

## S E C T. XI.

## Assignations of Bonds secluding Executors.

## No 64.

A bond secluding executors, assigned in favour of one, and his heirs, executors, or assignees, is thereby rendered moveable.

1680. *June 17.* MR JOHN SANDILANDS *against* AGNES SANDILANDS.

A COMPETITION betwixt the Heir and Executors of Mr Robert Sandilands for 2000 merks. The heir claimed it, because it was provided to Robert himself, and failing him to his daughter Rachel, and her heirs and assignees, excluding executors, and that she had renounced it in her contract of marriage. *Alleged*, Her renunciation made it moveable, because she had renounced it in favour of her father, his heirs, executors, and assignees. *Answered*, This ought no more to alter the nature of the bond, (which was originally heritable,) than the assignation of an heritable bond altered the same in the person of the assignee. THE LORDS preferred the executor.

*Fol. Dic. v. 1. p. 369. Fountainball, MS.*

## No 65.

A bond secluding executors being assigned by the creditor to his wife, with his other effects, without secluding her executors, was found heritable in the assignee's person.

1708. *January 28.* GEORGE LOCKHART *against* ROBERT MUIRHEAD.

GEORGE LOCKHART of Carnwath grants bond to the deceased Robert Muirhead for L. 9000 Scots, the bond expressly secludes his executors, and so is heritable. Robert assigns this and his other effects to Martha Lindsay, his wife, with this express condition and provision, that she pay to Anne Muirhead, their only child, the sum of 7000 merks. The father and mother being both dead, Anne Muirhead, the daughter, serves heir to her father, and confirms executor to her mother, and thereon charges Carnwath for payment. He suspends on these grounds, that the bond being heritable in the person of the first creditor Robert Muirhead, by the 32d act 1661, his assignation of it to the wife, with the burden expressed in favour of their daughter, could not alter the nature of the right, but it still remained heritable; and so her confirming herself executrix to her mother cannot convey the right so as she can sufficiently uplift and discharge this heritable debt, and he is not *in tuto* to pay it; and it has been oft decided, that even a charge of horning, which will make a sum due by infestment moveable, will not render a bond secluding assignees moveable, because the design of the creditor is thereby not to take it from his heir, and give it to his executor; 13th July 1676, Christie *contra* Christie, Sec. 24. *b. t.*; and 30th December 1690, Heirs and Executors of Bonar *contra* Gray\*. — *Answered*, By the husband's disposition to the wife, her executors are not excluded, which he would have done if he had minded that it should be

\* Examine General List of Names.

heritable in her person, as it was in his own; and President Newton, 1st March 1683, Wisheart *contra* Ballantyne, Sec. 24. *b. 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 obligation 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.

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

1747. November 17.

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

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 land-estate; 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 unlifted, a question arose between Thomas, now Sir Thomas, and his brother and sisters, whether the same

No 66.

No 67.

Bonds secluding executors, assigned to an eldest son, without repeating the seclusion, fall to the heir of the son.