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*** This case is also reported by Stair.

1666. *July 5.*—LAWRENCE SCOTT pursues the daughters of umquhile David Boswel of Auchinleck, and the Lord Cathcart, and the lairds of Adamton, and Sornbeg, for a thousand merks adebted by him to the defunct. The defenders offered to renounce. The pursuer replied, they could not renounce, because they had behaved themselves as heirs, in so far as by agreement betwixt them, and the heir male, they had renounced their interest of the heritage in his favours, and had gotten sums of money therefor. It was *answered, non relevat* unless they had so renounced, as to prejudge the creditor, or to assign, dispone, or discharge any thing they might succeed to, but if they only got sums of money from the heir male, in way of gratuity for their kindness to the estate, and to grant a renunciation voluntarily, as law would compel them, it would not make them liable; and the truth is, that by the defunct's contract of marriage, the estate is provided only to the heirs male, and only 10,000 merks to the daughters. Likeas, the defunct disposed the estate to his brother's son, who adjudged both upon the clause of the contract, and disposition, and the defenders renounced to him as a creditor, in common form.

THE LORDS found that the getting of sums of money, for such a renunciation, by which the creditors were prejudged, did not infer behaving as heir.

Stair, v. 1. p. 389.

1676. *July 19.* NEVOY *against* LORD BALMERINOCHE.

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An apparent heir having, after his predecessor's death, ratified a death-bed disposition, the Lords found his getting a valuable consideration for his consent, did not make him liable, he having done no deed tending to convey any right in the defunct, which might have been affected by the creditors.

MARGARET NEVOY pursues the Lord Balmerinoch, as representing the Lord Cowper, to make payment of Cowper's bond; and insists on this passive title, that Balmerinoch is apparent heir-male to the Lord Cowper, and that he transacted with the Lady Cowper, who got a disposition of the estate from her husband, whereby the Lady disposed to him the fee of the estate, and some bonds due to Cowper assigned to her, and Balmerinoch was obliged to deduce an apprising of the estate for debts due to himself by Cowper, and upon other debts of Cowper's; and therefore, having right as creditor, and for all rights he might have by the said apprisings, he ratifies the Lady's right, in so far as it is not disposed to himself, which right was *in lecto*, and defective as being in prejudice of the heir, and this contract imports in effect the heir's consent, and validates the disposition *in lecto pro tanto*; and the Lords have, by their act of sederunt in February 1662, declared, that it shall be a behaving if an apparent heir possess by virtue of an apprising, or an adjudication proceeding upon bonds granted by himself; and in this case it is offered to be proven, that the sums appraised for, or some part of them, are debts due by Balmerinoch as

principal, and Cowper as cautioner, and so is in effect for Balmerinoch's own debts, and he is in possession, and hath nothing else to ascribe his debt to but that apprising; *2do*, Though this condescendence should not make him heir simpliciter, yet it should make him liable *in quantum est lucratus* by the Lord Cowper's disposition.

THE LORDS found, that the getting benefit by transaction could not make an apparent heir liable, unless he had done a deed that might communicate the defunct's right which might have been affected by the creditors; but found that member relevant, that the defender possessed by an apprising deduced, containing debts due by Cowper as cautioner for Balmerinoch's father, to whom he is heir.

1676. December 13.—This cause being heard and decided the 19th day of July last, the defender further *alleged*, That he could not be liable, as behaving as heir, albeit he had right to an apprising led for his own proper debt, though he had intromitted thereby; because the act of sederunt 1662, being a great extension of that penal passive title, ought not now to be made use of; because the motives express in that act do cease by the act of Parliament 1661, 'Preferring the defunct's creditors to the creditors of the apparent heir, for the space of three years;' and, by the act debtor and creditor, 'Declaring all apprisings redeemable if they return to the apparent heir, for what they truly paid;' and, if these statutes had been duly considered, the act of sederunt would never have been made, the inconvenience being cured. But there is a great inconvenience to apparent heirs, who must either lose their inheritance, or be liable to all the defunct's debts, though far exceeding the value of the estate; *2do*, The act of sederunt must be strictly interpreted, which is only against bonds granted by apparent heirs after the defunct's death, as being of design to defraud creditors; but here the bonds were anterior to the defunct's death, and gestion being odious, is never understood but where there appears *animus immiscendi*; but here, by the transaction with the Lady Cowper, there is the greatest care taken not to immix. It was *answered* for the pursuer, That the act of sederunt stands in vigour and observance, and is well consistent with the prior acts, all being little enough to secure creditors against the contrivances of apparent heirs to bruik their predecessor's estates, without paying their debts; and the reason of the act of sederunt being against such contrivances, albeit in the narrative it bears, 'That bonds granted after the defunct's death by apparent heirs;' it beareth also, 'To be against all such ways.' And, by the contract with the Lady Cowper, there is no care taken not to intromit; but, on the contrary, the right of apprising to be led by Balmerinoch is provided to be disposed to the Lady in corroboration of her other rights, that she may possess thereby; and therefore the defender hath behaved in these points, *imo*, That he hath caused lead an apprising of Cowper's estate for Balmerinoch's own debt, carried on by his own agents, on his own ex-

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The heir's privilege of challenging a death-bed deed is purely personal.

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penses, which alone, unless he will renounce it, affects the defunct's estate, and imports behaviour; 2do, The ratification in favours of the Lady Cowper, though relating only to apprisings to be deduced, imports behaviour, much more when the Lady Cowper actually possesses, and can defend her possession by no other right, her own right being granted by her husband *in lecto*; 3tio, Balmerinoch hath entered vassals, which is a clear deed of behaviour, if he had no apprising, and if he had for his own debts, it is an intromission, against which the apprising cannot defend him from behaving according to the act of sederunt.

THE LORDS found, that an apparent heir having right to an apprising for his own debt, or assigning the same apprising, doth not import behaviour, if he, or others deriving right from him, intromit not; and found, that the ratification in favours of the Lady Cowper, being only for his right of apprising, did not import behaviour; but found, that if the apparent heir did receive vassals, or uplifted feu-duties, or other duties by himself, or any other deriving right from him, that the same is relevant to infer behaviour, notwithstanding of any apprising to which he hath right, or to his behoof, proceeding upon his own debt; and therefore found, that seeing the Lady Cowper possess, if she could not defend her possession by her right from her husband, as being granted *in lecto*, or being otherways defective, that her possession was to be ascribed to her right from Balmerinoch, and therefore did infer behaviour against Balmerinoch.

Fol. Dic. v. 2. p. 31. Stair, v. 2. p. 454, & 476.

* * * Dirleton reports this case :

THE Lord Balmerinoch was pursued, as representing and behaving as heir to the Lord Couper, at the instance of Margaret Nevoy, and diverse other creditors of the said Lord Couper, upon that ground, that he had ratified a disposition, made by the said Lord Couper, in favours of his Lady, on death-bed, and was obliged to comprise the said lands, and to give the said Lady a right to the comprising, to be deduced, that should be preferable to other creditors; and that, by the act of sederunt in my Lord Nithsdale's case*, apparent heirs, granting bonds to the effect their predecessor's estate may be established in their person, or in the person of some confident to their behoof, are liable as behaving; and it was *alleged* for the defender, That behaving is *magis animi quam facti*, and it is evident that the defender did shun to be heir, and did of purpose take the course foresaid, that he should not represent the defunct.

THE LORDS found, that the condescendence was only relevant in these terms, viz. that the defender, or any confident to his behoof, had comprised the said estate for Balmerinoch's own debt, and had possess by virtue of the comprising; or that the Lord Balmerinoch had communicated the right of the said comprising to the Lady Couper, and that she had possess by virtue thereof, and could

* Glendonwyne against Nithsdale, No 84. p. 9738.

not defend herself with her own right, as being *in lecto*, or otherways defective.

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It was the opinion of some of the Lords, that it was sufficient and relevant to say, that Balmerinoch had comprised for his own debt, and was obliged to communicate the said comprising, and had ratified the Lady Cowper's right; for these reasons, 1^{mo}, The law considers *quod agitur*, and not *quod simulate concipitur*; and the Lord Balmerinoch, by taking the course foresaid, to comprise for his own debt, intends upon the matter *adire*, and to carry away his uncle's estate, to frustrate creditors; 2^{do}, Though it be pretended that there is a difference betwixt Nithsdale's case and this, in respect, in that case, the adjudication was upon bonds granted by himself after his father's decease, and, in this, the comprising is for my Lord Balmerinoch's debts, contracted before my Lord Cowper's death, the said difference is not considerable, seeing, as to that case, there was a design to carry away the defunct's estate, by a deed of the apparent heir, to the prejudice of creditors, and there is the same in this; 3^{do}, Though my Lord Balmerinoch had granted only a ratification, without communicating any right, *eo ipso* he behaved as heir; in respect he had ratified the Lady's right, for any right or interest he had himself; and he had an interest, as apparent heir, sufficient to establish a right in the person of the said Lady, and to prejudge creditors; so that they could not question the same, seeing rights on death-bed being consented to by the apparent heir when they are made, or *ex post facto*, become valid and unquestionable *ex capite lecti*, as appears by the law of the Majesty, concerning rights on death-bed.

Dirleton, No 400. p. 197.

* * * Gosford also reports this case:

1676. July 25.—THE DOCTOR and Thomas Douglas, as creditor by bond to the deceased Lord Couper, did pursue the Lord Balmerinoch, as representing the Lord Couper, the uncle, upon the passive-titles, viz. that he was vicious intromitter with the rents of his estate, and that he had behaved himself as heir, by granting a charter to one of my Lord Couper's vassals, with a *de novodamus*. It was *alleged* for the Lord Balmerinoch, That he could not be liable for any of these deeds condescended upon, because he had intromitted by virtue of a comprising led against the Lord Couper's estate, which he had right to; and any charter he had was as compriser, so that the creditors may redeem, but there can be no ground of a passive title. It was *replied*, That the comprising could not defend him, because it was led for his own debts, and not for the Lord Couper's, and, as an apparent heir granting bonds, whereupon being charged to enter to his predecessor's estate, and acquiring right to that comprising, it will not free him from a passive title, as was lately found in the case of the Earl of Nithsdale, No 84. p. 9738., whereupon an act of sederunt was made to make it a leading case, so, upon that same reason, an apparent

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heir suffering a comprising to be led against him for his own debt, albeit prior to his predecessor's death, and obtaining a right thereto, and entering to the possession, he ought to be liable to his predecessor's debts, otherwise, by such a contrivance, the true creditors of the defunct might be disappointed, and his estate applied for payment of other debts than those contracted by himself. It was *replied* to the 2d, That Balmerinoch's comprising being but lately led, and the legal not expired, it could give him no right to grant a charter, with a *de novodamus*, to any vassal; it did necessarily infer a behaviour, having gotten a composition therefor.—THE LORDS did repel the first defence founded upon the comprising, which, after perusal, was found to be only the proper debt of my Lord Balmerinoch, and not for the debt of the Lord Couper; seeing that same reason did militate against his intromitting, by virtue of such a comprising, to make him heir *passive*, as did militate, in the case of the Lord Nithsdale, against voluntary granting of bonds by apparent heirs, that comprising might be led against their predecessor's estate, and right made to them without entering heir, they being both contrivances, of a like nature, to defraud the lawful creditors of their defunct predecessors, and yet to carry away the benefit of his estate. As to the *second* point, of granting a charter with a *de novodamus*, it was not decided, the first being sufficient for a passive title.

1676. December 14.—IN the action betwixt the said parties, wherein there was an interlocutor 25th July 1676, being again called, and the whole debate resumed upon that point, that the Lord Balmerinoch's comprising being for his own debts, could not make him heir *passive*, because it was a lawful title the time of his intromission; as likewise, it being *urged* against him, That he had transacted with the Lady Couper, and had confirmed her right of liferent, which was null of the law, being granted on death-bed; as likewise, that he had entered a vassal, by granting a charter, bearing a *de novodamus*, for which he had gotten composition, and had intromitted with the whole mails and duties of the lands, besides the liferent; so that it was decided in the case of my Lord Nithsdale, No 84. p. 9738., and thereupon an act of sederunt made, bearing, that apparent heirs granting bonds for their own debt, but not their predecessor's, whereupon comprising being led, and they intromitting, it should be a title to infer a behaviour, and make them liable to their predecessor's debt; it was *answered* for the Lord Balmerinoch, That *aditio hæreditatis* was *magis animi quam facti*; and, by our law, *quivis titulus etiam coloratus* would defend an apparent heir from being liable for all debts, but only to count for his intromission; so that he having of purpose led a comprising to be a lawful title, it cannot be presumed that he had *animum adeundi hæreditatem*; and, for the practise, it could not meet him, because the Lord Nithsdale was not debtor, before he was apparent heir, to any debtor, but did grant bonds after he was apparent heir, of purpose to defraud his predecessor's creditors.—THE LORDS did again renew their interlocutor; and found, that the granting

of a charter for composition, bearing a *de novodamus*, was relevant *per se* to infer a behaviour; as likewise, that he had possessed or granted right to the Lady Couper to possess her own liferent right, being reducible, as granted on death-bed; but, as to the last point, of causing comprise for his own debts, contracted before he was apparent heir, whereby he pretended not to fall under the act of sederunt, I was not decided, but it seems the law can make no difference, seeing the foundation is the same whether the bonds be before or after, viz. that taking an indirect course *animo de fraudandi creditores*, where the defunct had little or inconsiderable debt of his own, whereby they intend to possess their predecessor's estate, which may be great, and frustrate all creditors, by putting them to great expenses of plea, of necessity to compone with them as they please.

Gosford, MS. No 887. p. 568. & No 920. p. 596.

1711. June 28.

THOMAS DICK and WILLIAM ERSKINE against JOHN CARSTAIRS of Kinneuchar.

THOMAS DICK and WILLIAM ERSKINE being creditors in considerable sums to the deceast Carstairs of Kilconquhar, *alias* Kinneuchar, they pursue John Carstairs, now of Kinneuchar, his son, for payment, on the passive titles, and condescended on this act of behaviour, that Mr John Wood having adjudged his father's lands, did, after the legal, sell a part of them to Sir Philip Anstruther; but, in regard his right was looked upon as dubious and insufficient, and he gave only warrandice from his own fact and deed, Sir Philip the purchaser declined to pay an adequate price, or rely on Wood's right; and therefore Carstairs, now of Kinneuchar, gave him a bond of the same date, and before the same witnesses, expressly relative to the minute, obliging himself to deliver to Sir Philip the writs of the lands, to purge incumbrances, to warrant absolutely at all hands, and against all deadly; and, for his better security, to enter heir in certain lands which did belong to his grandfather, to make Sir Philip's warrandice more effectual; and he found Sir William Bruce, his father-in-law, cautioner for performance of the premises; by which deeds it was evident he was the principal disponent, and Wood only a mere name to cover and palliate the contrivance; and that he had plainly meddled with the charter-chest and writs, which was *per se* a sufficient passive title without any more. *Alleged* for the defender, This was one of the nicest passive titles had ever been fallen upon, and it being odious to subject a man to an ocean of debt, where his *animus gerendi* does, not appear, but, on the contrary, a formed design and intention not to represent, his concurrence being merely to do a kindness to his father's creditors, without a sixpence of benefit to himself, Wood having got the price, and purged some preferable writs therewith: But where the

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An adjudger, after the legal was expired, sold part of the lands, but his right being doubted by the purchaser, the apparent heir of the debtor granted a bond, obliging himself to deliver to the purchaser the writs of the lands, to purge incumbrances, and to give absolute warrandice. Found that this imported a behaviour.