1684. *March* 9. HENRY BOUSSIE *against* DUNCAN MENZIES.

No 74.
Found in conformity with Crawford against Kennoway, *supra*.

BY contract of marriage betwixt Duncan Menzies of Nether Urquhart and ——— Peacock his second spouse, the said Menzies as principal, and ——— Menzies as cautioner for him, is obliged, in the said contract of marriage, to employ 1100 merks to himself and his spouse, and the heirs to be procreated betwixt them, which failing, to the husband's heirs. Henry Boussie having adjudged the foresaid obligement in the contract of marriage from ——— Menzies's son procreated of the said marriage, and thereupon having intented action against ——— Menzies the cautioner, for implement of the contract to him, as having right from the apparent heir of the marriage; it was *alleged* for the defender, That this was only a destination, in so far as concerned the heir of the marriage, and that the pursuer could be in no better case than his cedent; but *ita est*, the cedent behoved to be served heir of the marriage, and so to represent his father the principal debtor, and consequently become liable to relieve the defender. It was *answered*, That though the pursuer's cedent was served heir of provision, and so did represent his father as such, as to any other extrinsic obligement, yet as to the obligement, which was conceived in favours of the pursuer's author, as heir of provision, he could not be liable to relieve his father's cautioners, otherwise obligements of this nature, in contracts of marriage, should be absolutely evacuated. THE LORDS decerned against the defender for implement, but superseded extract till the first of January next, betwixt and which time, the defender might do diligence for his relief, by discussing the heir of line, and declared, that after the discussing the heir of line, the pursuer's cedent should be liable for relieving the defender.

Fol. Dic. v. 2. *p.* 283. *P. Falconer, No* 89. *p.* 61.

*** Fountainhall reports this case:

1684. *March* 18.—THE LORDS found, seeing the cedent from whom his creditor had adjudged, was only cautioner in a second contract of marriage; therefore they found him liable to fulfil the obligements in that contract, reserving to him action of relief against the general heir of line of the first marriage; and in case he were irresponsal, and the discussing of him proved ineffectual, then declared he should have access *subsidiare* to recur against the heir of provision of the second marriage, so as to distress him, and force him to compense, as becoming both debtor and creditor, *et sic confusione* the debt was extinguished.

Fountainhall, v. 1. *p.* 282.

No 74.

*** Harcarse also reports this case:

1684. *March.*—IN a contract of second marriage, the husband having found caution to implement his obligement in favours of heirs of the marriage, the apparent heir after his father's decease granted a bond, on which an adjudication of the obligement in the contract, upon a charge to enter heir, was led for his own behoof; and thereafter the cautioner therein was pursued.

Alleged for the defender; The provision in the contract being conceived in favours of heirs, cannot be claimed but by him who is actually heir; and such a one would be liable to relieve the defender of his cautionry; and so there would be *ipso momento confusio debiti et crediti.*

Answered for the pursuer; The caution being given at the desire of the wife's friends, for making the provisions in her contract of second marriage effectual to the children, cannot be evacuated upon pretence that they must be heir before they can have a title to the provision; for in the second contract, heirs are but considered as bairns, and the obligement of relief strikes against the heir of the first marriage, who is heir general of line, and must at least be first discussed, as a substitute heir of tailzie is not liable for his predecessor's contravention of the terms thereof.

Replied; The cautioner can be no faster bound than the father, the principal debtor; now, though the father was obliged to implement the contract, by providing the fee of his estate to the heirs by way of destination, he might thereafter dispose on it at his pleasure, which the heirs who must represent could not quarrel; for the father and his cautioner were only liable for the actual implementing in the terms of the destination, which being done, the cautioner is no further liable, nor concerned which way the father manage thereafter; and as the cautioner, had he implemented before the father's decease, might have operated his relief by diligence against the father's estate, the son must now be equally liable to relieve him; 2*do*, Whatever might be pretended, that the pursuer were a true creditor, who had done the first preferable diligence against the apparent heir, yet the diligence being to the heir's own behoof, he the heir must represent, and be liable to relieve the cautioner, though he be heir of a second marriage, seeing he is also heir of line, and there are no children of the first marriage. The custom of tailzie does not meet, because, by express provision in the tailzie, the subsequent heir is declared free of the former's contraventions, who, by reason of the irritancy, forfeits his right as heir, and may be passed by, by the next heir's entering to his, the contravener's, predecessor; whereas in contracts of marriage no such irritancies are adjected.

THE LORDS found, that the destination in favours of heirs, though of a second marriage, made these heirs liable *suo ordine* to the cautioners in the contract for implement, as well as to other creditors.

Harcarse, (CONTRACTS OF MARRIAGE.) *No* 357. *p.* 91.

*** This case is also reported by Sir P. Home:

No 74.

1683. *December.*—BY contract of marriage betwixt the deceased Duncan Menzies in Nether Urquhart and Giles Pennycuik, the said Duncan and Archibald Menzies his father, as principal, and John and Archibald Menzies his brothers, as cautioners, being obliged to add the sum of 500 merks to the sum of 600 merks received in tocher with the said Giles, making in all 1100 merks, and to lay out and bestow the same at a certain term, upon sufficient security, to the said Duncan Menzies and his spouse in liferent, and the heirs to be gotten betwixt them; and Henry Boussie writer in Edinburgh having adjudged the right of that sum from James Menzies, who was heir of the marriage, and thereupon having pursued the representatives of the cautioners for payment of the sum; *alleged* for the defenders, That the adjudger could be in no better case than the son and apparent heir of the marriage, from whom he had adjudged; and if he were pursuing the defenders, they have this competent defence, that he could have no right except as heir of the marriage, and if he be heir, he behoved to relieve the defenders of the cautionry. *Answered*, That by the contract of marriage, the father and the cautioners being obliged to provide the same to the heirs of the marriage, that obligation must be understood *cum effectu*, and the father and cautioners are obliged to make the same furthcoming to the son of the marriage, without being served heir, otherwise such obligations should be altogether elusory; for if the children of the marriage should be obliged to relieve the cautioners, then such obligations as to the cautioners should be of no effect. *Replied*, That the provision being to the heirs, and not to the bairns of the marriage, the son cannot have right to the sum, unless he be served heir, and so must be liable for the cautioner's relief, as was decided 23d November 1677, Crawfurd against Kennoway, No 73. p. 12933.; and provision in contracts of marriage being but only destinations in favour of the heirs of the marriage, the father still remains fiar, and may dispose of the sum at his pleasure; and *de facto* Duncan Menzies the father has discharged the cautioners of the said sum. *Duplied*, That contracts of marriages in favour of heirs are always understood to be in favour of the bairns of the marriage, as is clear by several decisions; and the heirs and bairns have right to the sum without being served heirs; for when a father gives a tocher to his daughter, in contemplation that there should be a competent provision secured to the children of the marriage, and caution given for that effect, it were against all law, that the cautioner, upon whose faith and security the tocher is given, should evite the debt upon that pretence, that the son of the marriage should be served heir, and so obliged to relieve him, and the cautioner's becoming obliged for the debt, was a tacit renunciation and passing from any such defence, being inconsistent with the obligation to make the sum effectual; and the foresaid practick does not meet this case, seeing in that case the pursuit was at the instance of the

No 74.

heir of the first marriage, who was properly heir of line, and liable to pay his father's debts, whereas this pursuit is at the instance of the heir of the second marriage, who is not general heir to his father, nor liable for his debts; and any decision in that case cannot be a practice, not being upon a debate in presence, or upon report; and the sum being provided to the father in liferent, and to the children in fee, the father being only liferenter, he could not do any thing to prejudge the children, at least he could not grant any gratuitous discharge in their prejudice. THE LORDS decerned against the defenders, for implement and payment of the sum; but superceded extract till the first of January thereafter, betwixt and which time the defender may do diligence for his relief, by discussing of the heir of line, (and next) the son of the second marriage, from whom the pursuer had adjudged, should be liable for relieving the defender.

Sir P. Home, MS. v. 1. *No* 503.

1707. *December* 18.

JOHN DICKSON of Hartrie, and Captain WILLIAM MURRAY, *against* ALEXANDER MILL of Carridden.

No 75.
Heirs and children of provision not bound to relieve the cautioner for their provision.

ROBERT KENNOWAY, in his contract of marriage with Agnes Crawford, being obliged as principal, and Walter Kennoway his brother as cautioner, to provide and employ 8000 merks for the heirs and bairns of the marriage; Jean Kennoway, only child of the said marriage, and Captain William Murray her husband, assigned the said 8000 merks to John Dickson of Hartrie, who adjudged an heritable right that Walter Kennoway cautioner in the contract had upon the estate of Clackmannan, then standing in the person of Alexander Mill of Carriden, and pursued him upon his father's backbond to denude.

Alleged for the defender; That the said Jean Kennoway, as heir or bairn of the marriage, was liable to relieve her father's cautioner; as the LORDS had found, November 23. 1677, Crawford *against* Kennoway, No 73. p. 12933.

Replied for the pursuer; The provision pursued for being conceived in favours of heirs and bairns, Jean Kennoway became not thereby universally liable as representing her father, but had right thereto as a creditor without a service; nor could even the service of an heir of a marriage infer an universal passive representation, July 10. 1677, Carnegie *against* Smith, No 2. p. 12840. If heirs in a vulgar sense were not understood bairns, it were impossible to provide execution to pass at the instance of any person in favour of the heirs or bairns of a marriage, against their father, seeing the interest of an heir emergeth only upon the predecessor's death. Yea, if heirs and bairns of a marriage could not pursue for their portions without representing, all such provisions would be superfluous, elusory, and useless. By heirs procreated of a marriage, we can only from the natural import of the word mean bairns; seeing none are born heirs, but become such; especially in this case, wher words heirs