

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. *2do*, 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.

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

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1683. March. ELIZABETH FARMER *against* SARAH ELDER.

ONE being pursued as infest 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.*