No 6. substitution, which she could not pass from, being *jus tertii.* See SUBSTITUTE and CONDITIONAL INSTITUTE.

Fol. Dic. v. 2. *p.* 345. *Stair, v.* 1. *p.* 386.

*** Newbyth reports this case:

MALCOLM FLEMING, merchant, burgess of Edinburgh, having deceased *in anno* 1648, having left a considerable estate in money, upon bond, merchant-ware, and counts, and a number of children, to whom his wife Elizabeth Fleming, now spouse to Sir John Gibson, being tutrix, and having confirmed her husband's testament for the behoof of the children, their being a count and reckoning pursued against her, and her husband Sir John for his interest, by Andrew Fleming, who was a posthume, for his part of his executry; and there having been a sum of 6000 merks lent by the said Mother, *in anno* 1650, to the Laird of Cardross, which, by the conception of the bond, is provided to Malcolm and Andrew Fleming, equally betwixt them; and failing of the one's part by decease, to the other; and failing of both, to the mother, with a reservation of the liferent to her; Malcolm being dead, and his part, by virtue of the substitution in the bond, accrescing to Andrew, it was debated, whether Malcolm's part of the bond, which was 3000 merks, did belong to Andrew, with the burden of Malcolm's debt owing by him to his mother, or without any burden. THE LORDS found, that albeit Malcolm being dead, Andrew would have had right to his part of the sums of money summarily, without confirmation, or without a service; yet that the same belonging to Malcolm, could only be transmitted to Andrew with the burden of any debts owing by Malcolm to his mother; and therefore found that she instructing Malcolm to be her debtor, had right to his part of the sums of money contained in the bond; albeit it was alleged, that since it could not fall under Malcolm's executry, it could not belong to his creditors, so that they might affect the same to Andrew's prejudice.

This is a notable decision, and deserves consideration, there being, in my opinion, a great difference betwixt substitution in heritage and moveables. In the former, the right is not transmitted without a service, albeit the party substituted be particularly named therein; but it is far otherwise in moveables, where the substitution is rather like a condition than a substitution.

Newbyth, MS. p. 67.

No 7. Found, that payment of money in a bond, was unwarrantable,

1682. *December.* RIDDOCH *against* DRUMMOND.

MR DAVID DRUMMOND of Milnab having granted an heritable bond of 2000 merks to William Riddoch, younger, and the heirs-male of his body, which failing, to David Riddoch and the heirs-male of his body, which failing, to the

No 7.
where there was a clause discharging the debtor to pay without consent of one substituted in the bond; and that altho' the substitute was now served heir of tailzie to the granter of the discharge, he was not obliged to warrant that discharge.

said David Riddoch, his heirs and assignees; with this provision, that it should not be lawful to the said William Riddoch, or his heirs-male, to do any deed, or for any cause, to break the tailzie, or uplift the sum, without consent of David Riddoch, who is the person substituted in the bond, and his heirs; upon which infeftment followed; yet, notwithstanding Mr David Drummond having made payment of the sum to the said William Riddoch, without consent of David John Riddoch of Logan, as having right by assignation from David, pursues John Drummond, now of Milnab, as representing his father the debtor, for payment of the same. *Alleged* for the defender, That the pursuer having only right from David Riddoch, to whom the same was tailzied, failing of William and his heirs-male, he had not a title to pursue for this sum, unless David, or his heirs if he be deceased, had been served heir of tailzie; and albeit he was served heir, yet the defender would not be liable for the debt, because his father had made payment thereof to William Riddoch, to whom the bond was granted, and was fiar of the sum, and obtained his discharge and renunciation; and that the clause in the bond, that the sum should not be uplifted without the consent of David, can import no more but a naked counsel and advice; and David being deceased the time he made payment of the sum, and his son out of the country in Barbadoes, he could not seek his advice, and the money was profitably employed for payment of the said William's debt; and as that clause in the bond would not have prejudged a singular successor, if William had assigned the same for onerous causes, nor would it have hindered the creditor to have affected the sum for payment of a just debt, so neither could it have hindered William to have uplifted the sum and employed the same for payment of his debt; and sums of money cannot be tailzied, that being contrary to the thing, and the interest and advantage of commerce: As also David's son, who was apparent heir of tailzie, did homologate the payment in so far as he did receive 600 merks of the sum. *Answered*, That David Riddoch, and his heirs, being expressly substituted in the bond, they have right to the same without any service, as in the case of all bonds where a party is substituted *nominatim*; but if need were, David Riddoch's son should be served heir before extract; and albeit the defender's father had made payment of the sums to William Riddoch, yet that cannot exoner him, seeing the payment was unwarrantable, being without David Riddoch's or his heirs' consent, without whose consent it is expressly provided by the bond, the sum should not be uplifted; so that albeit William and his heirs were fiars of the sum, yet that provision, and restriction in the bond, did, in effect, make them to be but of the nature of naked liferenters of the sum; so that he could not have uplifted it, nor assigned it to a creditor, without David's or his heirs' consent, who were the persons substituted in the bond; and if a creditor had affected the sum by legal diligence, or if it had been uplifted, it behoved always to be re-employed in the terms of the bond; so that this provision in the bond did import more than a naked counsel and advice, and gave the person substituted right to the sum, failing

No 7. heirs of William, notwithstanding the sum was paid, seeing the person substituted did not consent to the payment and uplifting thereof; and it does not import that David was dead and his son out of the country, so that the consent could not be obtained, because if David had been alive, and his son in the country, if their consent had been required, and they had refused, the money could not have been uplifted; and David's death, and his son's absence, can have no greater effect than if they had been required and refused, seeing, in no case, the money could have been uplifted without their consent; and money may be tailzied as well as lands, seeing there is no difference as to the interest of trade and commerce, especially seeing this is not a naked personal debt, but secured by an infeftment of annualrent, which is of the nature of lands; so that as lands being tailzied with such a provision, the person in fee could not have alienated the same without the heir of tailzie's consent, so neither could William, to whom the bond was granted, uplift this sum, or assign or dispose thereof, without consent of David, or his heirs, who were substituted in the bond; and it is denied that David's heir received any part of the sum; and albeit he had, yet that cannot prejudge the pursuer, seeing David, the father, did assign the sum to the pursuer; so that he has not only right by assignation to the sum from David, but as apparent heir to him, his son being deceased. THE LORDS found that the payment of the money was unwarrantable, in respect of the clause in the bond, discharging the debtor to pay, or the creditor to uplift the sum without David's consent; and found that albeit the pursuer was served heir of tailzie to the granter of the discharge, yet he could not be liable to warrant that discharge, albeit he was obliged to warrant any other deed of the defunct's.

Fol. Dic. v. 2. p. 344. Sir P. Home, MS. v. 1. No 315.

*** P. Falconer's reports this case:

DRUMMOND of Milnab having granted bond to William Riddoch, younger, and the heirs to be procreate of his body; which failing, to William Riddoch elder, and his heirs; which failing, to David Riddoch, his heirs and assignees whatsomever, with this provision, That it should not be lawful to William Riddoch, elder or younger, either of them, or their heirs, without consent of David Riddoch, to uplift the sum contained in the said bond, or do any deed in prejudice of the said tailzie; as also, that it should not be lawful to the debtor to make payment; notwithstanding whereof, Drummond the debtor having made payment of the said sum to William Riddoch, younger, who was substitute, and obtained his discharge, John Riddoch, grandchild to the said David, as assignee by progress from David, to the foresaid substitution, (which was then but *spes successionis*, William Riddoch, younger, the person institute, being alive) intented process for making up a tenor of the said bond, which was delivered up the time of the foresaid payment; and accordingly the bond, by a

decreet *in foro*, is made up. The said William Riddochs, elder and younger, and the said David being deceased, there is a process intented at the instance of the said John Riddoch, against the apparent heir of the debtor for payment. It was *alleged* for the defender, That he could not be liable, because he had obtained a discharge upon payment made to William Riddoch, younger, who was fiar of the sum, and consequently might uplift and discharge the same; and that the foresaid clause, prohibiting the uplifting of the money without consent of David, was only a *consilium*, and did not stop the fiar to uplift, and apply the same for his necessary use, such as to pay his debts, or marry his daughter. 2*do*, That the pursuer could have no right thereto, unless he were served heir to William, who had discharged the same, and so would be liable to warrant his deed. And it being *replied*, That the foresaid clause of the bond was not only a *consilium*, but was conceived in favour of David and his heirs, for the security of the tailzie;—and to the second, That the pursuer was content to serve heir of tailzie, either to David or William, and so would only be liable to deeds relating to the tailzie, but could not be liable to warrant deeds which did infringe the tailzie, such as the discharge above-written;—the LORDS found, That, in respect of the foresaid clause of the bond, prohibiting the debtor to pay, or the creditor to uplift, without consent of David, that the voluntary payment was unwarrantable; and found, that albeit the pursuer was served heir of tailzie to the granter of the discharge, yet he would not be liable to warrant the said discharge, nor to warrant any deed tending to infringe the tailzie, albeit he might be liable to other deeds of the defunct. No 7.

Pres. Falconer, No 57. *p.* 36.

1683. *March.* ELIZABETH FARMER *against* SARAH ELDER. No 8.

ONE being pursued as infeft upon a precept of *clare constat*, as heir to his father, the defender *alleged*, Absolvitor, because his father's right was reduced *ex capite lecti*, since the serving of him heir, and consequently his service must fall therewith. To which it was *answered*, That the defender being major cannot revoke.

THE LORDS found the defender not liable as heir, in respect the father's right was reduced. It was *observed*, That if there had been a general service, or a special service, which includes the general, the matter would have been more doubtful against the defender if any other thing fell under the general service.

Fol. Dic. v. 2. *p.* 346. *Harcarse*, (AIRES GESTIO, &c.) *No* 39. *p.* 9.