heritable in her person, as it was in his own; and President Newton, 1st March 1683, Wisheart *contra* Ballantyne, Sec. 24. *h. t.* found a charge of horning made a bond secluding executors moveable; and if so, then an assignation will do it *multo magis*, especially where she was a fide-commissary and trustee for the behoof of her daughter; and therefore her confirmation, as executrix to her mother, did sufficiently convey the right of this bond, without putting her to the expense of serving heir.——THE LORDS having read the assignation, found she was stated in the fee and property of the sums, and had the power of uplifting and disposing; and the clause in favour of the daughter was only a personal obligement upon her, and that the assignation did not alter its former destination of being heritable; and therefore she behoved to serve heir to her mother, ere she could have a right to uplift the money, and validly discharge Carnwath. No 66.

*Fol. Dic. v.* 1. *p.* 369. *Fountainhall, v.* 2. *p.* 423.

---

1747. *November* 17.

Mrs ANN KENNEDY, and BLAIR her Husband *against* Sir THOMAS KENNEDY.

No 67.
Bonds secluding executors, assigned to an eldest son, without repeating the seclusion, fall to the heir of the son.

SIR JOHN KENNEDY of Culzean had issue at his death, three sons and two daughters. To each of his two younger sons, Thomas and David, he granted bond of provision for L. 1000 Sterling; and as thereby each was substitute to the other, so it was in Thomas's bond also provided, 'That in case, by the death 'of John, his eldest son, Thomas should succeed to his lands and estate,' and which event has happened, 'Thomas's L. 1000 should fall and accresce to 'David, and which Thomas should be obliged to pay to him, although part 'thereof should, before said event, have been uplifted by himself.'

Of the same date with these bonds of provision, 5th June 1742, Sir John executed a testament, whereby he nominated and appointed John, his eldest son, his executor and universal legatary, and left certain legacies; and, on the 15th of said month, 'He for the love and favour he bore to the said John, his 'eldest son, granted assignation to him and his heirs (these were the terms of 'the assignation) of several bonds,' whereof seven were conceived to him, his heirs and assignees, secluding executors; and this assignation bore to be granted with the burden of the bonds of provision made or to be made by him in favour of his younger children.

Upon Sir John's death, John, his eldest son, served heir to him in his landestate; and in about two year's after his father's death, died unmarried and intestate, after he had uplifted two of the bonds secluding executors in virtue of the assignation: And five of them remaining unuplifted, a question arose between Thomas, now Sir Thomas, and his brother and sisters, whether the same

No 67. fell under Sir John the younger's executry, or if they belonged to Sir Thomas as his heir.

This question coming before the Court by a multiple-poinding pursued in name of the debtors, the LORDS, 'found Sir Thomas the heir preferable.'

Though the Lords were unanimous in this judgment, they were of very different opinions upon the point of law. Some were of opinion, that as, before the year 1661, all bonds bearing annualrent were heritable, so when, by the act 1661, bonds, though bearing annualrent, were made moveable, there are two exceptions, if either they bear an obligation to infeft, or a clause secluding executors, in either of which cases the sums are declared to be heritable, and to pertain to the heir: Therefore, where a bond excludes executors, the sum in that bond is to all effects heritable, as all bonds bearing annualrent were before the 1661, and remains so notwithstanding an assignation thereof made by the creditor to the assignee and his heirs, without adding his executors; and that it is no objection to this, that the cedent cannot settle the succession of the assignee, for it is the assignee, that by taking the assignation in these terms, settles his own succession.

Others thought this a wrong conception of that exception in the statute, of bonds excluding executors; for that, by the statute, all bonds bearing annualrent are declared to be of their nature moveable, unless they bear an obligation to infeft. And that the other exception, in the case where the bonds seclude executors, does not leave such bonds to be heritable *ex sua natura*, but only gives force to that clause, which has obtained its operation how soon the bond is taken out of the person of the first creditor, and that whether by assignation made by him, be it to a stranger, or to his own heir, or by the general service of his heir; for that, even in that case, the clause has had its effect by the descent to the first heir.

Nevertheless, they thought the heir preferable in this case to the executors, in respect of the special circumstances of the case, where all the younger children were provided for, and the reason the same as at first, for continuing the money with the heir of the family, which therefore was presumed to have been the intention of Sir John the elder, by the assignation to his heir; especially as by the settlements made by him, the very event which has happened, of John the eldest son's dying, and Thomas the second succeeding, appears to have been in view and provided for, by his obliging Thomas, in that event, to pay the further sum of L. 1000 Sterling, which was his own portion, to David the third son, and which Sir John the father would not have obliged him to do, had he understood that the bonds secluding executors, which were so considerable a part of the fund out of which the heir was enabled to pay the provisions of the other children, were, upon his eldest son's death, to descend to the younger children, and among the rest to David, to whose portion so considerable an addition was made in that event.

No 67.

A third opinion was given by others, who thought, that had there been no assignation granted, and that Sir John the second had made up his title to the bonds by general service, they must upon his death have descended to his heir; and observed, that so much was the Court of this opinion, in the case observed by Home in his Select Decisions, M'Kay, and Elspeth his wife, *contra* Robertson, No 47. p. 3224. That a confirmation as executor-creditor to the heir, who had made up his titles by general service to a bond secluding executors, was found to be an inept title, *cum hæres hæredis mei sit hæres meus:* But they leaned to the opinion, that where an assignation is made to a stranger and his heirs, though not adding his executors, it would vacate the clause, secluding executors; but that where such assignation is made to the person who was heir, and who, in case no assignation had been made, must have taken the bond by service, it was a *præceptio hæreditatis*, and the bond was descendible from the assignee in the same way as it would have been, had he taken it by service.

*Fol. Dic. v.* 3. *p.* 267. *Kilkerran,* (HERITABLE and MOVEABLE.) *No* 3. *p.* 243.

*** D. Falconer reports the same case:

1747. *December* 3.

SIR JOHN KENNEDY of Culzean assigned to John his eldest son, and his heirs, a common moveable bond, together with several others, granted to himself and heirs, secluding executors, the stile of one whereof was, 'secluding the said Sir John his executors.'

Sir John younger succeeded his father in his estate, and uplifted the moveables, and part of the bonds secluding executors, and dying intestate, a competition arose for the bonds yet unpaid between Sir Thomas his brother, and Anne his sister, married to John Blair of Dunskey.

*Pleaded* for Mrs Blair; That, by the act 1661, cap. 32. all obligations bearing annualrent were moveable, unless they contained an obligation to infeft, or were conceived in favour of heirs and assignees, secluding executors; and therefore it could not be denied these bonds would belong to the heir of the original creditor, as his heirs were secluded, but as they were assigned to Sir John younger, without secluding his executors, they fell not under the exception, and consequently behoved to be governed by the rule: The clause of seclusion was only a substitution of the heir for the executor, for the bonds were still moveable, and they would not fall to the heir of that heir, as the provision had taken effect, but to his executor; which particularly behoved to obtain with regard to one of the present bonds, where the seclusion was of the executors of the said Sir John; and as one of the bonds assigned was moveable, and the assignation bore to heirs, which the executor was in moveables, the expression could not in the same clause bear different significations.

If the executor of the first heir were preferable, much more ought the executor of an assignee; for, in that case, there was a change of the destination, supposing otherwise it would have continued.

No 67.

*Pleaded* for Sir Thomas; That, before the statute 1661, bonds bearing interest were heritable: That an alteration was made by that statute, with an exception of bonds secluding executors, which remained as before heritable, and consequently descendible from heir to heir, although assigned; unless perhaps when executors were mentioned in the assignation, that might be construed an alteration in the destination: That there was no difference betwixt the bond, where the expression was, 'The executors of the said Sir John,' for by this the executors of his heir were sufficiently excluded, and the other bonds; but whatever was the case in general, here were heritable bonds assigned by a father to his eldest son and his heirs, which was only *præceptio hæreditatis;* and it was no absurdity, that the moveable bond in the same deed should be subject to a different destination; for, in a nicer case, between the Duke of Hamilton and the Earl of Selkirk, *voce* HERITAGE and CONQEST, where bonds secured by infeftment were found to go to the heir of conquest, yet a bond of corroboration being taken, accumulating the annualrents, secluding executors, it was found the accumulated annualrents went to the heirs of line; and thus the bond of corroboration was split.

THE LORDS, 18th November, 'preferred Sir Thomas Kennedy.'

They refused a petition, and adhered.

For Mrs Blair, *A. Macdouall & Lockhart.* Alt. *Ferguson.* Clerk, *Forbes.*

*D. Falconer, v.* 1. *No* 215. *p.* 296.

## SECT. XII.

### Effect of the death of Debtor or Creditor, before the term of payment, in cases of Bonds heritable by a clause of annualrent.

1624. *January* 8. BAIRNS of COLONEL HENDERSON *against* MURRAY.

No 68.
The creditor in a bond dying before the term of payment, the annualrent was found to belong to the heir.

IN an action betwixt the bairns of umquhile Colonel Henderson and James Murray, a bond being made for payment of a sum of money, with yearly annualrent therefor, after an heritable manner, to the Colonel, and he dying before the first term appointed for payment of the annualrent; for the bond was made, and the money lent out at Whitsunday 1622, and the first term's payment of the annualrent was by the bond appointed to be at Martinmas thereafter, the same year 1622, for the profit of the money of the term and space decurring betwixt Whitsunday, at which time the money was lent, and the said term of Martinmas subsequent, before the which term of Martinmas the Colonel died, to wit, in the month of August preceding: it being questioned