_ Gosford reports the same case:

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IN the aforementioned action, No 10. p. 4100. at David Graham's instance, as assignee by two of his brethren for payment of their proportions of 25,000 merks, amounting to 5000 merks a-piece, it was farther *alleged* for Morphie, That the pursuers could not crave payment of these sums; because, by the reservation in the contract of marriage, they were only payable a year after their marriage; and in case they should die within year and day without children, that the provision should return to the defender their eldest brother; and that it should not be lawful to dispone thereupon to defraud him of his succession thereto; so that they, not being married, could not assign or uplift the money, unless they found caution to re-employ the same, in the terms foresaid. It was *replied*, That, notwithstanding of the said clause of provision, the children did remain fiars of their portions, and their eldest brother had only the right of substitution, which could not hinder them to contract debt, or to assign the same for a just and onerous cause; and there being no clause irritant, the meaning of that clause could only be, that, in case of marriage, and that if they died without children, they should not be enticed to dispone their portions without any onerous cause.——THE LORDS, after much debate among themselves, did sustain the pursuit, in so far only as the assignation was for a just and onerous cause, to be condescended on and instructed, being moved thereto upon this consideration, that the children's portions being but mean, and the annualrent thereof not able to entertain them in necessaries, so that to breed them as scholars, or merchants, in any liberal calling, there was a necessity to uplift of this principal sum, or to assign or dispone thereupon, the said condition annexed to the payment could not hinder them, neither could be the meaning of the parent, seeing it did only instruct them, in the case of marriage, and dying without children, not to dispone; but did not hinder them, when they were majors, after majority, in case they should not marry, to make use thereof for their breeding and education. Likeas, in a late case betwixt the deceast Lord Justice-Clerk, and his Sister, Sect. 6. *h. t.* wherein the same point of law was debated, the LORDS did give their decision in the same terms, and upon the same grounds.

Gosford, MS. No 613. *p.* 355.

No 5.
A bond payable to the creditor and certain heirs of tailzie,

1674. *February* 3. DRUMMOND *against* DRUMMOND.

WILLIAM RIDDOCH having sold certain lands to Drummond of Millnab, with consent of David Riddoch, he took a bond for 2000 merks payable to the said William Riddoch and the heirs of his body, which failing, to William Riddoch his father, which failing, to David Riddoch, his heirs and assignees whatsoever,

and obliged himself to do no deed prejudicial to the tailzie; likeas Drummond the debtor obliged himself not to pay the sum without the consent of David Riddoch. Upon this bond there was infeftment, yet thereafter the money was paid by the debtor to the said William Riddoch the creditor. David Riddoch having assigned his right to David Drummond, he pursues declarator, to hear and see it found and declared, that the sum was unwarrantably paid, and the tailzie altered without consent of David Riddoch. The defender *alleged*, 1*mo*, No process at the instance of the heir of tailzie or his assignee, because he hath but a remote interest, the first fiar being alive, and having hope of succession. 2*do*, Tailzies, though they have been sustained for preserving of families as to lands, yet they ought not to be extended to sums of money, which should pass current by free commerce, and cannot be thus clogged without great detriment to public interest. 3*tio*, The pursuer can never quarrel the payment made to the first fiar, because he can have no interest but as heir of tailzie to him, and being his heir, he cannot quarrel his deed; and if the defender should be decerned, he would repeat the sum against David Riddoch as heir to William, who could pretend nothing but the discussion of the heir of line, or at least William Riddoch would be necessitated to borrow money to repay Drummond the debtor, and that creditor might apprise the right of this bond from William Riddoch; and it cannot be pretended, that this clause will exclude borrowing of sums, or hinder creditors to apprise, adjudge, or arrest, especially seeing there is no clause irritant declaring the contravener's right null, in case of contravening. 4*to*, The intent of this clause of not altering the tailzie, could only be understood by free deeds, but could not exclude necessary deeds, as if William Riddoch the first fiar were reduced to necessity for his livelihood, or had nothing else to pay his debt, or provide his children; and if upon these grounds he had raised declarator against this heir of tailzie, for employing the money for these effects, it would certainly have been sustained, and so now it being employed for those ends, it cannot be quarrelled. It was *answered* for the pursuer, That he hath sufficient interest to declare his right by a clause in his own favours, both by debtor and creditor, and there is nothing can hinder any party to provide his sum as he pleaseth, as well as his lands, neither will that be any clog upon the body of money, which will ever run current; and it cannot be denied, but the obligation of the creditor not to alter the tailzie, and of the debtor not to pay without consent, are valid obligations; nor is there ground to interpret them only as to acts which are not necessary, the clause being general, 'to do no deed;' and albeit heirs of tailzie do represent the fiars in their order, yet they do not represent them as to deeds, whereby they contravene the provisions of the tailzie; for in these they are the fiar's creditors, and not his heirs, so that Drummond the debtor could never recur against the heir of tailzie for repetition of the sum, as *indebite solutum*, that very deed being a contravention of the tailzie; and though there be not here a clause irritant which might annul the

No 5. contained this clause, that it should not be lawful for the debtor to make payment without consent of one of the heirs of tailzie. Payment being made without such consent, the same was found unwarrantable; and the debtor was ordained to grant another bond in terms of the former, without prejudice to the creditor, to declare in a process, that the sum should be affectable by his creditors, or be disposed of by himself for his necessary uses.

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fiar's right and exclude his singular successors, yet the clause itself is sufficient against the fiar and debtor themselves, having in it this speciality, that the debtor is not obliged to pay without consent of this heir of tailzie; and albeit the debtor might have safely paid, or the creditor compelled him to pay by consignation of the sum, to be employed of new in the same terms, yet this voluntary payment, without that order, is altogether unwarrantable.

The Lords found, that by the conception of this bond, payment made by the debtor, without consent of the heir of tailzie, or authority of a Judge, was not warrantable; and therefore ordained him to renew the bond in the former terms, but prejudice of either party, or their creditors, to declare how far the sum might be affected by the creditors of the first fiar, or disposed of by him for his necessity in any process intented by him for that effect. *See* Tailzie.

Fol. Dic. v. 1. *p.* 305. *Stair, v.* 2. *p.* 259.

*** Gosford reports the same case:

In a declarator pursued at David Drummond's instance, as having right from David Riddoch, against the said Drummond and William Riddoch, to hear and see it found and declared, that notwithstanding any payment made by Drummond of Millnab to William Riddoch, younger, of a bond of 2000 merks, yet after the death of the said William Riddoch, the said bond and sum would belong to David Riddoch, and the said David Drummond, his assignee; and the debtor would be still liable to them upon the ground, that the said bond was granted by Drummond of Millnab, bearing an obligement to William Riddoch younger, in an annualrent effeiring to 2000 merks, and the heirs-male of his body; which failing, to William Riddoch elder, his father, and the heirs-male of his body; which failing, the said David Riddoch, his heirs-male, and assignees whatsoever; in which bond there is an express provision, that it should not be lawful to the said William Riddoch, elder and younger, or any of their heirs-male, to do any deed, or, for any cause to break the tailzie, or uplift the sum without the consent of the said David, who was last in the tailzie; as likewise, that it should not be lawful to Drummond of Millnab, the debtor, to make payment of the said sum without the consent of the said David Riddoch. It was *alleged* for the defenders, that the declarator could not be sustained at the said David's or his assignee's intance, *first*, because the said David's interest was only a substitution in a tailzie, which was only *nudum jus apparentiæ;* and, until he were served heir of tailzie, he could never have right to pursue for the said sum; and, if he was served heir to the last fiar to whom he was substitute, he could not quarrel his deed in uplifting of the money to make the debtor liable, he being obliged to warrant the same as heir. 2*do,* There being no irritant clause in the tailzie, and William Riddoch, to whom the bond was granted, having still the same in his custody, as he might have uplifted the

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same, or his creditors have comprised his right; so the debtor, upon delivering back of his bond with a discharge, was *in bona fide* to pay the sum without the consent of David Riddoch, who was the last person in the tailzie; seeing in tailzies of land to persons substitute therein, and their heirs, albeit there be an obligement not to dispone, and that none of them who succeed shall dispone the right of the land in prejudice of the next heir nominate and substitute, yet if there be no irritant clause any person may lawfully make a purchase thereof, or a creditor may comprise the same from any of the heirs of tailzie who stand infeft as fiar, and the righteous acquirer can never be questioned by the next heir of tailzie, seeing the obligement not to dispone, is only personal, and does not affect the real right of the lands, nor a singular successor; far less can a tailzie or substitution in a bond for a sum of money, bearing that clause not to uplift the same for his necessary occasions, or to make provisions thereof to his children, which puts the debtor *in bona fide* to make payment; otherways sums of money being the subject of all commerce or transaction, it would introduce an inevitable prejudice to the public good; seeing, upon private conditions and clauses, the right of creditors and those that transact with them, should be in a perpetual uncertainty, and a door opened to infinite pleas and troubles. It was *replied*, That albeit in tailzies of lands, where there is no clause irritant, the acquirers for a just and adequate right cannot be quarrelled; yet there being an obligement in the tailzie, that it shall not be lawful to any of the heirs who succeed to annailzie and dispone in prejudice of the next person, who is substitute in the tailzie, the same furnishes an action against the first disponer for damage and interest; and the person substitute or his heirs who are prejudged, albeit they cannot succeed to the land, yet they will have a personal action *super pacto de non alienando* against the disponer and his heirs, as is clear by Hope in his Compend., where he treats of the nature of tailzies of lands; but it holds far more in this case against the debtor, who paid the money, seeing he was *in pessima fide*, contrary to the obligement and condition of his own bond to make payment without consent of David Riddoch, who, albeit he were heir of tailzie to William, yet as to any deed contrary to the tailzie itself, he will not be liable in law, to warrant the same, albeit he being served heir as to any debts or other deeds extrinsic to the tailzie, he will be liable to the creditors as heir of tailzie. THE LORDS having considered this case, as being *in apicibus juris*, did find, that the debtor was *in mala fide* to have paid the sum contained in the bond, contrary to the express clause and condition thereof, declaring that it should not be lawful to uplift the same without consent of the pursuer; and, therefore, ordained that he should renew the same in the terms of the former bond; but did not decide that great point in debate, if a person substitute in the tailzie, succeeding to be heir where there is no clause irritant, be liable, or if it be lawful to enter heir without being liable to the predecessor's debt; but there being only a personal obligement not to dispone, they being thereafter

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served heir, may quarrel their predecessor's deeds, and pursue for damage and interest, because in law the person standing in the right of the tailzie hath *plenum dominium et disponendi facultatem*, and as heir cannot quarrel his deed nor pursue for damage and interest, which in effect were that same, and puts as great a restraint upon him as if he were debarred by an irritant clause, but this was not decided.

Gosford, MS. No 685. *p.* 406.

No 6.

A bond secluding assignees, and providing that in case of the creditor's death, without issue, the bond should be null, may be assigned for necessary causes, and action will be sustained on it, tho' the creditor die without heirs. *See* Fountainhall's report of this case, p. 4311.

1683. *January.* STRACHAN *against* BARCLAY.

JAMES STRACHAN having granted a bond to David Barclay of Urie, for 900 merks, which being assigned to ——— Strachan bishop of Brechin; and James Strachan his son, commissary of Brechin, as executor to his father, having pursued the said David Barclay for payment, it was *alleged* for the defender, That the bond was retired and cancelled, and it is a principle in law, that *instrumentum apud debitorem repertum*, is presumed to be paid; and albeit the bond had not been retired, yet it bears a clause secluding assignees, and consequently the pursuer, as executor to the assignee, could have no right thereto; as also it did bear a provision, that in case the said James Strachan should die without heirs of his own body, the sum should return to the granter. *Answered*, That the bond being entrusted by the defunct to Robert Rate of Snawdoun, and after his decease, the defender got up the bond from his relict upon his receipt; and albeit it did bear a clause secluding assignees, and that the sums should return to the granter, failing heirs of the said James Strachan's body; yet he might still have uplifted the sum in his own time, and it might have been affected by a legal diligence at the instance of a creditor; and, by that same reason, they might have assigned it for an onerous cause, and the true cause for which the assignation was granted was, upon the account that the Bishop, the pursuer's father, did aliment the said James Strachan the cedent. THE LORDS found, that a clause of that nature, secluding assignees in bonds, did not burden the parties to assign for onerous and necessary causes, and therefore sustained the assignation, the pursuer proving that the Bishop his father did aliment Strachan the cedent.

Fol. Dic. v. 1. *p.* 305. *Sir P. Home, MS. v.* 1. *No* 390.

*** President Falconer reports the same case:

THE deceased Colonel Barclay having granted a bond to James Sinclair his nephew, for a sum payable to himself, secluding assignees, and providing, that in case James died without heirs of his own body, the bond should be null; the said James Sinclair, being alimented by the Bishop of Brechin, who had married his mother, he grants an assignation of the said bond to the Bishop, bear-