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 decreet 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 decreet 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. No. 49.

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.

No. 50.
The heirs of the disponee, though he predeceased the disponer, preferred in the succession to the disponer's other nearest heirs.

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 disponed, 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 haill these my dwelling-house, closes, gardens, orchards, &c. of New Campbelton." The deed contained certain provisions and conditions; the

No. 50. granter's life-rent and a power to alter were reserved; and it also contained procuratory and precept.

John Campbell, the granter, died in 1765; and as it was uncertain whether John, the disponee, was alive, a factor was appointed to manage the subject: Thereafter, John Campbell's daughters, being informed that their brother was dead, made up titles, as heirs-portioners to their deceased father, expede their service, and got infeft. Some time after this, Gabriel Campbell, the nephew of John Campbell, senior, by a brother, appeared for his interest; and having been served heir-male in general to John Campbell, junior, and got infeft, brought an action for reducing and setting aside the titles made up by the daughters as heirs-portioners to their father. After a good deal of procedure as to the title, and the daughters having repeated a reduction of Gabriel Campbell's titles, the Lord Ordinary pronounced this interlocutor: "Sustains the title of Gabriel Campbell, pursuer, as sufficient to entitle him to carry on this action of reduction; sustains the reasons of reduction to the defenders' service, precept of *clare constat*, and sasine, so far as the same affect the subjects conveyed by the disposition of John Campbell, senior, libelled on; assoilzie the said Gabriel Campbell from the process of reduction raised at the defenders' instance, and repeated in this process."

In a reclaiming petition, the defenders pleaded:

1mo, There could be no doubt it had never been the intention of John Campbell, the maker of the settlement, that, failing his son John, his own daughters and grandchildren, who had in no shape offended him, should be passed over, and that the whole of his estate and effects should go to the pursuer, with whom he was little connected, and hardly knew. This was clear, from the circumstances in which John Campbell stood at the time he executed this deed: The mistake had been owing to the ignorance of the country procurator, who perhaps imagined that the words "heir-male" conveyed no broader right than the words "issue-male;" and, if permitted, they would prove that their father's intention had actually been as they had stated it.

2do, As John Campbell, the son, had predeceased the father, he never had any right to the subject in question. In all substitutions, if the institute accept not, the whole must fall to the ground, there being no way for a substitute to take up such right but by service to the institute; and hence, if no right ever vested in the institute, nothing could be carried by the substitute. The deed founded on was not an absolute conveyance of any particular subject, but a general conveyance, with an absolute power to alter, &c.; so that, during the life of the granter, no proper right could vest in John Campbell, the disponee; and as the pursuer claimed only as heir-male to John Campbell, he was contending for a right which never existed; Irvine *contra* Skene, No. 19. p. 6350. *voce* IMPLIED CONDITION, Farquharsons *contra* Farquharson, No. 43. p. 2290. *voce* CLAUSE. It did not appear how the pursuer could ever make a title to the subject in dispute; he could not be served heir to John Campbell, senior, in any shape; and when he was served heir to John Campbell, junior, which was all that, upon the construc-

tion of the deed, he could demand, he was served heir to one who had no right in him, and of course such service could carry nothing. No. 50.

Answered for the pursuer:

1*mo*, The words in the deed 1758 were as clear and express as any that were known in law; and though a destination to "heirs whatsoever" might have been made a question what description of heirs were thereby meant, this was the first instance where any party had been so bold as to dispute the import of a settlement to "heirs-male." These words were strictly *technical*, and had ever been allowed the same sense and meaning; Tenant *contra* Tenant, No. 26. p. 14897. M'Lauchlane *contra* Campbell, No. 54. p. 2312. *voce* CLAUSE. There was no appearance whatever of a contrary intention upon the part of John Campbell from what the words import; even the strongest indication of intention on the other side would not avail or enable the Court to make a settlement for the granter, which he himself had not made; and a proof by extraneous evidence of intention was totally inadmissible even to *explain* the term "heirs whatsoever;" *multo magis* when, in the present instance, instead of explaining, it was proposed to alter the will altogether.

2*do*, Upon the supposition that John Campbell, junior, predeceased his father, but which was not proved to be the fact, it was nevertheless a mistake to say, that he had no right vested in him. Conveyances of heritable subjects must necessarily be in the form of deeds *inter vivos;* and though, by means of a reserved life-rent and power to alter, their substantial effect was postponed till the death of the granter, yet, from the date, there was a right vested in the grantee. In this case, therefore, there was a right of fee vested in John Campbell, the son, even during his father's life, which was never taken out of him by any deed of alteration. The pursuer's service as heir-male was sufficient to carry that fee; or, at any rate, as it was a general one, it was enough that it thereby established the fact, that John Campbell, junior, was dead, without issue-male, and that the pursuer was now his heir-male; so that, upon that evidence, he became entitled to take the estate as the disponee of John Campbell, senior, rather than as the successor of his son; Sinclair *contra* Earl and Countess of Fife, No. 47. p. 14944.

Though the civil law held a donation *mortis causa* to become void through the predecease of the donee, yet that was only where the donation was purely personal to the donee, and not extended to his heir; Voet. Lib. 39. Tit. 6. § 7. On the other hand, there were many authorities which established, that where a disposition, even of moveables, and *a fortiori* of heritage, was made *mortis causa*, but extended to the heirs of the disponee, it did not fall by the disponee's predeceasing the granter, but was good and available to his heirs; Lord Bankton, v. 1. p. 231. § 18.; Galloways, No. 20. p. 6352. *voce* IMPLIED CONDITION; Inglis *contra* Miller, No. 33. p. 8084. *voce* LEGACY. The same rule must, with greater force, apply to the present instance, where there had been a formal disposition of lands and

No. 50. heritable subjects in favour of a man and his heir; so that the defender's argument upon the alleged nature of substitutions was erroneous, and did not touch the question.

The Lords adhered.

Lord Ordinary, *Monboddo.* Clerk, *Ross.*

For Gabriel Campbell, *Rae.*
For Elizabeth Campbell, *Elphinston, Ilay Campbell.*

Fac. Coll. No. 52. p. 147.

1774. *June* 22.

JOHN MURRAY, Sailor in Alloa, *against* ALEXANDER FLINT.

No. 51.
Import of the word *heirs* substituted to the children *nascituri* in a settlement in a marriage-contract, upon a competition for the succession, on the failure of such children, between the person claiming as nearest heir to them, and the father's heir of line.

John Murray, merchant in Alloa, was twice married; first, to Jean Finny, by whom he had two sons, John and James; and, secondly, to Margaret Lindsay.

John Murray was proprietor of, and stood infeft in, certain tenements in Alloa; and, by contract of marriage, entered into upon the 6th March, 1733, between him and Margaret Lindsay, his second wife, disponed " to her, her heirs, executors, or assignees, in life-rent, and to the child or children, one or more, of the intended marriage, equally amongst them, their heirs or assignees, in fee or property, the half of these tenements, reserving to himself the life-rent thereof; and providing, that in case there should be no child or children of that marriage existing at the death of him, the said John Murray, then the subjects so provided should return to, and be at the disposal of, his nearest and lawful heirs and assignees; and the said John Murray bound himself and his above written, to grant a valid disposition and assignation of the above subject, in the terms above specified, to the said Margaret Lindsay, and the child or children of the said marriage.

Of this marriage there were two sons, viz. Charles, the eldest, who predeceased his father, and Peter, who survived him, and died only about six years ago, but without making up titles in his person to any of the subjects provided by the foresaid marriage-contract, and without issue.

John, the eldest son of the first marriage, died, leaving a daughter, Mary, who intermarried with Alexander Flint.

As no infeftment had followed upon the marriage-contract, so the foresaid subjects did, by the last investiture thereof, stand in the person of John Murray, devised to him and his heirs whatsoever; and as Mary Murray, his grand-daughter by his eldest son of the first marriage, was heir under that investiture, so she made up titles thereto, as heir to her grandfather, by a precept of *clare* and infeftment; and the feudal right of the subjects being thereby vested in her person, she, by settlement, executed with consent of her husband, for love and favour to him, and in consideration of his having paid a debt affecting the heritable sub-