

S E C T. X.

Import of the Obligation with regard to the Father's cautioners.

No 73.

Found, that heirs of provision are bound to relieve the cautioner for their provisions. But see No 75.

1677. November 23. CRAWFORD *against* KENNOWAY.

By contract of marriage betwixt Robert Kennoway and Agnes Crawford, Robert as principal, and Walter his brother as cautioner, are obliged to secure and employ to the future spouse in conjunct fee, and to the heirs of the marriage in fee, 4000 merks of tocher, and 4000 merks further, and execution is declared to pass at the instance of James Crawford father to Agnes; wherupon he charges Walter the cautioner; who suspends on this reason, that the charge is to the behoof of Jean Kennoway the only bairn of the marriage, and she doth only represent her father, and therefore is obliged to relieve Walter the cautioner, and so cannot distress him. It was *answered*, That the provisions in the contract are to the heirs and bairns of the marriage, and therefore would have been effectual against the father in his own life; who, if she should allege, that by the clause of employment he was fiar, and so might dispone after the employment, and therefore could not be compelled to employ, it had been repelled; for the bairns in such clauses are creditors, and not simply heirs of provision; and though the father's creditors might affect the sums employed, yet no gratuitous deed of the father's would affect the same, and the cautioner neither then nor now can have any other defence than the principal. It was *replied*, That during the father's life there was no defence either to the principal or cautioner against the fulfilling of this clause, because then the bairns neither were nor could be heirs, and so the cautioner could not found upon their obligation to relieve; but now the father being dead, whether the provision be to them as heirs or bairns, the obligation being to employ to the father and mother in conjunct fee, the bairns are unquestionably heirs of provision to the father, though their designation as bairns may serve in place of a service; and all the father's debts to his death would reach them, unless they abstained and renounced; and therefore the bond of relief for this cautioner must have this same effect.

THE LORDS found that the bairns were obliged to relieve the cautioner after their father's death, there being no other heirs of line to discuss, and therefore sustained the reason of suspension upon the clause of relief, and suspended the letters simpliciter.

Fol. Dic. v. 2. p. 283. Stair, v. 2. p. 564.