

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 obligations, 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 obligations, 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.

Fountainball, 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 restitutus*. 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.