

No. 47. “ The Lords preferred Sir John Sinclair, and found that he is entitled to be served heir of provision, under the settlement of the deceased Alexander, Earl of Caithness, and repelled the objections to his service.”

For John Sinclair, *Lockhart, Macqueen, H. Dundas.*

Alt. *Burnet, Rae, Ja. Ferguson.* Clerk, *Ross.*

G. F.

Fol. Dic. v. 4. p. 308. Fac. Coll. No. 37. p. 260.

* * This case having been appealed, the House of Lords, 6th April, 1767, ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1768. July 1.

MRS. FLORENCE M'LEOD *against* MR. JOHN NICHOLSON, and the CHILDREN of the deceased DONALD NICHOLSON.

No. 48.

A right assigned by a wife in her marriage-contract, transmits to the husband's heirs, though heirs are not mentioned.

Donald Nicholson, in 1757, married Mrs. Florence M'Leod, relict of Archibald M'Queen, out of whose subjects she was entitled to a jointure or life-rent-annuity of 150 merks yearly.

After Mrs. M'Leod's marriage with Mr. Nicholson, a post-nuptial contract was entered into, proceeding on the narrative of their being already married; that no contract had been extended; that Mrs. M'Leod was not sufficiently secured in a jointure, nor the children to be procreated of the marriage provided, or a tocher given to Mr. Nicholson, according as was communioned upon between the parties, before and after marriage;—therefore the said Donald Nicholson binds and obliges himself, his heirs, &c. “ to secure the said Florence M'Leod his spouse, after his decease, in life-rent, during all the days of her lifetime, in all and whole the interest of 2000 merks Scots.” If no children of the marriage, the wife is to have the interest of 3000 merks; and she was farther provided to 700 merks, in compensation of her terce of moveables, the half of the household-furniture, and all the sheep and goats that should pertain to them at the time of the husband's decease.

And, on the other part, the said Florence M'Leod “ assigns and disposes to, and in favour of the said Donald Nicholson, the interest of 3000 merks money, provided to her in life-rent, by the deceased Archibald M'Queen of Tott, by their contract of marriage, bearing date the day of years, with the contract itself, and all that has followed or may follow thereupon; surrogating and substituting the said Donald Nicholson in her full right and place of the same, which assignation she binds and obliges herself to warrant from any fact or deed done by her, or foresaids, prejudicial hereunto.”

Donald Nicholson died in October 1761, leaving Mrs. Florence M'Leod his widow, and a family of children under age. John Nicholson, brother to Donald, as pro-tutor for the children, took upon him the management of their affairs;

and, soon after the husband's death, the widow received the furniture, and sheep and goats, to which she was entitled, and she was allowed for some years to uplift the 150 merks annuity, settled on her by her former husband, with a view of compensating the 700 merks, to which she was entitled by her contract with Donald Nicholson, in lieu of her terce of moveables.

After matters had remained in this situation for some years, Mrs. M'Leod insisted in an action for payment of the 700 merks, due to her in consequence of her contract of marriage with Mr. Nicholson, and likewise of 100 merks annuity, settled on her by said contract; and she farther contended, that she was still entitled to uplift the annuity of 150 merks provided to her by her first husband, which she pleaded, was, by her contract with Mr. Nicholson, conveyed only to him personally, but not to his heirs or assignees.

It was, on the other hand, contended for the children of Donald Nicholson, That the annuity of 150 merks, settled upon Mrs. M'Leod by her first husband, was effectually conveyed, by the contract, to Donald Nicholson her husband, and must go to his heirs, though not expressly mentioned; and as to the other claim of 100 merks annuity, settled by Donald Nicholson on Mrs. M'Leod, in the event of her surviving him, it was agreed it should be paid her.

The question turned entirely upon the import of the assignation by Mrs. M'Leod, in her contract of marriage with Donald Nicholson, and was taken to report by the Lord Coalston Ordinary.

Pleaded for Mrs. M'Leod: The conveyance of her former jointure to Mr. Nicholson, in the post-nuptial contract, was personal to him, without being granted to his heirs and assignees; therefore the contract could only give him right to the annuity, during the subsistence of the marriage, without transmitting it to his heirs; and, upon his death, the right again reverted back to Mrs. M'Leod: That when it happens that a right is granted or conveyed to a person simply, without mention of heirs and assignees, it becomes a mere *quæstio voluntatis*, whether the right shall be held as personal to the acquirer for his lifetime, or shall transmit to his heirs; and that it was only from the nature of the subject, and presumed will of the parties, that rights could be transmitted to heirs, where heirs were not expressly mentioned; as, in such cases, heirs could have no claim under the words of the deed: That the subject here conveyed was not a right of property, being no more than an annuity in favours of the widow, personal to her, and granted for the sole purpose of affording her aliment and subsistence, after her first husband's decease; and in support of this plea, sundry authorities were referred to. L. 25. § 1. D. Lib. 2. Tit. 14.; L. 7. § 8. *eod.* Stair, Lib. 3. Tit. 5. § 5. Lyon *contra* Stewart, No. 5. p. 10321. *voce* PERSONAL AND TRANSMISSIBLE.

Answered for Mr. Nicholson: That, independent of any deed, Donald Nicholson, while he lived, was *jure mariti* entitled to uplift the annuity settled on his wife by her former husband; so that, unless the assignation in the contract carried this annuity to Mr. Nicholson's heirs, it could carry nothing: That it is a general maxim, *qui providet sibi, providet hæredibus*: If a right is meant only to be temporary, and limited to the lifetime of the disponent, such limitation must be expres-

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.

No. 49.

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-