1666. *June* SCOTT *against* THE HEIRS of AUCHINLECK.

No 50.
The receiving a gratuity for executing a renunciation, which the party might have been compelled by law to grant, and by which creditors were not injured, found not to infer behaviour.

DAVID BOSWEL of Affleck, by contract of marriage with his first Lady, being obliged, in case their should be no heirs male, but female, of the marriage, to provide them to certain portions. Lawrence Scott, as creditor to the deceased Affleck, (having left only daughters) pursues them and their husbands, as they who have renounced to be heirs, yet have gotten satisfaction, from the heir male, of their portions provided to them, at least received sums of money, from the heir male, and that for no other cause, but for granting the renunciation. It was *alleged* for the daughters and their husbands, absolvitor, because they renounce to be heirs, and any receipt of sums of money by them in manner libelled, cannot import behaviour as heir; by the contrair, their express renunciation takes away any presumption *et animum immiscendi;* and as to the receipts of sums, *non relevat*, (and it was lawful for them to receive sums from the heir male, *gratuito* for kindness and good offices,) unless the pursuer will say, that the sums received were in satisfaction of the provisions made to them as heirs, by their mother's contract of marriage, which cannot be alledged, seing the said provisions are entire undischarged, and may be adjudged by the heirs of line against the heirs male, and which heir male is likeways liable to the creditors, for all their debt, though the heirs of line have renounced.

THE LORDS found the allegeance relevant.

Fol. Dic. v. 2. p. 31. Gilmour, No 186. p. 135.

*** Newbyth reports this case.

1666. *June* 16.—IN a pursuit at Lawrence Scot's instance, against Boswel of Affleck, for payment of a debt owing by one of his predecessors to the said Lawrence, and the defender being pursued upon the passive titles, as behaving himself as heir, which was referred to his oath, and he having deponed, that he had intromitted with none of the heirship goods, but only his sister having come to his house upon his father's best horse, he did ride upon the same several times to the kirk; and it being questioned whether his riding upon the said horse as it was qualified, did import a gestion; the LORDS were of opinion, for the most part, it did not, and therefore assoilzied the defender from that part of the libel, but found him liable for the debt, upon that member as successor *titulo lucrativo* to his father, by accepting of a disposition from him, to a clause contained in his uncle's contract of marriage, to whom his father was heir served and retoured, conceived in favour of the heirs male.

Newbyth MS. p. 62.

*** This case is also reported by Stair.

No 50.

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 kindliness 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 disponed 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 geting 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 Balmerinoch.

No 51.
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 disponed 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 disponed 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 apprised for, or some part of them, are debts due by Balmerinoch as