*** Dirleton reports the same case:

No 3.

MARGARET BINNY being induced to grant a bond, obliging her to resign some tenements of land in favour of herself and the heirs of her body, which failing, in favours of her brother Alexander Binny, and to do no deed in prejudice of his succession, she did thereafter marry, and dispone to her husband the said tenements. In a pursuit at the instance of her brother against her and her husband for his interest, upon the said bond, and implement thereof,

THE LORDS found, that she, with consent of her husband, ought to resign. Some of the LORDS thought, that the import of such obligements is only that the granter should not alter such tailzies in favour of other heirs; and that they are not restrained to sell or dispone, for onerous causes, if they should have occasion; otherwise they should cease to be fiars, the very essence of fee and property consisting in a liberty to dispone. It may be questioned, How far the husband may be liable to his wife's obligements before the marriage? For there being a communion betwixt them only as to *mobilia*, it may appear that he should only be liable to moveable and personal debts, seeing *penes quem emolumentum, penes eundem onus*; but this point was not debated.

Dirleton, No 136. *p.* 56.

1673. *July* 8. GRAHAME *against* The LAIRD of MORPHIE.

No 4.
A bond of provision was granted to children, in these terms, 'That, in case they died unmarried, or within year and day thereafter, that the sum should return to the granter's heir, and that they should make no assignation or other right in defraud of his heir.' This clause was found to import, that the children could do no gratuitous deed, but that it did not hinder them to uplift for necessary causes.

THE deceast Laird of Morphie granted a provision to his five children of 25,000 merks, but in these terms, 'That in case they died unmarried, or within 'year and day thereafter, that the sum should return to his heir; and that they 'should make no assignation, or other right, in defraud of his heir.' Whereupon he *alleged*, He was not obliged to pay any more but the annualrent, this being a clause adjected by the father *de non alienando*. It was *answered*, That here was no clause irritant, but a substitution of the heir, in case the bairns were not married, and had no children, and doth only exclude assignations, or other rights, but doth not hinder the children to uplift the sums.

THE LORDS found, that the clause did import that the children could do no gratuitous deed, or any thing to defraud the heir, but found that the children, for a necessary cause, such as their breeding to letters, merchandize, or trade, might dispose of so much of the sums as was necessary; and that the making of no right in defraud of the heir, did import that they could neither uplift nor assign further than necessity required.

Fol. Dic. v. 1. *p.* 305. *Stair, v.* 2. *p.* 206.

*** Gosford reports the same case:

No 4. 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,