

1687. *July.**MUIR against MUIRS.*

No 83.
A bond secluding executors found heritable *a principio*, tho' the creditor died before the term of payment.

ROBERT MUIR, as heir to his father, having pursued several debtors for payment of the sums contained in their bonds, as being heritable, bearing a clause secluding executors; and there being compearance made for their children, who *alleged*, That albeit the executors were secluded, yet the bonds were moveable, and did fall to the executors, because the defunct died before the term of payment; as in the case of an heritable bond, which will belong to the executors if the creditor die before the term of payment. *Answered*, That there is a great difference betwixt a bond secluding executors, and a bond heritable without that clause; because, when a creditor takes that bond, secluding his executors, it is evident that his design has been to seclude his executors from the very beginning, so that it cannot fall to them albeit he die before the term of payment; whereas, in the case of an heritable bond, without that clause, by the nature of the right the executors are not secluded, if the creditor die before the term of payment; and so it belongs to them, because it is only the creditors' surviving the term of payment, at which the annualrent is due and payable, that makes the sum heritable. And as, when a party acquires lands, and provides the same to special heirs, that provision to special heirs will exclude all other heirs; so, by that same reason, a creditor taking a bond secluding executors, all his executors will be secluded from the sums, albeit the creditor die before the term of payment.—THE LORDS found, that the bond secluding executors did belong to the heir, albeit the creditor died before the term of payment; and that the executors have no interest therein, and therefore decerned in favours of the heir.

Fol. Dic. v. 1. p. 370. Sir P. Home, MS. v. 2. No 950.

* * * Fountainhall reports the same case :

THERE was a bill given in against Robert Muir, son to umquhile John Muir, writer to the signet, by the younger children, against the interlocutor he had gained the last summer session, whereby the LORDS found bonds taken by his father, excluding executors, did belong to him as heir, though their term of payment was not come at his decease; albeit formerly *in pari casu* they had found a charge on such a bond made it moveable. But the LORDS rejected this bill, and adhered.

Fountainhall, v. 1. p. 475.