No 46. visions were to his prejudice. And this is Lord Stair's opinion, l. 3. t. 4. § 29.; and a similar case to this was determined 23d February 1665, Jack *contra* Pollock, No 36. p. 3213. And as to the decision Riddel *contra* Richardson, it is *answered*, That the course of our law at that time was to allow no aliment to younger children, however necessitous, from the heir; which is otherwise now, according to the citation from Lord Stair, mentioned before. 'And now,' says that author, 'since the Lords have frequently decerned aliment for bairns a-'gainst the father's heirs, having competent estates; it is like the Lords will 'allow all provisions on death-bed, in so far as they may be competent ali-'ments.'

Replied for the pursuer; A father is bound to aliment his children till their majority, that they are capable to provide for themselves; deeds on death-bed will be sustained so far as that obligation of aliment reaches; and this is all Lord Stair says: But here the bonds craved to be reduced are not alimentary bonds; they are bonds which the father was not under any antecedent obligation to grant, and therefore cannot stand against the force of a reduction upon the head of death-bed.

'The Lords found the bonds reducible upon the head of death-bed.'

Fol. Dic. v. 1. p. 213. Rem. Dec. v. 1. No 27. p. 59.

1725. *January* 12.

William M'Kay, and Elspeth his Wife, *against* Thomas Robertson.

No 47.
A bond secluding executors cannot be disposed of upon death-bed.

Thomas Robertson, merchant in Inverness, became debtor in a bond for 3000 merks, to William M'Wirrich and his heirs, *secluding executors*. John M'Wirrich, only son to the said William, made up a title to the bond, by serving heir in general to his father; and thereupon charged Robertson the debtor, who suspended. Thereafter upon death-bed, he conveyed this bond, by a testamentary deed, in favours of his mother, and William M'Kay her husband, the present pursuers; who being confirmed executors to the defunct, *insisted* against the debtor Robertson for discussing the suspension.—It was *objected*, 'That the pursuers had no sufficient active title by their confirmation as executors, the bond charged on being heritable, secluding executors:' To enforce which it was *pleaded*, *1mo*, That formerly all bonds bearing annualrent were heritable, whether in the person of the original creditor or his heirs; and could only be transmitted by a service. The 32d act, Parl. 1661, declares all bonds bearing annualrent moveable, except in these cases following, viz. 'That they bear an 'express obligement to infeft, or that they be conceived in favours of heirs and 'assignees, secluding executors; in either of which cases, ordains the sums to 'be heritable, and to pertain to the heir.' Here there is a general alteration of our ancient law with respect to bonds bearing annualrent, with an exception

from that alteration; so that in the cases excepted, the former law continues in its full vigour as if no alteration had been made; and therefore it clearly follows, that bonds secluding executors are simply heritable, without regard in whose person they exist, equally as bonds with clauses of infeftment; 2*do*, In this bond there is a destination of succestion, *sciz.* to the creditor's heirs, secluding his executors; for it is not conceived to the creditor and his heir, but to the creditor and his heirs; and therefore, till this destination be altered in a legal way, the bond for ever must descend from one heir to another, because *hæres hæredis mei, est hæres meus.* But this alteration could not be made upon death-bed, or by way of testament; in both which views the pursuers, as executors confirmed to the defunct, can have no right to this bond. No 47.

Answered to the *first*, A bond secluding executors, though it go to the heir, not to the executor, is not for that reason in its nature heritable; for these questions are perfectly distinct, 'What rights are in themselves heritable and moveable? And what go to heirs in opposition to executors?' This last is a *quæstio voluntatis*; the other independent of any man's will; for though a proprietor has it in his power to make his rights descend from him in any channel he pleases, he has no power to alter the legal essence and nature of them. Thus then, as bonds bearing annualrent are made simply moveable after the act 1661, they cease not to be so, though having clauses secluding executors; and when the act mentions bonds secluding executors as an exception, it is not with an intention to continue them simply in their nature heritable, but only to make them pass to the heir, according to the destination of the creditor. Hence it is that a bond secluding executors, though it would go to the creditor's heir by virtue of that clause, yet if the creditor assign the bond, it goes to the assignee's executor by virtue of the legal succession, unless the contrary be expressed; which is a demonstration, that it is in its nature, and by the law, moveable; for did it continue heritable, as before the act, it would infallibly go to the assignee's heir, as bonds bearing annualrent did before that time. To the *second*, *answered*, That this bond was indeed heritable in the person of the first creditor *destinatione*; but having devolved into the person of a successor by service, it became moveable, so as to fall to the heir's executors. The reason is, that when a moveable sum, contrary to its nature, is made *destinatione* heritable, that destination not being intended as a continued tailzie to heirs, but only a provision for the first heir of the creditor; the destination coming to be satisfied by an heir once existing, the sum thereafter returns to its proper nature of a moveable subject. But granting even such a destination to heirs, as is contended for, the pursuers title falls notwithstanding to be sustained; for where a subject, in itself moveable, the case of bonds bearing annualrent, comes to be tailzied to heirs, it ceases not to be moveable in its nature, and therefore capable to be disponed of in testament and upon death-bed. Thus a bond granted to a creditor, 'which failing, to Titius; which failing, to Mævius,' &c. will as effectually exclude the executors, as a bond expressly excluding them; and the

No 47. right too must be made up in the person of the substitutes by a service; and yet the creditor, or any of the substitutes, may dispose of such bond by way of testament. Neither is it in law considered as any other way heritable, but as to the form of establishing the title; and why it ought not to be so likewise in bonds secluding executors, when once come in the person of the successor, no solid reason can be given; for as Sir James Stewart observes, *voce* BOND HERITABLE, p. 17, *versus finem*, 'There is a great difference betwixt *heritable* and '*moveable*, and *testible* and *intestible*; and some subjects may befal to the heir, 'and be carried too by service, and yet the creditor or the substitue may test 'upon the same.'

Replied for the defender; Were it even true, which will not be allowed, that bonds secluding executors, are in their nature moveable, and consequently conveyable by testament; the pursuers will still be cut off by the law of death-bed: For if any moveable subject by a tailzie be appointed to go to heirs, the proprietor upon death-bed, has no more power over this moveable subject, than if heritable; because in no case can a man prejudge his heir upon death-bed; and this the pursuers will never get over. *See* February 1722, Maxwell *contra* Neilson of Barncailly, No 13. p. 3194.

'THE LORDS sustained the objection.'

Fol. Dic. v. 1. *p.* 213. *Rem. Dec. v.* 1. *No* 53. *p.* 103.

No 48. 1727. *January* 26. ADAMS *against* THOMSON.

A WOMAN upon death-bed granted a disposition to one of her sisters, excluding another who had a right to come in as heir portioner.——THE LORDS repelled the allegeance, that the alienation was *intra familiam*, and found the reduction on the head of death-bed relevant. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 213.

No 49. 1733. *December*. CHRYSTISONS *against* KER.

A TACK for three nineteen years of the granter's whole estate done on death-bed, though alleged to be for an adequate rent, was reduced; it being *pleaded*, That though a tack for a moderate endurance, granted upon death-bed, may subsist, as being an act of ordinary administration, a tack for three nineteen years is a *species* of alienation which cannot be granted upon death-bed. *See* APPENDIX.—TACK.

Fol. Dic. v. 1. *p.* 115.