

No 5. 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.

1683. *January.*

STRACHAN *against* BARCLAY.

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.

JAMES STRACHAN having granted a bond to David Barclay of Urie, for good marks, 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 alimnt 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 alimnt Strachan the cedent.

Fol. Dic. v. I. p. 305. Sir P. Home, MS. v. I. 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 alimnted by the Bishop of Brechin, who had married his mother, he grants an assignation of the said bond to the Bishop, bear-

ing in the narrative thereof, That the Bishop had alimeted and educated him. James Strachan, the Bishop's son and executor, did pursue the Colonel for payment of the said sum assigned. And it was *alleged* for the Colonel, That the bond was not assignable, seeing assignees therein were expressly secluded, and that there was an express provision therein, that the same should return to the Colonel, in case the said James should die without heirs of his body, which *de facto* fell out. It was *replied* for Strachan, That the foresaid clause did only bind up the defunct, that he should not assign without an onerous cause; but the cause being here most onerous, viz. his alimeted, the assignation to be sustained. THE LORDS found, that clauses of that nature did not bind up the party from assigning for onerous and necessary causes, and therefore sustained the assignation, and ordained the pursuer to prove the Bishop's alimeted of Sinclair the cedent.

No 6.

P. Falconer, No 55. p. 34.

*** This case is also reported by Harcarse :

COLONEL BARCLAY having granted bond to one, and the heirs of her body, with these expressions, That it should not be in the creditor's power to assign, and that the sum should return to the debtor, by the creditor's dying without heirs of her body; the LORDS found, that the creditor might, notwithstanding the provisions in the bond, assign for onerous causes. But here it was not considered whether the bond was for onerous causes or not.

Harcarse, (BONDS.) No 183. p. 40.

*** Fountainhall also reports this case :

1683. February 28.

COMMISSARY STRACHAN and Robert Barclay of Urie's cause being reported by Redford, ' THE LORDS found, though the bond expressly secluded Sinclair the creditor's assignees, and was provided to return to the debtor, in case Sinclair the creditor should have no children lawfully begot, yet he might assign it for so onerous a cause as the payment of his alimeted, as he might have uplifted it, or his creditor might have affected it; and therefore before answer ordained them to condescend, and prove how long and by whom he was alimeted.'

1683. November 16.—STRACHAN Commissary of Brechin his action against Robert Barclay of Urie and his father was decided; and the LORDS, notwithstanding of the interlocutor of the 28th of February 1683, finding the bond assignable for alimeted, and notwithstanding of an act extracted admitting to the pursuer to prove the alimeted, and to Barclay to prove payment, and witnesses led; yet the LORDS assoilzied Barclay from the debt summarily on these

No 6. new grounds, not then represented, viz. that the aliment being given by a grandmother it was presumed to have been done *ex pietate*, especially seeing there was no paction for aliment alleged on, which ought to be when the party alimented is come to the age of 14 years; for then he is capable of pactioning; as also in respect the assignation granted to the Bishop of ———, bore this quality, that in case of James Sinclair the cendent's reconvalescing he should be in his own place again; which proved that the assignation was but *donatio mortis causa*, and not for the onerous cause of aliment; and, 3tio, Because of the documents adduced to prove it was paid, or that he was *alibi* all that time, either as an apprentice in Edinburgh, or as a soldier abroad; and upon these and sundry other complex grounds, they annulled the act of litiscontestation and probation following thereon, (though some of the grounds were formerly proponed, and others were competent and omitted), and gratified Robert Barclay the Quaker with an absolvitor; who stood at the bar with his hat off, and gave the Lords a relation of a part of the case, and gave the Chancellor the compellation of 'my Lord.'

Fountainball, v. 1. p. 223. & 243.

1714. December 17.

STRACHAN of Glenkindy against DUMBAR of Grangehill.

No 7.
Although a bond of provision, granted to a daughter bore *secluding assignees*, yet, she was not thereby precluded from assigning the same to her husband in her contract of marriage.

THE deceased Grangehill, by his bond of provision in favours of Mary Dumber his eldest daughter, binds to pay to her, her heirs, &c. 'secluding assignees,' 8000 merks after her marriage; and in testament, names certain friends, by whose advice his children (who were then minors) should be ordered. With consent of these, she having entered into a contract of marriage with Sutherland of Kilminity, they assigned the apparent husband, his heirs, &c. to the said sum, and he transferred the same to Glenkindy; and it being controverted what the import of the words 'secluding assignees' should be, even though there were children of the marriage,

It was *alleged* for Grangehill, That the assignation could not be sustained, though in a contract of marriage, because assignees were expressly excepted in the body of the writ.

Answered for Glenkindy, that such exceptions were only to be understood to seclude voluntary rights to extraneous persons, and not legal assignees, such as the husband became by the marriage; for if it were otherwise, it would overturn the design of the bond, the cause whereof rendered by the father in the preamble was, 'for his said daughter's creditable and honest provision, and settlement in the world,' by which it is plain to have been the father's design that the said sum should go to his daughter *nomine dotis*.