

No. 48. sed in the deed, otherwise the right will be understood to go to heirs, whether mentioned or not: That this cannot be considered as a *quæstio voluntatis*, the assignation to the annuity being absolute and unlimited; and that, in all questions where persons have been called to a succession, without heirs being mentioned, where a competition has ensued between the heirs of the person called to the succession, and the next substitute, the heirs have constantly been preferred, though not particularly mentioned.

“ Upon report of Lord Coalston, the Lords found, That the annuity in question returned to Mrs. M'Leod, and did not descend to her deceased husband's heirs.”

But, on a reclaiming petition for Mr. Nicholson, with answers for Mrs. M'Leod, the Lords altered this interlocutor, and found, “ That the assignation in the contract of marriage between the pursuer and the deceased Donald Nicholson, did carry not only the annuity which fell due during the marriage, but also the annuities which were to fall due thereafter during the life of the pursuer.”

“ And to this last interlocutor the Court adhered, upon advising a reclaiming petition for Mrs. M'Leod, with answers for Mr. Nicholson.”

For Mrs. M'Leod, *Dav. Rae*, and *B. W. M'Leod*.

For Mr. Nicholson, *Ilay Campbell*, and *Al. Elphinston*.

Fol. Dic. v. 4. p. 308. Fac. Coll. No. 78. p. 138.

1770. *March 2.*

Ross against Ross.

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Alexander Ross, solicitor in London, was proprietor of the lands of Little Daan and Muyblairie, in the shire of Ross, together with several heritable bonds on lands in Scotland, to the amount of some thousand pounds, besides personal property. He died in 1753, leaving a holograph deed of settlement, by which, on the narrative of love and favour to Elizabeth Ross his daughter, and in consideration of her dutiful behaviour and virtuous conduct in life, he resigns his lands of Little Daan and Muyblairie in favour of himself, and failing him, the said Elizabeth Ross and the heirs of her body; whom failing, his other nearest lawful heirs or assigns whatsoever; providing, “ that David Ross, my son, is not hereby intended to be called to the succession of the said lands, under the description of heir whatsoever, but is hereby for ever excluded;” and thereafter he declares, “ That the said Elizabeth Ross shall be bound to pay to the said David Ross the sum of one shilling, on the first day of every month of May yearly, that being his birth-day, thereby to put him in mind of the misfortune he had to be born.” Then follows a clause, assigning and disposing to his daughter and her aforesaid, all goods, gear, debts, sums of money, corns, cattle, insight plenishing, and other effects, of what nature or kind soever, belonging to him at the time of his death;” and assigning to her all charters, dispositions, writings, rights, titles, and securi-

ties whatsoever of and concerning the lands and others foresaid. In consequence of this settlement, Elizabeth and her husband, Hugh Ross, took possession of the whole property, heritable and moveable, of her father, after charging her brother David to enter heir and convey, and obtaining decret of constitution and adjudication against him to that effect. In 1769, David Ross, then in Scotland, brought an action in the Court of Session for setting aside this decret obtained against him in absence, on the ground, that the settlement of his father, though effectual to convey to his sister the personal estate and the lands of Little Daan and Muyblairie, did not convey the other heritable subjects, viz. the bonds above mentioned, which must of consequence fall to him as heir at law.

Urged in defence, That this was purely a question of intention; that the testator's will to exclude the pursuer was evident in every part of the deed; and, moreover, that the bonds claimed were conveyed under the general words of "all effects, of what nature or kind so-ever."

Replied, That the law of Scotland does not authorise the disinheriting the heir by mere words of exclusion. It can only be done by express conveyance of the inheritance to another, which was not done with respect to the heritable bonds in question. Neither can these fall under the general clause of all effects whatsoever; for this clause plainly related only to the personal estate, and followed the description of goods, gear, debts, &c. whereas, had the testator meant to convey those heritable subjects, it would have been done along with the other heritage, and in express words.

The Lords found, That nothing was conveyed to Elizabeth Ross except the lands of Little Daan and Muyblairie, and the moveable effects of the deceased; and that the general clause is not sufficient to convey the bonds in question; they therefore sustained the reasons of reduction.

This judgment was affirmed on appeal.

Fol. Dic. v. 4. p. 306. Fac. Coll.

* * This case is No. 15. p. 5019. *voce* GENERAL ASSIGNATION.

1770. *November 28.*

GABRIEL CAMPBELL *against* ELIZABETH and ISABEL CAMPBELLS, Daughters of John Campbell of New Campbleton, deceased, and JOHN BROWN, Tailor in Glasgow.

In the year 1758, John Campbell executed a disposition and settlement of his heritable and moveable estate, which bears, "For the love and favour which I have and bear to John Campbell, tailor in New York, my only son, and to my other children after mentioned, &c. wit ye me to have given, granted, and disposed, to and in special favour of the said John Campbell, his heirs-male and assignees whatsoever, whom failing, to my other nearest heirs, heritably and irredeemably, all and hail these my dwelling-house, closes, gardens, orchards, &c. of New Campbelton." The deed contained certain provisions and conditions; the

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The heirs of the disponent, though he predeceased the disponent, preferred in the succession to the disponent's other nearest heirs.