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 THE LORDS decerned against the defenders, for implement and payment of the sum; but superceded extract till the first of January thereafter, betwixt and which time the defender may do diligence for his relief, by discussing of the heir of line, (and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

and bairns are conjoined. Again, though the cautioner be creditor to the father for his relief, it were against common sense to say, that he could operate his relief against the bairns to whom he is cautioner. 2*do*, As to the decision 1677, which seemed to run in favours of the cautioner, that being yet in the terms of a simple interlocutor, cannot alter our law, which provides action to bairns as such upon personal obligements conceived in their favours, without necessity of a service, though they must be served heirs in special for transmitting infeftments into their person. Again, perhaps that which influenced the interlocutor 1677, was the tutor's pursuing in Jean Kennoway's name as heir of the marriage, whereas the 8000 merks is provided to heirs and bairns. 2*do*, It is *jus tertii* for Carriden, who is convened as having the cautioner's effects in his hands, to propone any defence *in jure* for the cautioner, which is disclaimed by the cautioner's representatives. No 75.

Duplied for the defender; Bairns are unquestionably heirs of provision to their father, though the designation of bairns may be sustained in place of a service: And whether the provision be claimed as heir or bairn, it makes the receiver liable to the creditors of the father *in valorem*, and the relief of a cautioner for the father must have the same effect. As to the alleged inconvenience, that if heirs or bairns of a marriage were obliged to relieve their father's cautioner there would be no security for provisions in contracts of marriage, suppose it were so, *incommodum non solvit argumentum*; and yet they have this security, that implement may be pursued in the father's life, when the defence of relief is not competent.

The Lords found, That Jean Kennoway, the heir and bairn of provision, is not bound to relieve the cautioner for her provision, and sustained the pursuer's allegeance of *jus tertii*.

Fol. Dic. v. 2. p. 283. Forbes, p. 210.

*** Fountainhall reports this case:

1707. *July* 12.—By contract of marriage passed betwixt Robert Kennoway and Agnes Crawford, Walter Kennoway, brother to the said Robert, becomes cautioner for him, that he shall secure and provide 8000 merks to the heirs of the marriage. Jean Kennoway, being the only daughter procreate of the marriage, assigns the said obligement in her mother's contract of marriage to Dickson of Hartrie, and he pursues the heirs of Walter, the cautioner, and Carriden, for implement. The defence proponed for them was absolvitor; for the case is *res hactenus judicata* by a decreet *in foro*, which is the strongest of all exceptions, in so far as they having been pursued by some creditors-adjudgers of the right, *in anno* 1677, there was a decreet then given, finding that Jean being both debtor and creditor in the obligement, it was extinct by confusion. Creditor she was, by the clause whereby Walter became cautioner, that his brother Robert should employ 8000 merks of his own proper means for the

No 75. heirs of the marriage; and as she was this way creditor, so she was likewise debtor in the obligation, being heir to her father, who was bound to relieve his brother Walter of his cautionry, and so *confusione tollebatur*; and in the Roman law there is an express title, *Ne fidejussores dotium dentur*, *lib.* 5. *C. tit.* 20. which defence the LORDS sustained, and thereon a decreet absolvitor followed. *Answered*, There was such an interlocutor pronounced, but it was never extracted, and so has not the force of *res judicata*, or decreet *in foro*, but lies open to quarrelling or rectification till extracted. *Replied*, There were all the evidences imaginable of an extracted decreet; for, 1*mo*, It is marked by Stair, in his printed decisions, (No. 73. p. 12933.); 2*do*, It is put up in the minute-book; 3*tio*, The warrants are all extant; 4*to*, It is set down in the respondee-book as paid for, which is never done till it be signed by the clerk. Neither is there any vestige of a stop to it; and Lord Newton observes a parallel case, 9th March 1684, Menzies *contra* Peacock, No 74. p. 12935.; so that nothing hinders but that the clerk may give a new extract of it still, the first being casually lost. *Duplied*, All this might be, and yet the decreet never be taken out; so it stands only in the case of an interlocutor, which may always be reclaimed against till extracting, whereof they have raised a reduction, and repeat the reason, that such a metaphisical consolidation, as to make her both debtor and creditor, destroys the faith of all contracts of marriage and obligements fidejussoril assumed to fortify the same; for, by this logic, no cautioner in such contracts can ever be bound, but all these clauses must evanish in the air as vain and frustratory; whereas, by the principles of law, no such confusion can take place; but the heir of provision of that marriage may crave implement, not so much as heir, as *qua* creditor, by the obligement foresaid, that it may not be evacuate as superfluous. THE LORDS found the evidences and presumptions adduced not sufficient to astruct that there was a decreet extracted, and so repelled the allegeance of *res judicata*, seeing it could amount to no more but an interlocutor, and therefore allowed them to be yet heard against the same.

1707. *December* 19.—IN the action mentioned 12th July 1707, Dickson of Hartrie *contra* Mill of Carriden, the LORDS proceeded to determine the point *iu jure*, whether an heir of a marriage is both debtor and creditor, so as that they have no action against the cautioners in the contract of marriage, but are bound to relieve them. They, in the first place, observed, that in that interlocutor betwixt the parties, of the 23d November 1677, the LORDS went on a supposition, that there was no heir of line to discuss, which was a mistake in point of fact; for though there were no more children of that marriage but one daughter, yet Robert Kennoway had a son by another bed, who was his lineal heir; likeas, it was supposed the provision was to the heirs of the marriage, whereas it was to the heirs or bairns; but the LORDS made a very great differ-

ence betwixt the heirs of the marriage debating with their father's extraneous creditors and pretending to the matrimonial provisions as bairns and creditors and not as heirs, and an heir of a marriage obtruding this against the cautioner in the mother's contract, pleading to be free of his obligements, because you represent the person bound to relieve me of my cautionry; for, in the first case, no doubt such an heir of provision, or a marriage, will be liable to extraneous creditors, and can never be heard to obtrude that they are creditors by the provisions in their mother's contract-matrimonial; but this will not exclude them from pleading, that *quoad* you, who became cautioner for my father's performance of the provisions to the bairns or heirs of the marriage, I may very well found on my being creditor on these obligements, and that I am not bound to relieve you. And, according to this distinction, the LORDS found the debt not confounded by her being both debtor and creditor, but that she had good action to compel the cautioner to fulfil the articles of her father's contract, reserving relief against his heirs of line, but not against her, who was only heir of provision to a particular sum of 8000 merks. No 75.

Fountainhall, v. 2. *p.* 381 & 404.

1734. *December* 5. FOTHERINGHAM *against* FOTHERINGHAM of Pourie. No 76.

IN a contract of marriage the husband's cautioner being bound to employ a sum for the use of the wife in liferent, and the children of the marriage in fee; and the husband having died bankrupt without implementing, in a process at the instance of the children against the cautioner, the defence was, That the pursuers, as heirs of provision, are ultimately liable to relieve the cautioner, and *frustra petit quod mox est restituturus*. *Answered*, The pursuers have got nothing by their father, and so cannot be liable for any of his debts; nor will the sum they recover from the defender make them liable for their father's debts, because their claim is not *qua* heirs to their father, but as the defender's creditors. THE LORDS found the cautioner bound to implement, and that without relief. See APPENDIX.

Fol. Dic. v. 2. *p.* 283.

*** The same was found the day following, Ross of Markinch against M'KENZIE of Applecross. *See* APPENDIX.

*** Lord Kames, in his Dictionary, v. 2. p. 283. refers to a case, 6th January 1627, Stewart against Campbell, in which he mentions, that a decision similar to the above was pronounced. No such case has been found. Perhaps the date ought to have been 1727. See APPENDIX.