[18th August, 1843.]

JAMES RENTON, *Appellant.*

PHILIP ANSTRUTHER, Esq., and Others, *Respondents.*

Titles — Tailzie. — A procuratory of resignation, executed by a party uninfeft, having right to a previous unexecuted procuratory made by a party infeft, coupled with obligation to infeft, and an assignation to writs and evidents, rights, titles, and securities, will operate an effectual conveyance of the lands to be resigned under all the conditions; and if the procuratory be made upon conditions fenced with the usual clauses, it will form an effectual tailzied conveyance.

THIS case was heard at great length in the year 1842, and for the reasons which will be found in 1 *Bell*, 129, was remitted to the Court of Session for the opinion of the whole Judges of that Court. These opinions, which have not been reported elsewhere, were delivered in the following terms:—

" After hearing the cause very fully argued on the remit from " the House of Lords, we are of opinion, that the judgment of " the Second Division of this Court, now under appeal, was well " founded in the principles and authorities of the law of Scot- " land; and is such as we should have held ourselves bound to " pronounce, if the case had been originally before us.

" From the course and tenor of this last argument, we observe " that the matters in dispute between the parties have been " considerably narrowed since the cause was formerly discussed " and decided in this Court; and that the only propositions on " which the appellant now insists are the two following:— " *First*, That the deed of 1810 is ineffectual, as not containing " any proper conveyance of the right to the lands, which is

" admitted to have been in the granter at its date; and, *Second*,
" That the destination in that deed was, at all events, revoked
" by the subsequent deed of 1814, which is obviously defective
" and inept, as a separate or independent deed. The last of
" these points was very little discussed; and, as it appeared to
" us, not much relied on by the appellant; and certainly the
" weight of his argument was directed entirely to the first.

" Now, with reference to this first point, we think it material
" to observe, that it is now fully admitted by the appellant, and,
" we think, necessarily and properly admitted —

" *First*, That a party uninfeft, and having only such a
" personal title to lands as was confessedly in Sir Alexander
" Anstruther in this case, under his sister's disposition of 1808,
" may yet make an effectual entail of such lands.

" *Second*, That, for this purpose, it is not necessary, nor even
" perhaps strictly proper or correct, that he should use disposi-
" tive words, or in any way profess directly to convey or make
" over the property of the lands themselves; and that it is
" perfectly sufficient, if he assign and convey, in any habile
" manner, his own personal right to them; together with such
" writs and documents as may enable the assignee to make it
" real. And,

" *Third*, That an unexecuted procuratory of resignation is, in
" its own nature, an assignable instrument; and may be as
" effectually carried by a general assignation of writs, titles, and
" evidents, (where there is nothing in the deed containing it to
" exclude such a construction,) as if specifically mentioned or
" described.

" Holding all these points, as we do, to be in themselves in-
" disputable, and seeing that they are no longer questioned by
" the appellant, his argument upon the first and leading branch
" of the case comes shortly to this: — The deed 1810, he
" observes, has four separate parts, — 1*st*, An obligation to

" infeft, under the conditions of the entail; 2*d*, A procuratory of " resignation; 3*d*, A precept of seisin; and 4*th*, A clause assign- " ing writs, titles, and evidents. Now, the obligation to infeft, he " maintains, has not been carried into effect in the only legal or " effectual way, since the granter, or his heir-at-law, did not " themselves make up titles, and then convey to the heirs of " entail, and, therefore, is now altogether unavailing. The pro- " curatory and precept, again, are both represented as utterly " inept, and mere nullities, as being granted by a party " uninfeft; and, therefore, the whole case of the respondents " must rest on the assignation to writs and evidents; and this, " he says, is a mere accessary or subsidiary clause, which cannot " subsist to any practical effect, except by reference to some " separate and substantive conveyance of the personal right, for " the completion and security of which alone, he contends, it " was inserted; and he refers to the cases of Don, Hamilton, " and Strachan, in support of this last and most important of " his propositions.

" We hold the whole of this argument to be fallacious, both " in its premises and its conclusion. But, in order to clear the " grounds of this opinion, we think it right, in the first place, to " say a word or two on what we conceive to have been the true " import and amount of the decisions now referred to, and par- " ticularly those in the cases of Don and of Hamilton, on which " the appellant chiefly relies.

" What was settled then by these two decisions we apprehend " was this, and no more, — that where, in a regular deed of con- " veyance by a person infeft, the subjects to be conveyed are " distinctly specified and set forth in a proper dispositive clause, " (or other sufficient clause of conveyance,) the terms of that " leading clause shall be taken as the measure of the rights so " given; and the extent of the grant thus constituted shall not " be varied, enlarged, or restrained, by the terms of any sub-

" sequent clause of assignation of writs and evidents, which, " when annexed to such a cardinal disposing clause, must be " viewed as subsidiary only, and be construed and have effect " only in subordination to that substantive clause of conveyance, " and not according to the literal import of the words in which " it may be expressed. These, therefore, were truly questions " of construction as to the true meaning and effect of the whole " instruments relied on: and the judgments proceeded on a " comparison of their different clauses with each other, and a " due consideration of which of them were to be regarded as the " governing, and which the subordinate clauses. They were " mere illustrations, in short, of that very elementary and " familiar principle or maxim in the law of Scotland, that it is " the exclusive province of the dispositive clause, in all instru- " ments where there is such a clause, to define and settle what " it is that is conveyed; and that no other clause, intended " substantially for different purposes, shall ever be so construed " as to control or limit its operation; and they, therefore, leave " quite untouched the more general question, as to the effect of " an assignation of writs and evidents, where it stands alone, " and not in connection with any such overruling antecedent.

" The slightest consideration of the cases themselves must " make it apparent that no other question was raised, or could " be decided, in either of them. In the latest of them, that of " Hamilton and Lady Montgomery in 1834, there was a regular " feu-disposition by a party infeft, expressly disponing certain " lands and teinds with procuratory and precept, but with a " special stipulation that the disponee should relieve the disponer " of all future augmentations of stipend, on being allowed to " retain a part of his feu-duty, to answer such augmentations; " and then there was a general assignation of writs and evidents " in common style. In the course of time augmentations were " laid on the teinds so conveyed, to a greater extent than the

" feu-duties allowed to be retained; and then, at the distance " of upwards of a century from the date of the conveyance, the " disponee having discovered that his author held an obligation " of absolute warrandice against all augmentations, from a third " party, and actually stood infeft in certain lands in security of " that warrandice, attempted to maintain, that this general " assignation of writs and evidents was sufficient to give him a " title to found on that disposition to the warrandice lands; " and, under it, to claim an immunity from augmentations, " palpably beyond and inconsistent with that to which he was " restricted by the clear and unequivocal terms of his own " disposition. The Court, accordingly, had not the least " difficulty in finding that, in such circumstances, it would be a " mere perversion and abuse of the clause of assignation, to hold " that it imported a grant, not only beyond, but plainly contra- " dictory to, the conveyance, which it was only meant to secure.

" The earlier case of Don, in 1814, proceeded indisputably on " the same general ground, of the impossibility of controlling or " enlarging a specific grant, constituted by leading clauses of " conveyance, by the terms of a relative assignation of writs and " evidents, however comprehensive those terms might be. It " happened, in that case, that there was no proper dispositive " clause, the conveyance to the heirs of entail being in the form " of a procuratory of resignation by a proprietor infeft: but such " a procuratory, as Lord Stair has observed, 'has in it the " 'effect of a disposition,' and is, in fact, a full and direct " disposition of the subjects resigned, to the superior in the first " place, to whom it expressly 'surrenders, upgives, and delivers' " the subjects resigned; and in the next place, and in substance, " to the heirs in whose favour he is required to grant new infeft- " ment. It is, accordingly, quite settled, that the original " specification in a procuratory, of the subjects resigned, where " the conveyance is completed in this form, is as exclusively the

" measure of the grant, as a similar specification in the disposi-
" tive clause is, where the title is meant to be made up under a
" precept of sasine; and, accordingly, the specification and
" description of these subjects in the charter of resignation is
" always and necessarily identical with that in the procuratory,
" which is, in this respect, its sole pattern and warrant. Now,
" in this procuratory, which constituted the entail of Finlaystone
" in 1708, the lands of that name alone were conveyed, without
" any mention of teinds; though the entailer at the time held a
" lease or tack of those teinds for a period of upwards of two
" hundred years; and the same specification, of lands only, was
" repeated in the charter of resignation, and all the subsequent
" titles. There happened, however, to be, in this original deed,
" a clause assigning all writs and evidents, &c. 'of and concern-
" 'ing the said lands, and teinds thereof;' and in a very copious
" enumeration of these writs, there were there mentioned, 'all
" 'tacks, assedations, subtacks, prorogations, and others what-
" 'soever, of and concerning the said lands, and teinds thereof,
" 'made or granted to me by authors,' &c. And, in 1812, an
" action was at last brought, for having it found that the said
" tack was effectually conveyed to the heirs of entail by this
" assignation.

" There could not certainly be a stronger case for questioning
" the absolute supremacy of the proper dispositive or conveying
" clauses, in fixing the extent of the grant, and preventing its
" being enlarged by any accessary provisions; and accordingly,
" Lord Balgray, who was very learned in conveyancing, when
" the case first came before him as Lord Ordinary, found that
" the right to the tack was effectually conveyed, by this clause,
" to the heirs of entail. But, on farther consideration, the Court,
" and at last unanimously, altered this judgment; and in respect
" the heirs could take only what was resigned by the procuratory,

" and given anew by the charter of resignation, found that 'the
" 'general clause of assignation to writs and evidents annexed to
" 'the procuratory of 1708 was not a due and sufficient convey-
" 'ance of the tack of teinds in question, to the heirs of entail.'
" The case is very imperfectly reported; but the ground of
" decision cannot be mistaken.

" Strachan's case, in 1776, was different in its circumstances,
" but rested on precisely the same principles. Aird, a proprietor
" infeft, had, in that case, sold certain lands to Stewart by a
" mere minute of sale, in which he bound himself afterwards
" to grant disposition with procuratory and precept; but had
" not done so. In that situation, Stewart borrowed money from
" Whiteford; and in security merely for the sum lent, thought
" fit to grant him a disposition of these lands, with a general
" assignation to writs and evidents. On this, Whiteford, assum-
" ing that the full right to the minute of sale was conveyed to
" him by this assignation, raised an adjudication in implement
" in his own name, against Aird, who was noway his debtor,
" and proceeded to adjudge the lands; when a reduction of that
" proceeding was brought by Strachan, as trustee for Stewart's
" other creditors; and the Court — holding that it was absurd in
" one who had a right merely in security, and apparently for a
" small sum, to pretend that a general assignation of writs, in
" corroboration of such security, could give him a right to com-
" plete the inchoate titles of his debtor, and to sue his authors,
" in his own name — set aside his adjudication, and found that
" the right to the minute of sale was not carried by that relative
" assignation, but remained with Stewart, for the benefit of his
" creditors in general. The grounds of decision are very dis-
" tinctly set forth in the argument for the successful party, in
" the report of Lord Hailes; and, without looking at that argu-
" ment, it is impossible to make sense of the very imperfect notes

" of the opinions delivered when judgment was given; though, " with this key, their true bearing and import are sufficiently " evident.

" There is nothing, therefore, in any of the decisions referred " to, that imports more than that an assignation to titles, where " it is made in corroboration of a precise grant, can carry " nothing beyond what is included in that grant; or that affords " any ground for holding that such an assignation, when not con- " nected with, or controlled by, such a grant, may not give the " full right constituted by such titles to the assignee. And, in- " deed, when it is considered, that in all these cases there were " these words and clauses of direct disposition, to which the " appellant attaches so much importance, and the combination " of which with an assignation to writs and evidents, he distinctly " admits to constitute a complete conveyance, it must be at once " apparent, that the decisions referred to, must have proceeded, " not upon any inherent insufficiency in these assignations, to " effect such a conveyance, but solely on the disconformity be- " tween the terms in which they were conceived, and those of " these other leading clauses: with which, if they could only " have been reconciled, there must have been an end of all ob- " jection. Nor was it possible for him to have avoided such an " admission; since it is matter of notoriety, that by far the " greater part of conveyances made on open charter — which " are probably equal in number to half of all the conveyances " made in Scotland — have been completed, and now stand, upon " nothing but such dispositions by parties uninfeft, with relative " assignations to the means of obtaining infeftment.

" But is it to be understood, then, says the appellant, that a " mere assignation to titles is sufficient, of itself, to carry the " personal right to the lands, to which they relate, without any " substantive or separate conveyance of that right? and, conse- " quently, to entitle the assignee to an unexecuted procuratory

" of resignation, to vest himself with the real right, by obtaining " an entry from the superior? We do not know that we are " particularly called upon to answer this question, since, in our " apprehension, the case before us does not depend on the " answer. But, as it may bring out more clearly the principles " on which we think that it does depend, we may take occasion " to observe, 1*st*, That we conceive that an unexecuted procura- " tory of resignation constitutes a mandate which the superior is " not at liberty to disobey; 2*d*, That, though undoubtedly " assignable at the pleasure of the holder, we do not think that " it should pass by mere indorsement, like a bill of exchange; " or even by such a vague and inexplicit assignation as may " leave it uncertain for what purposes, and to what limited or " unlimited extent, it is meant to be conveyed; but, 3*d*, That " where the ends and purposes for which it is made are distinctly " expressed, and are in no way repugnant with each other, or " with any thing else in the deed by which it is effected, we " see no reason to doubt that such an assignation will carry the " whole right which the cedent held under that procuratory, and " be of itself sufficient to entitle the assignee to an entry in his " room.

" Suppose a party, holding only a personal right to lands, " should execute a deed, in which he first recited that he had " sold them for a certain price, and that the purchaser had now " made tender of that price, and required a conveyance in return, " and then proceeded to say, 'and whereas I am ready and " 'willing to comply with the said requisition; but, seeing that I " 'am myself uninfeft in the said lands, and consequently unable " 'either properly to dispone the same directly, or to grant any " 'effectual procuratory of resignation or precept of sasine in " 'regard to them, I hereby, and in and for implement of the said " 'bargain and sale, assign and make over to the said A. B. a " 'certain unexecuted procuratory of resignation, (dated so and

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" ' so,) granted in favour of me, and my heirs and assignees, by
" ' the party last vested and seised in the said lands; to the end
" ' that the said A. B. may instantly vest himself with the full
" ' right to them, by forthwith executing the same in favour of
" ' himself, and such heirs and successors as he may choose to
" ' appoint; and I hereby farther desire and require my superior
" ' to receive resignation from the said A. B. (or his procurators,)
" ' as my full and lawful assignees, in and to the said procuratory,
" ' and to grant new infeftment thereon to him and his heirs
" ' accordingly.' Here would be a deed which clearly conveyed,
" and professed to convey, nothing but the procuratory of resig-
" nation alone; and yet we are unable to see any ground on
" which, consistently with the fundamental maxim that such
" procuratories are assignable, any doubt could be raised as to
" its sufficiency to pass the full right to the property.

" But, though we have said so much on the hypothetical case
" of a naked and detached assignment to title-deeds and evidents
" alone, it is scarcely necessary to observe, that in our view of
" the present case, the clause relied on can neither be considered
" as importing an assignment to writs only, nor as standing by
" itself, and without connection with other important clauses.
" On the contrary, we conceive, that while there is ground for
" holding that it contains an express assignment to the cedent's
" personal right, as well as to the written titles in his person, we
" hold it to be clear that it refers to, and is to be taken in con-
" junction, — 1*st*, with the obligation to infeft, and 2*d*, with
" the procuratory of resignation — the tenor of both which is not
" only consistent with the largest and most beneficial meaning
" and effect it admits of, but necessarily requires it to be taken
" with such large meaning and effect. It is upon this complex
" view of the whole structure and import of the deed that we
" chiefly rest our opinion; though it may be right to premise a

" few words on the effect of certain expressions which are to be " found in the clause itself.

" We understood it to be fully conceded in argument by the " appellant, and, indeed, it could not well be disputed, that if " the clause in question, standing where it does, had only, after " assigning the whole writs, titles, and evidents of or relating " to the lands, contained these few additional words, 'together " 'with all right, title, and interest which I now have, or can in " 'any way pretend to have, in and to the said lands themselves,' " the title of the assignee would have been perfect, and his right " to execute the assigned procuratory free of all objection. But " what are actually the words of the clause as it stands? It does, " in point of fact, "assign and dispone, under the conditions, " provisions, and clauses, irritant and resolutive, above written, " all and sundry writs, evidents, rights, and title-deeds, of or " relative to the said lands and others. There is here, there- " fore, an assignment, in express words, not only to all the writ- " ten titles in the person of the granter, but to his whole rights " to, or in relation to, the lands; and they are not only assigned, " but disponed also, and with and under the whole limitations " of the entail — a qualification which was necessary and appro- " priate, if the right itself was meant to be assigned, but utterly " without meaning as to a mere conveyance of written papers. " Why, then, should not both parts of the assignment be effec- " tual?

" The appellant thinks it a sufficient answer to say, that the " words referred to are mere words of style — that the word " 'rights' in such a clause is but a synonime for rights or titles, " and that in the case of Don, and in other cases, these, and " even still stronger words, were accordingly held insufficient to " carry more than the written documents: and to a certain " extent this answer, we think, must be admitted. The words

" certainly are words of ordinary style, and are not unfrequently " found where it is apparent, from the context, that nothing " more than a relative assignment of writings was contemplated. " But where there is no such conflict between their natural " meaning and an overruling context, we do not know upon " what principle this, their plain and natural meaning, should " be refused to what are called words of style. When first " introduced into such styles, they certainly had their appro- " priate and ordinary meaning; and though upon some occasions " they may now be used where effect cannot be given to it, there " seems no reason why they should not retain it, whenever that " meaning is in full accordance with all the other indications of " intention in the deed. We are now considering the clause as " if it stood alone, uncontrolled by, and unconnected with, any " other; and the question is, whether, on that supposition, effect " should not be given to the express conveyance it contains of " 'rights' to lands, as well as of writs relating to them? And to " this it is obviously no answer, that effect has been systemati- " cally denied to those, and to still stronger words, where their " disconformity to other and more authoritative clauses made " this unavoidable. In the case of Don, it is certain that far " stronger words were on this account disregarded: For there, " an express assignation of 'all tacks of teinds' was found " ineffectual to convey a tack of teinds, confessedly at the " granter's disposal; though it was beyond all question, that if " these words of assignation had stood alone, in a substantive " and independent clause, or unconnected with a leading " conveyance relating to lands only, and not to teinds at all, " effect could not possibly have been denied them. We incline " to think, therefore, that under the express words of this clause, " as well as by its plain implication, the granter's personal right " to the lands was sufficiently conveyed, as well as the titles and " evidents, by which it might be cleared and completed.

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" But though this is the view which we should be disposed " to take of this assignation clause, if we were to consider it as " separate from, and independent of, any other, we have already " intimated that we are not of opinion that this is truly the " situation or character in which it presents itself. We think it " clearly a relative, and, in some sense perhaps, a subordinate " and accessary clause: but if it be accessary and subordinate, " then most certainly the principle clauses to which it stands in " that relation, are in no respect inconsistent, but in perfect " accordance with the largest and most extensive sense that can " be given to its terms. The object and purpose of the deed " was, beyond all question, to settle and entail the lands which " were at the disposal of the granter, in favour of a certain series " of heirs; and it is worth while to consider how clearly and " closely all its different parts are connected with, and made to " bear upon and support each other. The obligation to infeft " the heirs specified is the first; then, and with express " reference to that obligation, namely, as the deed bears, 'for " 'accomplishing the said infeftment by means of resignation,' " comes the procuratory of resignation for new infeftment in " their favour; and finally, and for the purpose (as we read it) " of enabling his procurators effectually to execute this mandate, " and obtain such new infeftment, there is 'the assignation to " 'all writs and titles' in the person of the granter; including, " beyond all question, his sister's disposition of 1808, (which " was in fact his only available title,) and the unexecuted pro- " curatory of resignation therein contained. According to our " conception of the matter, this short view of the import and " tenor of the whole deed, should leave as little doubt of its " general efficacy, as of the substantive and separate validity of " each of its connected parts. But a word or two may now be " added as to each of these.

" We do not understand upon what ground the appellant holds

" the obligation to infeft to be of no avail to the respondents. " It is easy enough to see why he represents the procuratory and " precept as null and inept — as flowing from one who was not " himself infeft in the property. But it certainly requires no " infeftment to enable one who has a full personal right to " lands, effectually to bind himself and his heirs to give infeft- " ment to those to whom he proposes to convey them; nor can " it be doubted that such an obligation will vest most important " rights and powers in those in whose favour it is conceived. It " is, indeed, in very many cases, by and through such an obliga- " tion alone, that the parties so favoured can render the grant " to them effectual, even where they have received a formal " disposition with procuratory and precept from one whose " right is but personal. The procuratory and precept of such " a party are plainly incapable of precise execution, and, as " direct means of access to the property, are truly altogether " inept and unavailing. But, in truth, so also is his direct " disposition of the lands. One not infeft cannot effectually " dispone. The property is not in him; and he cannot, there- " fore, make over directly any proper right of ownership to " another. He has himself merely a personal right to claim " sasine from the bailie of the former proprietor, under the " precept of that proprietor; or a new charter from the superior, " under his procuratory of resignation; and those personal " rights or claims he can no doubt validly assign: but he " cannot give over the lands themselves. The formal clause of " disposition may indeed be held to infer an assignment of the " personal right, or to imply an obligation to infeft, where that " is not expressed; but at best it can do no more; and if there " be no conveyance of the unexecuted procuratory or precept in " his person, neither that nor his own new precept and procu- " ratory will be of the least avail to the disponee. The " obligation to infeft, therefore, may often be all that is really

" operative or effectual in the deed; and if the granter, or his " heir-at-law, do not choose voluntarily to fulfil it, his only " remedy is, by adjudging in implement of that obligation: for " it is always on this obligation alone, whether expressed or " implied, that this important diligence must proceed.—So " substantively and exclusively efficacious is that leading part of " the deed, which the appellant now represents as of no practical " importance.

" But if an obligation to infeft be thus sufficient, of itself, to " let the party into the right of the lands, by means of adjudica- " tion founded on it alone, where there is no assignation to " writs and evidents, why should it not be sufficient without any " such procedure, when it is coupled with such an assignation, " which puts it in the power of the party himself to implement " the obligation, and plainly makes it unnecessary to go back " to the granter, or his heir-at-law, either for any voluntary, or " legal and constructive fulfilment of it? If a good right, in " short, can be made up, on that obligation to infeft alone, by " the party to whom it is granted calling on the granter to " execute in his favour any procuratory which may be in his " person, where there has been no assignation of that procura- " tory—how should there be any difficulty in the favoured " party completing the right himself, where, in addition to this " obligation, there is an express assignation to him of that " procuratory, for the very purpose of securing implement of the " obligation?

" Laying aside for the present the new procuratory, which, " in the deed of 1810, is locally interposed between the obliga- " tion to infeft and the assignment to the original procuratory; " and holding the former, in the meantime, as entirely null and " inoperative, (which is the worst that can be said of it,) see " how the deed would stand, when the two remaining members " of it, of which we are now speaking, are brought into juxta-

" position. It would then read substantially as follows:—' Being
" ' resolved to entail my lands of Caiply,' &c. ' on the following
" ' series of heirs, and under the conditions and limitations
" ' underwritten, I hereby bind and oblige myself, and my heirs
" ' of every description, duly to infeft the following persons,
" ' namely,' &c. ' in the said lands,' &c. ' And in order that, in
" ' the event of my not myself fulfilling this obligation in my
" ' lifetime, they may have it fully in their power to take imple-
" ' ment of it for themselves, I hereby assign and make over to
" ' them all the writs and titles that now stand in my person;
" ' and especially the procuratory of resignation contained in
" ' the disposition by my sister in 1808; to the end that they
" ' may execute the same in favour of the heirs herein before
" ' mentioned, and under the provisions foresaid.' Now, we
" think it impossible to doubt that this would be an effectual
" deed; and though these are not the actual words of the entail
" of 1810, we think it can be as little doubted that it has words
" fully equivalent; and that this is truly a mere paraphrase and
" abridgment of what it substantially contains: and therefore
" we are of opinion, that the obligation to infeft, taken along
" with the conveyance of all that is requisite to obtain infeftment,
" is *per se* sufficient to effect a complete conveyance and settle-
" ment of the property. We have here, in short, upon this
" separate view of the question,—1st, A confessedly valid
" obligation to infeft; 2d, A valid assignment to the proper
" warrants for infeftment; and, 3d, An infeftment regularly
" completed upon these warrants. The appellant now seeks to
" reduce and set aside all these; and we are of opinion that one
" and all of them are unimpeachable.

" But then there is, over and above, the new procuratory of
" resignation. Now, it is quite true that this, standing by
" itself, did not admit of direct or proper execution, so long as
" the granter was uninfeft; and that it could not, *per se*, vest

" any available right in the respondents. But it does not stand " by itself; and in the connection in which it does stand, it is as " far as possible from being a nullity.

" First of all, as has been already observed, a procuratory of " resignation is truly of the nature of a disposition. It is, " indeed, in form as well as in substance, a direct conveyance of " the lands to the superior, for new infeftment to the heirs " specified; or, substantially, a conveyance to those heirs, " mediately, and by the intervention of the superior. It is, " therefore, in itself a proper dispositive instrument; and where " the granter is infeft, it is accordingly undeniable that it must " be admitted to direct and complete effect, as such. But it is " conceded by the appellant, that wherever there is a proper " dispositive grant, followed by a relative assignation to writs " and inchoate titles, no way contradictory to the terms of such " grant, the two together will give a complete right, although " the granter was not infeft; and could not, therefore, transfer " the property of the lands by any mere words of disposition. " The use of such words has no doubt been held to import a " disposition (or assignation rather) of the personal right, which " was all the granter had to give — as *majus includit minus*, — or, " at all events, to constitute an obligation on him to make good " what he held out to the disponee: but still, whether the " dispositive words are held to apply to the lands themselves, or " to the personal right, or to both, or only to infer an obligation " on the disponer, two things may be taken as certain, — first, " that they will not of themselves make a complete conveyance, " unless they be coupled with a relative assignation to the means " of completing it; and second, that when they are so coupled, " they will make such a conveyance. But if this be incontro- " vertible where the deed begins by a direct disposition or " conveyance to the heirs, there seems no reason for holding that " the rule should be different, where there is an equally effectual

" and substantive conveyance to them, though only through the " medium of the superior. Where the granter is not infeft, " neither the one conveyance nor the other will, *per se*, give the " grantees any direct access to the property; but if the insertion " of such a conveyance will give full effect to a subsequent " assignation of writs and titles, in the one case, it is difficult to " understand why it should not do so also in the other. Looked " at nakedly, and by itself, there is but the form of a conveyance " in either case; and if it be undeniable that a procuratory of " resignation by a party infeft is as complete a conveyance, " though circuitously, as a direct disposition from such a party, " the same circumstances which will render the one effectual, " where there is no infeftment, would seem necessarily sufficient " to produce the same result as to the other.

" But there is a more simple and familiar view of the matter, " which probably led first to the adoption of the practice " followed in this case, and suggests a clear justification of its " legality. The original procuratory in Miss Anstruther's " disposition was in favour generally of her brother and his " heirs; but he wished the new infeftment to be in favour of a " particular series, and under the limitations of a strict entail. " This he might have unquestionably obtained, by himself " resigning on the original procuratory, and requiring the new " charter to be qualified according to his wishes and intention. " To make this requisition, however, with proper assurance of " its being accurately attended to, it was obviously desirable, if " not strictly necessary, that some written intimation to this " effect should be made to the superior; and, considering that " the only legitimate way in which a superior can be approached " with a view to a new investiture, is by procuratory of resigna- " tion, it will easily be understood, that this would naturally " occur as the most expedient form to be adopted. It is in " instruments of this description that the destinations and

" limitations of most entails have in fact been introduced; and if " the granter had been himself infeft, there can be no doubt " that such would have been the course he would have followed; " and though he was not infeft, and could not therefore make a " procuratory upon which actual resignation, which was the first " step to the new investiture, could follow, there might seem no " objection, but the contrary, to his making a second instrument " of that description the vehicle of his requisition for the new " destinations and limitations, under which it was to be ultimately " completed. No surer or more correct way could be devised " for bringing that requisition to the knowledge of the superior, " who was bound to give effect to it; and though the instrument " itself could not accomplish the resignation, no inconvenience " could result from that, if another instrument perfectly fitted " for that purpose was presented along with it. By the one " instrument the old investiture was put an end to, and the " lands effectually resigned; and by the other, the terms of the " new were distinctly and authoritatively dictated.

" Nor will it appear, when the form and regular tenor of such " a deed is considered, that there was truly any thing anomalous " or inconsistent in this mode of proceeding. There were here, " no doubt, two procuratories of resignation, for the purpose of " effectuating one new investiture; and though it may in one " sense be true, as we have already stated, that it was the " peculiar province of the one to effect the resignation, or to " place the lands in the hands of the superior, and of the other " to define the terms of the charter he was thereafter to issue, it " would by no means be correct to hold that the latter could " have no other operation; or in fact that it gave any directions " which could not be substantially obeyed. It will be recollected, " that the form and substance of a deed of this kind, consists in " a mandate or direction to certain procurators, whose names " are all along left blank, and who are presumed to act, when

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" the mandate comes to be executed, as the nominees or procu-
" rators of the person then in right of the instrument. Now,
" though Sir Alexander Anstruther was himself uninfeft when
" he granted the procuratory of 1810 to certain blank manda-
" tories, he was at the same time the holder of the other procu-
" ratory of 1808, granted by a party who was infeft, also to
" certain blank procurators, who by that time had come to be
" his; and, in so far as they had any existence, (constructive or
" prospective at the time,) must be held identical with those to
" whom his own procuratory was granted. The sum of the
" matter, therefore, was, that he issued a mandate to these his
" procurators to resign the lands, by executing the former pro-
" curatory, which he had placed in their hands for that purpose;
" and that for new infeftment to the parties, and under the
" conditions which he had expressed in that second or supple-
" mentary mandate.

" In all this we see nothing incompetent, or inconsistent
" either with principle or with form. He had full right and
" power to order the execution of the original mandate of 1808,
" and to annex to that order any new destinations or conditions
" he chose; and we do not think it can be questioned, that he
" might give this order by his commissioners and mandatories,
" as well as directly; and this we conceive is truly all that he
" did. The procuratory of 1810, in so far as the actual resigna-
" tion of the lands is concerned, is a mere mandate, as we take
" it, to execute the procuratory of 1808 — the execution of
" which, though uninfeft, he had an undoubted right to direct;
" and, in this sense, there was no impropriety or usurpation of
" power, in directing his mandatories to resign the lands, which,
" though uninfeft, he could legally resign, or cause to be
" resigned, upon that original procuratory.

" It is in this way that, connecting the terms of this procura-

" tory with the clause of assignation with which it concludes, we " think the whole instrument may be reconciled, both with each " of its separate provisions, and with the strictest rules of con- " veyancing. After directing his procurators to resign the lands " in common form, and specifying the persons in whose favour, " and the limitations under which the new investiture was to be " taken, the granter, with a view, as it would seem, to the con- " veyance he was about to make of the former procuratory, and " as introductory to that conveyance, proceeds to give 'full " 'power, warrant, and commission to my said procurators, to " 'do all and every thing necessary for such resignation and " 'new infeftment, which I could do of myself;' and then, in " the very next sentence, or rather continuously, and as part of " the same sentence, he 'assigns and dispones all and sundry " 'writs, rights, and title-deeds, of and concerning the said " 'lands;' as if he had said, in terms,—'and to enable you so " 'to do, I hereby assign to you the unexecuted procuratory of " '1808, upon which I might myself, and but for this dele- " 'gation to you, would have made the resignation.' If this " had been so said, we apprehend that no doubt could have been " raised, either as to the true meaning of the procuratory of " 1810, or of the competency and propriety of every part of its " directions. But we hold that this is the true meaning and " effect of what is said; and that the whole instrument must be " read as if this meaning had been fully and precisely expressed. " The two instruments, in short, we apprehend, were welded " together, and consolidated into one, by the assignation to " the first, which occurs in the close of the last: and when " the heir's procurators, who were, of course, the procura- " tors in both, appeared to make resignation, with both in " their hands, their right and title to do so could admit of " no dispute, any more than their right to have all the

" conditions contained in the last of them inserted in the new " chat er.

" Considering the terms of the remit from the House of Lords, " under which our opinions are required, and the circumstances " in which that remit was made, we have thought it right to go " thus fully into the grounds and reasons on which it appears to " us that the law, to which effect was given in the judgment " appealed from, is founded. But, for the justification of that " judgment, and probably even for the satisfaction of the Court " of Review, it might have been enough to refer to the solemn " decision by which that law was settled, in circumstances pre- " cisely parallel, in the case of Lord Napier, and Livingstone, in " 1763, and affirmed on appeal to the House of Lords, in March, " 1765. It is now admitted that that case was exactly parallel " to the present; and this, indeed, is demonstrated by the " original documents, judgments, and pleadings, which have " now been printed, and will be reported to the House of Lords " along with these opinions. The circumstances were shortly " these: — The Countess of Findlater had merely a personal " right to the lands of Westquarter, under a disposition by the " last proprietor infeft, with procuratory and precept in favour " of her and her heirs generally; and, having no other title to " these lands, she, in 1705, executed a mere procuratory of " resignation, without either any clause of disposition of the said " lands, or of her personal right to them, or even any obligation " to infeft, and with a general assignation only, to writs, titles, " rights, and evidents, in favour of a certain series of persons, " and under the limitations of a strict entail. Infeftment was " afterwards taken by one of the heirs of entail, upon the joint " exhibition of this procuratory, and the precept of sasine in the " original disposition to the Countess, which was held to have " been effectually conveyed by the general assignation in the

" procuratory; and this entail was found, after a most anxious " litigation, to be 'good and effectual against singular succes- " 'sors;' and separately, 'That the prohibitive, irritant, and " 'resolutive clauses in the Countess's entail of 1705 (viz. her " 'procuratory of resignation) were competently engrossed in " 'the sasine of 1706, though not contained in the precept upon " 'which it proceeded.'

" The appellant now admits that this case is exactly in point; " and that it necessarily assumed and imported the fallacy of all " the arguments he now maintains. But he says, that the pur- " suer in that case had no interest to maintain the general " insufficiency of the conveyance and destination effected by " these titles, as his own right was derived from them; and that " the only question discussed, was with regard to the fetters and " limitations of the entail, and the competency of imposing those " by the deed of a party uninfeft; while the larger question, as " to the competency of establishing any effectual right to the " lands under such titles, was not properly in the view of the " Court. But though the pursuer might be willing to evade " that question, it was, first of all, impossible to withhold it from " the view of the Court, to whom the whole documents were " submitted and anxiously commented on; and next, it is plain, " from the pleadings now exhibited, that the defender had no " desire that it should not be fully considered; and, accordingly, " it is brought forward and insisted on very strongly, at pages " 15 and 16 especially, of the prints now referred to — where it " is clearly shewn that, if the objections to the entail on the " alleged defects of the title were well founded, the whole con- " veyance by the Countess must necessarily be null, and the " right to the lands remain with her heirs-at-law. It was with " this alternative, therefore, distinctly before them, that the " Court not only found generally that the entail 'was good and

" ' effectual,' but specially, that the fetters, contained only in the " procuratory, were aptly imposed, by being engrossed in the " seisin taken on the original precept in favour of the Countess, " though that precept contained no such fetters, and had only " been conveyed by the general assignation of writs annexed to " her procuratory.

" It is in vain, therefore, for the appellant to say that nothing " was settled by this decision except that a party uninfeft might " make an effectual entail. It was also very clearly settled, we " think, — 1*st*, That such a party might make such an entail by " a mere procuratory of resignation, without dispositive words, " or even without (which, however, we have here) any obliga- " tion to infeft; 2*d*, That such a mere procuratory, with a " relative assignation to writs and evidents, import, between " them, a complete conveyance to the granter's whole right to " the subjects resigned, and are sufficient, *per se*, to entitle the " assignees to make their right to them real, by executing the " assigned titles; and, 3*d*, That any destination or limitation " contained in the procuratory, may be competently inserted in " the seisin or charter taken on the assigned precepts or pro- " curatories, though no mention is made of such limitations in " those precepts or procuratories themselves. All these points " were fully argued and discussed in that case; and it is need- " less to say that the decision upon them effectually negatives " every one of the propositions now maintained by the appellant.

" When the frequency of the practice of transferring and " holding property on what is called open charter, indeed, is " considered, and its manifold advantages, in saving the great " expense of making up new titles, and the hazard of blunders " in completing them, it cannot appear wonderful that such a " compendious method of effecting a new investiture as was " followed in the case of Livingston, should have been frequently

" adopted; and accordingly we have been very much impressed
" by the evidence which we think is afforded of the views enter-
" tained at and previous to the time of that decision, of the
" principles and practice referred to, by certain passages of the
" pleadings for the defender in that case, and by one parti-
" cularly, at p. 16 of the print, where he says, 'It was never
" 'doubted that a proprietor (of course uninfeft) might make
" 'an entail by assigning his author's procuratories, as well as
" 'by granting his own. An immense number of such entails
" 'have been made; and a list is produced in process, of tailzies
" 'which contain no procuratories, but only assignations to those
" 'of the tailzier's authors — some of them executed by families
" 'of the first note, and likely, therefore, to be well advised.'
" This list, it appears, has unfortunately been mislaid; but it is
" impossible to suppose that any misrepresentation of a docu-
" ment actually on the table of the Court, could be made in a
" pleading for such a party. We have no doubt, accordingly,
" that the fact was as stated; and we may mention, that the
" same practice appears to have been followed, and was much
" discussed, in a case between the Duke of Hamilton and the
" Earl of Hopetoun, with regard to the lands of Auld Cathie,
" in 1839. In that case, (exactly as in that of Livingston, and
" in the present,) Lord Hopetoun, being himself uninfeft,
" granted a procuratory of resignation, without any dispositive
" words, for resigning those lands in favour of a new series of
" heirs, and under the limitations of a strict entail; with a
" general assignation (as here) to writs and evidents. This was
" in 1733; and in 1784, the heir in right of these titles, having
" vested himself with them (as here) by service both as heir of
" line and of entail, took infeftment, for the first time, on the
" unexecuted precept which stood in favour of the entailer in
" 1733, and which was held to have been validly conveyed by

" the general assignations in the procuratory of that date — " inserting in the sasine so taken all the limitations of the entail, " and narrating as its warrants, that procuratory of 1733, 'and " 'assignation to writs therein contained,' with the services and " original precept itself. In short, it was an exact copy and " repetition at all points, of what had been done in the case of " Livingston; and though in this last case the correctness of the " title was most eagerly and pertinaciously impugned, the " objections to it were utterly disregarded, and their fallacy " necessarily assumed in the judgment which was given, though " the shape of the action did not admit of any special finding to " that effect.

" It only remains, then, to say a word on the appellant's " second proposition — that the whole destination of the deed of " 1810 was revoked by that of 1814 — which is confessedly " ineffectual as a separate conveyance. We are clearly of " opinion, that there is no ground whatever for this proposition, " — first, because there is plainly no general revocation of the " original destination; second, because there is no change " whatever on that leading part of it under which the present " heir has succeeded; and, third, because the deed of 1814, " instead of generally recalling that of 1810, has expressly " declared, that 'the foresaid deed of entail, in so far as not " 'altered by these presents, shall remain in full force, virtue, " 'and effect.'

" F. JEFFREY.
" D. BOYLE.
" JOHN HOPE.
" J. W. MONCREIFF."

" We concur in the above opinion, with this qualification " only, that we hesitate to say, that the use of the word " 'rights' in the assignation of writs, considering the context in

" which that word stands, affords any argument of weight that " would not have existed if that word had not been used in that " assignation.

" J. H. MACKENZIE.
" A. MACONOCHIE.
" J. H. FORBES.
" JOHN FULLERTON.
" AD. GILLIES.
" J. CUNINGHAME.
" JOHN A. MURRAY.
" H. COCKBURN.
" J. IVORY."

These opinions were printed, and laid upon the table of the House, along with supplementary cases for the parties, and this day, without farther argument being allowed, it was moved that the judgment should be affirmed, which was accordingly done by the following order.

Whereas this day was appointed for hearing counsel farther upon the petition and appeal, wherein James Renton, accountant in Edinburgh, is appellant, and Philip Anstruther, Esq., second son of the late Sir Alexander Anstruther, of Third Part, Knight, sometimes recorder of Bombay, and Dame Sarah Anstruther, relict of the said Sir Alexander Anstruther, are respondents,—which said appeal was on the 28th day of February, and 1st day of March, 1842, heard *ex parte* as to Robert Anstruther, Esquire, of Caiplie and Thirdpart, in the county of Fife, he not having answered the said appeal, though peremptorily ordered so to do, — and which cause was with the consent of the counsel on both sides, by an order of this House of the 1st day of March, 1842, remitted back to the Second Division of the Court of Session, in Scotland, " to review generally the interlocutor com- " plained of, with an instruction to the Judges of that Division to " order the same to be argued, *vivâ voce*, before the whole Judges,

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" including the Lord Ordinary, and to report their opinions thereon " to this House." And this House did not think fit to pronounce any judgment upon the said appeal, until after the said interlocutor should have been so reviewed, and the opinions thereupon should have been reported according to the direction of this order ; and which opinions of the whole Judges of the Court of Session, including the Lords Ordinary, upon the matter so referred to them, were laid before this House on the 22d day of July, 1842. Counsel were accordingly called in, and counsel having been heard for the appellant, and counsel appearing for the respondents, the counsel were directed to withdraw : and on due consideration of the said opinions of the Judges of the Court of Session, and also, on due consideration had, of what had been offered on either side in this cause, it is Ordered and Adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, That the said petition and appeal be, and is hereby dissmissed this House, and that the said interlocutor therein complained of be, and the same is hereby affirmed.

JOHN BICKERTON. — SPOTTISWOODE and ROBERTSON, Agents.