

1770. March 2.

DAVID ROSS, Manager of the Theatre Royal, Edinburgh, Pursuer, *against*
ELIZABETH ROSS, Spouse to HUGH ROSS, Merchant in London, Defender.

DAVID and Elizabeth Ross were the only children of Alexander Ross solicitor in London, who, in the year 1748, executed a holograph settlement of his estate; by which, disinheriting his only son David, he, by a deed containing a procuratory of resignation, settled his landed estate upon his daughter Elizabeth. This deed contained the following clauses: 'I hereby also assign and dispone to and in favour of my said daughter, &c. all my goods, gear, debts, sums of money, corns, cattle, insight plenishing, and all other effects which shall belong to me at the time of my decease, of what nature or kind soever they are, dispensing with the generality thereof, and admitting the same to be as effectual as every particular herein were enumerated and described; whereanent, and with all objections that may be moved in the contrary, I hereby dispense for ever, &c.'

The settlement farther contained the following clauses: 'And I hereby assign, transmit, and make over to myself and to the said Elizabeth Ross, my daughter, and her foresaids, &c. all and singular charters, dispositions, retours, precepts, and instruments of sasine, procuratories, and instruments of resignation, and all other writs, rights, titles, and securities whatsoever, made and granted to me, &c. of or concerning the lands and others foresaid, and of and concerning my goods, gear, and debts, and other moveables aforesaid, whole tenor, contents, and effect thereof, with all that has followed or may follow thereupon.'

Alexander Ross died in 1753; and at the time of his death, besides a landed property, was possessed of two heritable bonds and of several adjudications, the legals of which were expired; and upon one of which possession had been obtained.

As the conveyance in favour of Elizabeth Ross was in general terms, she, in 1755, brought an action against her brother, that he should make up titles to the heritable debts which had belonged to the defunct, and convey the same to her. She accordingly obtained decret to that effect; and thereafter obtained a decret of adjudication in implement of the above disposition.

David Ross, upon his coming to this country, made inquiry into his father's settlements; and having expedie a general service as his heir, brought a reduction against Elizabeth his sister and her husband of the settlement 1748, and of the decret of constitution and adjudication in implement thereof, upon the ground, that as the deed did not specify the heritable debts secured by adjudication or otherwise, so the general words therein, conveying goods and effects, could not extend to or comprehend those heritable debts, which must therefore belong to the heir.

No 15.

A general clause of 'goods, gear, debts, &c.' and all other effects of what nature or kind soever, in a disposition, held insufficient to convey heritable bonds and adjudications.

No 15.

THE LORD ORDINARY, on the 23d December 1769, pronounced the following interlocutor: 'Having considered the disposition and procuratory of resignation executed by the deceased Alexander Ross, father to the pursuer and defender, of 2d May 1748, in favour of the defender, Finds that nothing is thereby conveyed to her except the lands of Little Daan and Mayblairie, and the moveable goods which belonged to the said Alexander Ross; and that there are no general clauses in said deed sufficient for conveying, in favour of said defender, any other heritable subjects which belonged to him; and therefore sustains the reasons of reduction of the decret of constitution, and of the decret of adjudication, obtained at the instance of the defender against the pursuer in implement of the said deed, so far as it adjudges the adjudications and heritable bonds which belonged to the said Alexander Ross; and reduces the same accordingly.'

In a reclaiming petition, Elizabeth Ross *pleaded*,

Heritable subjects, as well as moveables, were capable of being conveyed by a general disposition; and the words made use of in this deed, and the arrangement in which they were placed, were sufficient to convey the heritable subjects in question, alongst with the rest of the estate. The only subject specified in the deed was heritable, viz. the lands of Little Daan and Mayblairie. This was the leading subject; and then came a general clause of 'all goods, gear, debts, and sums of money.' Had the deed even stopped here, it might, on good grounds, have been argued, that heritable debts were understood to be comprehended under the words 'debts and sums of money;' for as a land estate had been conveyed, it could not be alleged that moveables only were in the testator's contemplation.

But the deed did not stop here, but added, 'All other effects which shall be long to me at the time of my decease, of what nature or kind soever.' These words applied to all that went before, to goods, debts, sums of money, and all other effects; and must therefore mean both those that were heritable and those that were moveable. The testator specified no particular, but used the most general and comprehensive words that could be devised; and as, in all questions concerning the legal import of such general words, the rule of decision must be the intention of the maker of the deed; so, in the present instance, it was clear that the testator meant the deed should comprehend debts; and of course, by the addition thereto, debts of every kind were included.

A farther argument was held upon the clause of the deed assigning the writs and evidents; as, besides those relating to the landed estate, it comprehended all other writings, &c. of or concerning the lands and others foresaid.

The pursuer *answered*, That Alexander Ross's disposition in 1748 fell to be considered as comprehending two separate and distinct deeds; by the first he conveyed his lands, and these only; and by the second, his goods, gear, and all other effects; which could only comprehend his moveable estate. The words of the deed could admit of no other construction. Nothing heritable be-

sides the lands was intended in the first clause; and it was impossible in the other to discover a single expression that could, in fair construction, imply an heritable subject the most trifling, far less a variety of heritable bonds and adjudications, with expired legals. The leading words in the clause, goods, gear, &c. could import nothing more than moveables; and although it contained the general phrase, 'all other effects,' yet as that phrase was subjoined to a variety of particulars, all respecting executry, it was impossible to construe that general expression as meant to comprehend subjects of a different and more important nature.

The clause assigning the writs and evidents confirmed this construction. It also consisted of two similar branches; the first respecting the land; the second in the following words: 'And of and concerning my goods, gear, debts, and other moveables aforesaid;' thereby explicitly referring to the disposition to the moveables, and pointing out the testator's understanding of the general phrase 'effects' in the disposition.

It was an established principal of law, that, in the construction of such general words, whether in assignations or discharges, they never were extended to particulars of a distinct species from those occurring in the same clause; and in support of this proposition, and of the argument applicable to the precise nature of the question, the following authorities were referred to; Stair, b. 1. tit. 18. § 2. b. 4. t. 40. § 34. Erskine, b. 3. t. 4. § 9. Bankton, b. 1. t. 24. § 2. Durie, 1636, Lawson *contra* Ardkinlas, No 2. p. 5023. 19th November 1680, Dalgarno, No 10. p. 5030. Fountainhall, 29th June 1705, Talbot *contra* Guidet, No 6. p. 5027. 1736, Mochrie *contra* Lind, No 13. p. 5018. 19th February 1745, Kerr *contra* Young, No 29. p. 2274. Fac. Col. 26th January 1770, the Heirs *contra* the Trustees of Dr Brown, *voce* HERITABLE AND MOVEABLE.

In giving judgment, their Lordships admitted that it appeared to have been the intention of the testator to disinherit the heir; but as exheredation was not a *nomen juris* in the law of Scotland, it could only be effected by a proper conveyance of the subject to another. This had not been done; the words were insufficient to convey the heritable debts; *quod potuit non fecit*; so that the intention could not be regarded. It was also *observed*, that it was a general rule in law, that when a man in a discharge or disposition conveyed particulars, and subjoined a general clause, such clause imported only subjects of the same nature with those specially mentioned. In this case, the particulars specially conveyed were moveables; and hence the subjoined words 'all other effects,' &c. could include subjects only of the same kind.

The cause was brought twice before the COURT upon petition and answers; but the Lord Ordinary's interlocutor was unanimously adhered to.

For David Ross, Lockhart, Sinclair.

Lord Ordinary, Kennet.

For Elizabeth Ross, Rae, J. Swinton, junior.

Clerk, Ross.

R. H.

Fol. Dic. v. 3. p. 250. Fac. Col. No 28. p. 71.

28 K 2

No 15.

*** This cause was appealed.

THE HOUSE OF LORDS, 11th April 1771, 'ORDERED AND ADJUDGED, that the appeal be dismissed, and that the interlocutors therein complained of be, and are hereby affirmed.

1789. February 13.

GEORGE WADDELL *against* ROBERT COLT.

No 16.

Disposition of all sums of money due by bond, does not comprehend those due by heritable bonds.

THE PROPRIETOR of the estate of Garturk executed a settlement in favour of Mr Colt, by which he conveyed to him that estate, and assigned to him 'the hail sums of money he should have belonging or addebted resting and owing to him by bonds, &c. with the said bonds themselves,' &c.

Mr Waddell, the heir-at-law, raised an action declaratory of his having, in that character, right to certain heritable bonds that belonged to the deceased, and to all other debts heritably secured, which were due to him at the time of his death; and,

Pleaded; When any debt is heritably secured, it is understood to have become secondary to the real or heritable right of lands thereby acquired, which last is therefore the immediate and proper object of the law. Hence it no longer comes under a description belonging to moveable subjects. Thus an assignation, *mortis causa*, to 'all debts and sums of money,' was found not to comprehend an heritable bond; Mochrie *contra* Lind, No 13. p. 5018. And in the case of David Ross *contra* Elizabeth Ross, No 15. p. 5019, the COURT, by a judgment affirmed on appeal, determined, that a disposition 'of all debts and sums of money' was not effectual to convey heritable debts.

Answered; As no argument can be safely drawn from one *quæstio voluntatis* to another, unless when the respective circumstances accurately correspond, it seems improper to consider the cases that have been quoted, as precedents with respect to the present. Independently of precedent, the express conveyance in question, 'of the whole sums of money due by bonds,' would seem inconsistent with the supposed exception 'of sums of money due by heritable bonds.'

THE LORD ORDINARY, 'in respect of the practice of the Court, and particularly in the case of David Ross, repelled the defences.'

On advising a reclaiming petition and answers, the COURT considering, as the Lord Ordinary had done, the decision in the case of Ross to have established a rule, Adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Swinton*. Act. *M. Ross*. Alt. *Blair*. Clerk, *Sir J. Colquhoun*.
S. *Fol. Dic. v. 3. p. 250. Fac. Col. No 61. p. 111.*

General assignation derogates not from a prior special destination. See PRESUMPTION.—See CLAUSE.—See APPENDIX.