[16*th August* 1836.]

SIR WINDHAM CARMICHAEL ANSTRUTHER, *Appellant.*—

Mrs. ANSTRUTHER and Husband, *Respondents.*—

Collation — Heir and Executor — Entail. — Held (affirming the judgment of the Court of Session) that an heir of entail, who was at the same time heir of line and one of the nearest of kin, was not entitled to a share of the personal estate of the deceased without collating the heritage to which as heir he had succeeded.

THE circumstances of this case, and the antecedent proceedings, will be found ante vol. i. p. 463. The case having returned to the Court of Session, the judgment of the House of Lords was applied, parties were heard before the whole judges, and the following interlocutor was pronounced:

" The Lords, in pursuance of the order of the House " of Lords, having heard counsel in presence of the " whole Court, having obtained the opinions of the " consulted judges, and having resumed consideration " of the case, find that the claimant and petitioner Sir " Windham Carmichael Anstruther, Bart., cannot " claim any share in the executry of the late Sir John " Carmichael Anstruther, Bart., without previously col- " lating the heritage to which as heir of Sir John he " has succeeded; Find Mrs. Marian Anstruther and

ANSTRUTHER v. ANSTRUTHER.

16th Aug. 1836.

" her husband entitled to the expenses of process, and " remit to Lord Jeffrey, as Ordinary in the place of ". Lord Medwyn, to proceed accordingly."

Against this judgment Sir Windham Carmichael Anstruther appealed.

LORD CHANCELLOR.—My Lords, in this case of Anstruther v. Anstruther, the question arose in a suit of multiplepoinding, and the point for decision is, whether an heir of entail, being also heir of line, and being one of several next of kin, can claim a share of the personalty without collating the heritage to which he succeeds as heir of tailzie. The deceased was nephew to the claimants, the uncle and aunt. The claimants are his only next of kin. The uncle is heir of tailzie of certain entailed estates, and is also heir of line to the deceased. The case came before the Second Division of the Court of Session in November 1833, when an interlocutor was pronounced by which it was declared, " that Sir Windham Carmichael " Anstruther, the claimant, cannot claim any share of " the executry of the deceased, without previously col- " lating the heritage to which, as heir to the deceased, " he has succeeded." Against this judgment the heir appealed to this House, and the appeal came on for hearing in April 1835; when the case having been only in part heard, an order was made, declaring, " that " the House, by consent of parties, forbear, hoc statu, " to pronounce any decision upon the matter of the " said appeal, but directed that the cause should be " remitted back to the 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 of the judges, " including the Lords Ordinary, and to pronounce " judgment according to the opinion of the majority of " the whole of the judges." The case was accordingly so heard on the 20th of January last, when the opinions of all the judges were in favour of the interlocutor before pronounced.[1] Under these circumstances the case came again before this House; and without in any degree assenting to the proposition, that the judicial functions of this House are in no case, and under no state of facts, to be exercised against such high authority, founded upon an admitted course of decision and practice of above twenty-five years, yet undoubtedly this House would pause long before it reversed such a judgment, and altered so long a course of decisions and practice. I have however thought it my duty to go through the whole case, to consult and consider all the authorities quoted, and have come to the clear conclusion that we have not, in this case, any such distressing duty to perform; because it appears to me that the decision of the case of Little Gilmour in 1809, which it is admitted governs this, if it be to be treated as an authority, was rightly decided, and in strict conformity with the principles of former decisions, and the unquestioned doctrines of the Scotch law as applicable to strict entails. It being admitted that the case of Little Gilmour, decided in 1809, is identical with the present case, and that subsequent decisions have taken place upon the authority of that case, and that the law upon this subject has been considered as established by that decision, it is only necessary to consider

ANSTRUTHER v. ANSTRUTHER.

16th Aug. 1836.

[1] The opinions will be found, ante vol. i. p. 522.

ANSTRUTHER v. ANSTRUTHER.

16th Aug. 1836.

whether that decision be so contrary to principle, and so inconsistent with former authorities, as to make it the duty of this House to overrule that decision, and to establish a rule of law diametrically opposite to that upon which that case is founded. It is admitted by the appellant, that the heir must collate whatever heritage he takes from the person whose estate is to be administered; but he contends that, in the case of a strict entail, the heir of entail, though he be also heir of line, takes nothing from the deceased, that he takes from the entailer as a person designated, and that he therefore ought not to be compelled to collate such heritage as the price of participating in the property of the deceased, such person so deceased never having had the power of diverting the heritage from the heir, and such heir, therefore, claiming nothing from him, and not even owing any thing to his forbearance. Many arguments were urged at the bar for the purpose of showing that absurdities and inconsistencies might, in certain cases, arise in the application of the rule laid down in the Little Gilmour case. Such argument might be entitled to much consideration in considering the propriety of establishing a new rule, but ought not to have much weight in considering whether an old and established rule of property ought to be overturned. In all codes of law founded upon technical reasoning such arguments might be found to apply. Before I consider the cases referred to I will for a moment call your Lordships' attention to the question, how far the rule objected to be or be not consistent with the acknowledged rule of the Scotch law as applicable to strict entails? Such entails rest upon the provisions of the act of 1685. Now, it is not disputed

but that an heir, taking by simple destination, must collate; and if that act had not been passed, and the property in question had been permitted to descend, according to the entail, from the last possessor to the present appellant, that the appellant must have collated such heritage before he could participate in the executry. If therefore he need not now do so it must be by virtue of the provisions of the act of 1685. The object of the act was, to enable persons effectually to entail their estates, by preventing the heirs of entail from alienating or charging the estate entailed. It therefore secured to the heirs in succession the enjoyment of the entailed estates. Did it also entitle them to share in the executry without collating the heritage? Yet such must be the effect of it, if the appellant be right. The argument of the appellant proceeds upon the practical effect of that act, and not upon its legal operation; and therefore to support his argument he is compelled to treat the possessor under an entail as merely a liferenter. But this is contrary to the known principle of the Scotch law, which considers the fee as in the party in possession under the entail, and his heir makes up his title as heir to him, as owner of the fee. If the act of 1685 did not consider the heir as in possession of the fee, why restrain him from exercising rights which are conceded to the fee? The heir may sometimes suffer from this supposed fiction, but he sometimes also benefits by it, as occurred in some of the cases referred to, particularly in Spalding v. Farquharson, and Russell v. Russell, 1 Bell's Commentaries, p. 102, in which it was held that an heir of entail was not bound to collate the heritage with the next of kin of his father, because, as such father had not made up his

ANSTRUTHER v. ANSTRUTHER.

16th Aug. 1836.

ANSTRUTHER v. ANSTRUTHER.

16th Aug. 1836.

title, the heir was to claim as heir to the grandfather, and not as heir to his father. Not only must an heir who takes by simple destination collate, but so must an heir who takes by the bounty of his father, or under his father's marriage settlement. In principle, therefore, there is nothing to impeach the doctrine acted upon in the Little Gilmour case. Is there then any thing of authority against it? It is admitted that there is no case of prior date precisely in point, but there are several in which it appears to me that the principle has been recognised. The first of the cases cited, and which was relied upon by the appellant, was the case of Rickart v. Rickart in 1720, in which, there being three sisters next of kin of the deceased, and the eldest being heir of entail, it was held that she was not bound to collate. In that case the question arose between sisters, so that as to two thirds the eldest sister was not heir at law, but took by special destination. But in the Scotstarvet case in 1787, (Morrison's Dictionary, 2379,) the circumstances were the same, except that the sisters were not sole next of kin; and there it was held by the Court of Session, that the eldest sister, being heir of entail, must collate with those who were next of kin, but not heirs-portioners. The distinction between the two cases is obvious; the eldest sister was not in competition with heirs-portioners only, but with others, next of kin, who were not so. This judgment was reversed in this House, but merely upon the ground that the domicile having been in England, the law of Scotland did not apply. In the case of Rae Crawford a sister succeeded to an estate under an entail. She had a brother and a sister. It was held she was not bound to collate, because she was not heir of line,—assuming that, had she been heir of

line, she would have been bound to collate. Such being the state of the authorities prior to the case of Little Gilmour in 1809, your Lordships have to decide whether that case was so contrary to those decisions, and so inconsistent with the principles of the law of Scotland, as to induce your Lordships to overrule it. Had the decision of the case of Little Gilmour been the reverse of what it was it might have established a rule in some instances more conducive to the equitable arrangement of the claims of different members of a family, and have avoided some consequences of the present rule which it is impossible to reconcile with notions of abstract justice, such as the consequences, that if a second son be heir of entail he need not collate with his brother and sister, but that an eldest son, heir of entail, must. But then such a decision to obtain such a result would, in my opinion, be a violation of the principles of the Scotch law, arbitrary and technical as they may be in the present instance. I have therefore come to the conclusion that the decision of the case of Little Gilmour was right upon these grounds; and if your Lordships should concur in that opinion you will not hesitate to act upon it, particularly as it has been considered as the rule of law for twenty-five years, and has been followed in other cases. I therefore move your Lordships to affirm the interlocutor of the Court of Session appealed against.

LORD LYNDHURST.—I beg to state, that I was present at the hearing of this case, which was very elaborately argued at the bar, and that I entirely concur in the judgment which has been moved by the noble and learned Lord; and I beg further to state, that another noble and learned Lord, who was also present, has

ANSTRUTHER v. ANSTRUTHER.

authorized me to state that he also concurs in this judgment.

16th Aug. 1836.

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNELL,—Solicitors.