

1747. November 18. SIR JOHN KENNEDY against —.

[Elch., No. 13, *Heritable and Moveable* ; Kilk., 3, *ibid.* ; Falconer, No. 215.]

THE LORDS found that a bond, taken by the late Sir John Kennedy to himself and heirs, (excluding executors,) and assigned by him to his eldest son and heir, and his heirs, descended to the heir of that son, and not to the executor. *Dissent. Drummore.*

The Lords who voted for the interlocutor, put their opinions upon different principles. Tinwald thought that such a bond assigned continued still heritable in the person of the assignee, in the same manner as a bond with a clause of infestment, or a bond bearing annualrent before the 1661. But Arniston thought that it was the assignation in such a case that determined the succession of the assignee, not the bond, which only regulated the succession of the cedent; and that a bond made heritable by a clause excluding executors, differed very much from a bond heritable *sua natura*, which was heritable in the possession of whomsoever; whereas the other bond is heritable only by the private destination of the creditor with respect to his own succession, who intended in this manner to divide his effects among his children, but cannot be supposed to have meant to regulate the succession of any third party, nor of his own heir; with respect to whom, such division of his effects, by giving so much to his heir, might be very irrational, and it would be absurd to suppose that such a clause should make a tailie of a moveable sum, to last for ever till it was altered; and therefore he rejected the decision, in 1725, *M'Kay* against —, collected by Home, by which it was found that a bond of this kind, taken up by the heir, descended to his heir, and not to his executor. But, from the particular style of this assignation to heirs, and not to executors, joined with the nature of the bond assigned, he presumed it was the intention of Sir John that it should descend to his son's heirs and continue in the family. But Elchies, on the other hand, rested his judgment on that decision, and said that the son's taking the bond by this assignation was a sort of *præceptio hæreditatis*, which had the same effect as if he had taken it by a service to his father. See *January 11th, 1745, Duff* against —.

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1747. November 27. — against —.

A FATHER disposed his estate to his second son, (his eldest having been engaged in the Rebellion 1715,) with the burdens of provisions to his younger children, and with a power of redemption for a rose-noble reserved to himself, or to any body he should name. Accordingly he named his eldest son, by a deed under his hand, who came home at the end of the three years, got the estate from his second brother, (the father being then dead,) and possessed it all the days of his life, upon the title of apparency. After his death the