
 “ not inherent in the character of entailed property to exclude the neces-
 “ sity of collation, I do not know how an entailer could proceed if he
 “ wished to exclude this condition, and yet give each heir in succession a
 “ share along with the other next of kin in the moveable succession of his
 “ predecessor in the estate. He could, no doubt, prevent any of the
 “ heirs from claiming a share of the moveables, because he could make it
 “ a condition of the entail that no heir should do so; but how could he
 “ provide that the heir might share in the moveables without collating?
 “ These moveables are not his estate, and do in no respect belong to him,
 “ so as to entitle him to regulate the succession to them. They are the pro-
 “ perty of the deceasing heir, and may have been the fruits of his industry
 “ or economy, and the entailer can have no power over them. It is only
 “ his own estate, the succession to which he can regulate by entailing
 “ clauses.

“ It has been further argued, that, in this question, the Court attends
 “ more to substance than to form, and that in form only it can be said
 “ that an entailed estate is taken up as the estate of the predecessor by the
 “ succeeding heir; and, in proof of this proposition, reference is made to
 “ the case of lands taken præscriptio hæreditatis, which must be collated,
 “ although they were given by disposition in the lifetime of the father,
 “ and not succeeded to as heir. But this instance seems insufficient to
 “ prove the point for which it is adduced. The very name shows that it
 “ is the inheritance of the father which the son takes; that he gets it
 “ because he is heir to it, and would succeed to it at his father’s death.
 “ Hence he is liable to his father’s prior creditors for its value; and most
 “ justly it seems to have been thought as unreasonable that the rights of
 “ the younger children should suffer by the anticipated right of the heir,
 “ as those of the creditors of the father; or that the eldest son should get
 “ quit of his obligation in the character of heir in affecting the interests of
 “ the younger children, while it is regarded with creditors. But can a
 “ stronger proof be given that form is, in this matter, at least as much
 “ attended to as substance, when it is founded on legal principle, that if
 “ the father never was infest, although he may have possessed the estate

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.
 15th Apr. 1835.

“ for twenty or thirty years, and his son makes up titles, as he must do,
 “ to the person last infeft, he may claim a share of his father’s moveables,
 “ without collating the heritage which he did not take by feudal forms, as
 “ an inheritance from his father. (Spalding, Dec. 11, 1812, in 1 Bell,
 “ 102.)

“ The application of the principles on which collation rests to the suc-
 “ cession of an entailed estate did not demand the consideration of the Court
 “ till the case of Little Gilmour. It could only occur after the act 1685,
 “ and it obviously must happen but in rare instances that it can be for the
 “ interest of such an heir to collate. I conceive that, in that decision, the
 “ rules which had been observed in analogous cases with great consistency
 “ were correctly followed out, and I have already anticipated the grounds
 “ on which this opinion is founded.

“ The cases on collation are not numerous in our law books. We are
 “ not to look for them at first among the records of our civil courts, nor
 “ perhaps in the earliest institutes of our civil law ; for this matter, at an
 “ early period, fell under the cognizance of the ecclesiastical courts. With-
 “ out laying much stress on the passage quoted from the Reg. Maj. in the
 “ case of Mrs. Anstruther, it appears, from the laws of William, c. 22.,
 “ that the church had then a jurisdiction as to testaments and intestate
 “ succession ; and, in the canons of the Scottish Church, c. 50., enacted in
 “ 1242, among other delinquents directed to be excommunicated are ‘ im-
 “ ‘ pedientes ordinarios, quominus de bonis ipsorum decedentium ab in-
 “ ‘ testato, secundum consuetudinem ecclesiæ Scoticanæ, rite valeant
 “ ‘ ordinare.’ (Hailes, vol. iii. p. 192.) And, in a provincial council,
 “ held at Perth in 1420, the clergy of each diocese were required to
 “ report on oath what was the practice as to the confirmation of testa-
 “ ments ; when they unanimously reported, ‘ that the bishops had been
 “ ‘ in the constant practice of confirming testaments, and of naming exe-
 “ ‘ cutors to those who died intestate,’ and then the order of procedure
 “ and distribution is set forth. (Hailes, vol. iii. p. 249.) This unifor-
 “ mity shows a well-established practice proceeding from an authoritative
 “ source, and referring to ancient practice. The doctrine of collation was
 “ fully established in these ancient times ; but the destruction of the re-
 “ cords of our ecclesiastical courts, at the tumultuous period of the
 “ Reformation, leaves little hope for much information from that quarter.
 “ I know of one such record only which has been preserved, the volume
 “ of decrees of the official of St. Andrew’s for the archdeaconry of
 “ Lothian, from 1500 to 1551 ; but I do not know if it throws any light
 “ on this question, whether the vassal ever objected to collate his feu, when
 “ the predecessor had as little power to alienate it as in the case of a
 “ strictly entailed estate, and when the heir succeeded in virtue of the
 “ grant of the superior, the original granter. It appears, however, by the
 “ case of Law in Balfour, that this doctrine was, at some early period,
 “ firmly fixed in our practice. It struck me as singular that this question
 “ should have arisen and been decided at this time in the civil court, and
 “ it seemed as if collation only required the heirship moveables to be
 “ collated. But these points were cleared up on examining the decree
 “ itself. It appears that the parties interested in the succession of

“ Steven Law, a burghess of Edinburgh—that is, the widow, two sons,
 “ and a daughter—had entered into a reference to arbiters, who pro-
 “ nounced an award, estimating the property at a certain amount, and
 “ assigning certain sums to the widow and each of the three children as
 “ their portions of the succession. Some years afterwards the younger
 “ son, Alexander, designed writer to the signet, raises a process of reduc-
 “ tion of this award, citing as a defender Andrew, the son and heir of
 “ Robert, who was the eldest son and heir of Steven, complaining of the
 “ award on the head of minority and lesion, and craving to have it set
 “ aside, and that the defender should be decerned by the Court to pay the
 “ sum he claimed as his proper share of his father’s succession. The
 “ reduction was of course raised in the civil court, the ecclesiastical court
 “ not being competent to reduce an award or decree-arbitral. The
 “ minority is stated to be, and is so found by the Court, That, at the time
 “ of the reference and award, ‘ Alexander was a pupil proximus infantiaē
 “ ‘ of nine or ten years, and had na tutor or curator, whereby he had na
 “ ‘ persoun nor power to transact;’ and the lesion is made out, because
 “ the arbiters had undervalued the property; and further, had given a
 “ portion of the moveables to the eldest son, who had succeeded as heir.
 “ The defender did not dispute the law of collation as here laid down—
 “ evidently holding it unquestionable—just as little as he did the plea of
 “ minority; but he pleaded this defence against the application of the
 “ doctrine in this particular case, that at the time of his father’s death he
 “ was not the heir, as he had an elder brother at the time; but the answer
 “ was held satisfactory, that this eldest son died soon after his father,
 “ before he had entered heir to his father, or got sasine of his lands, or
 “ received heirship; and further, died before the goods were divided; so
 “ that Robert came to be heir to his father when the children took up
 “ the succession, and it was therefore held that he could not claim a
 “ share in the moveable succession without collating his father’s lands.
 “ This is the subject of the decision reported by Maitland, then a judge
 “ on the bench, 13th July 1553 and 24th April 1554, M. P. 2365.
 “ The decree bears, accordingly, that the award was set aside on this
 “ ground, that the third part of the free funds should have been divided
 “ into two shares only, because for four years before Robert was heir and
 “ successor to his father, and ‘ enterit to his landis, heritages, and airship
 “ ‘ guidis, and therefor, be the lauchfull consuetude and use of our said
 “ ‘ burgh of Edinburgh, lauchfullie and continewallie observit and kept
 “ ‘ past memor of man, burges airis of the samen aucht nought to haif
 “ ‘ ony barnis part of geir nor falls them by (besides) thair airschip guidis
 “ ‘ and heritage, without thai wald renunce the samen, and cast it in, and
 “ ‘ concur with the remanent of the barnis equallie thereintill.’ The
 “ award is set aside on these grounds; but the Court does not proceed
 “ with the adjustment of the pursuer’s claims; that belonged to the
 “ ecclesiastical court, but ‘ assoilzies the defender, and decerns her (the
 “ ‘ cause had been transferred against the sister of the original defender)
 “ ‘ quyte therfra, as it is now libellit, reserving to the pursuer his
 “ ‘ action for persute therof before quhatsumever judge he pleases, as
 “ ‘ accords of law.’

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER
 v.
 ANSTRUTHER.
 15th Apr. 1835.

“ The examination of this decree is valuable, because it shows that
 “ this matter was still within the province of the ecclesiastical court, and
 “ accounts for the few notices of this doctrine in our civil courts; and it is
 “ a declaration of the law past memory of man, that in the case of the
 “ heir of a burghess, he was excluded from a share of the moveable succes-
 “ sion, unless he collated not merely the heirship goods, but the lands and
 “ heritage also ‘ to the which he succeedit throu the deceis of the said
 “ ‘ umquhile Stevin, his father.’ (How Balfour has omitted to notice
 “ that the heir must collate lands as well as ‘ airship guidis,’ I know not.
 “ Maitland includes both in terms of the decree itself.) This description
 “ of the succession to the heritage, which infers the necessity of collation,
 “ is important, when it is considered, that the heir making up titles more
 “ burgi in fact takes the subject in virtue of the original grant, but still
 “ he succeeds through the decease of his father.

“ But the decision would be still more important in the present case if
 “ a burghess at that time had not the power of alienating his heritage, except
 “ of his own acquisition, unless of necessity for debt, after offering it to his
 “ nearest heirs, and when the necessity was proved before twelve of his
 “ neighbours. This was once the law even as remodelled in 1395 (Ll.
 “ Burg., c. 45. 125.); but I will not take upon me to say, because I do
 “ not know the fact historically, that this continued to be observed down
 “ to 1520, the period of Steven Law’s death.

“ As collation was originally consuetudinary, and introduced by no
 “ statute, and as the question occurred relative to the succession of a
 “ burghess of Edinburgh, the pleading of the successful party in the case
 “ of Law most correctly founds upon this doctrine as a consuetude of this
 “ burgh. This was all that was necessary. But the notice of this
 “ decision, both by Balfour and Maitland, contemporary lawyers of the
 “ highest character (the latter then a judge on the bench; the other
 “ eminently qualified for the task for which he was selected, of drawing
 “ up, or superintending the drawing up, the Practicks, or digest of our
 “ law, by having been official of Lothian before the Reformation, and
 “ one of the first commissaries of Edinburgh after it; also a Judge of
 “ the Session, and finally its President,) shows that both these lawyers
 “ recorded this decision to sanction the doctrine of collation, which they
 “ then recognized as a general rule of the law of Scotland.

“ If, a century afterwards, Dirleton (v. Collation) really seriously
 “ doubted whether the heir was bound to collate more than the heirship
 “ moveables (and he may have been misled by the way in which the case
 “ of law is given in Balfour), these doubts must have been speedily
 “ resolved by the discussion this subject underwent in the cases of
 “ Buccleuch, 1677, and Murray, 1678; and Mackenzie, Stair, Stewart,
 “ Bankton, and Erskine distinctly announce the doctrine of collation as
 “ we now hold it; in truth, we may safely rest the law of collation upon
 “ the authority of their opinions and the decisions of the Court pronounced
 “ in their time and since, which are singularly uniform and consistent—a
 “ very sufficient foundation for any doctrine of our common law—with-
 “ out seeking the aid of any more ancient authority.

“ For, as to the opinion of Mr. Erskine (B. 3. t. 9. sec. 3.) where he

“ says it is only the legal heir, or the heir ab intestato, who is obliged to
 “ collate the heritage, I am inclined to think his meaning has been mis-
 “ understood. It may not be very clearly expressed, for the work was
 “ posthumous, and did not receive the learned author’s last corrections ;
 “ but it seems to me that he means only that it is the heir alioqui succes-
 “ surus who is bound to collate, which is quite true ; and he does not say
 “ that the heir at law, or he who would be heir ab intestato if there were
 “ no destination, would be relieved from the necessity of collating if he
 “ takes by virtue of a destination. Indeed, if this passage is construed in
 “ the way attempted to be done, it would exclude from collation all estates
 “ under an investiture, even to heirs whatsoever. This certainly is not the
 “ law he lays down. He then contrasts the case of an heir with the case
 “ of heirs portioners, who, in relation to the moveables, are altogether in a
 “ different situation from an heir succeeding either at law or by destina-
 “ tion to the heritage, for the moveable estate, ‘ by legal succession, de-
 “ ‘ scends equally to all the daughters ;’ and if the father settles his landed
 “ estate upon the eldest daughter, having full power so to do, she takes it in
 “ virtue of that settlement, without affecting in the smallest degree her
 “ legal claim to share the moveables with her younger sisters. The case of
 “ the heir is quite different, because he has no legal title to the moveables,
 “ if he takes the landed estate, unless he collate. I admit, however, that
 “ Mr. Erskine’s opinion in the same section has not been adopted by the
 “ Court, where he says that the son should have the same privilege that his
 “ father would have had ; but it is there only that he seems to have given an
 “ erroneous opinion on a case which had not then occurred. But even
 “ were it true that Mr. Erskine’s opinion was as has been supposed, how-
 “ ever high I rate the opinion of that learned author, I am not inclined, on a
 “ point of law which had not then occurred for decision, to put it in com-
 “ petition with that of the late Lord Meadowbank and first Lord Newton
 “ (I speak only de mortuis), when called upon to consider and adjudicate
 “ the very case.

ANSTRUTHER
 v.
 ANSTRUTHER.
 —
 15th Apr. 1835.

“ I have no intention of going farther into the decisions as to collation.
 “ I have already observed, that they are uniform and consistent, and they
 “ support this proposition, that an heir of provision or tailzie, being also
 “ heir of line of the preceding heir, can claim a share of the moveables
 “ with the other next of kin only by collating that estate which would have
 “ devolved upon him, which he would have taken as heir at law, and to
 “ which the deed providing it to him has only more effectually secured his
 “ succession.

“ I believe that in England there is something like this doctrine of colla-
 “ tion among co-parceners at common law, and in the case of moveable
 “ succession by the statute of distributions ; and that the succession to an
 “ estate tail is not, in this matter, attended with the same consequences as
 “ with us. (Blackstone, vol. ii. p. 191 and 517.) There may be sufficient
 “ reasons in the varying circumstances of the two countries why the burdens
 “ under which the heir is entitled to share in the moveable succession should
 “ not be the same in both ; and in the different distribution of wealth in the
 “ two countries perhaps it may not be difficult to find a solid reason for
 “ this difference. But be this as it may, and even if the distinction were
 “ purely arbitrary, it is of much more consequence that the rules of suc-

ANSTRUTHER v. ANSTRUTHER.
15th Apr. 1835.

“ cession should be fixed, and steadily adhered to, when once deliberately
“ laid down, than that in all respects they should be assimilated in the two
“ countries. And, upon the whole, it appears to me that the application of
“ the doctrine of collation in the case of an entailed estate was correctly made
“ according to the principles of our law, when the question occurred in the
“ case of the succession of Mr. Little Gilmour ; and that it could not be
“ deviated from now without adopting a view of the character of a pro-
“ prietor of an entailed estate totally different from what is recognized by
“ our law, and unnecessarily aggravating the inequality which the law of
“ primogeniture has introduced among us against the interests of the
“ younger children.”