1701. *July* 23. JOHN BAILLIE *against* ALEXANDER CHANCELLOR.

No 33.
An appriser executed a renunciation of his right in favour of the debtor, which he kept in his own custody till his death. His apparent heir, by intermeddling with it, and giving it up to the debtor for gain, was found to have incurred behaviour.

JOHN BAILLIE of Woodside pursues Alexander Chancellor, merchant in Edinburgh, for a debt due by Helen Barns, his mother, on this passive title, that Helen having an apprising on the lands of Bagbie, she subscribed a renunciation thereof, which he either found among her papers after her decease, and kept it, which meddling was an undoubted gestion and behaviour, or it was in his hands before her death, and was after it given by him to his brother William, to be given up to the debtor-reverser, in prospect of gain. *Alleged*, He got it from his mother to give up to the party; and though his endeavouring to get money for it might be a fault, yet it cannot amount to the passive title, especially seeing he had the gift of his mother's escheat, which is a probable and colourable title to assoilzie from behaviour, as Stair shews, Book 3. Tit. 6.; and 10th June 1674, Spencerfield against Hamilton, *infra*, *h. t.* 2*do*, He had a *dispositio omnium bonorum* from his mother, which is enough to elide behaviour, which is only inferred by deeds transmitting property, and not by renunciations extinguishing it, 5th July 1666, Scot against Auchinleck, *infra*, *h. t.* *Answered*, His giving up and disposing upon the said renunciation could be by no other title but *animo domini et hæredis*; neither does the escheat palliate, for that gives right only to moveables, whereas this was an heritable subject; and her *dispositio omnium bonorum* gave as little right, being only deposited in the Clerk's hands to get her *cessio* and suspension, and belonged to all the creditors as much as to him, and was never his evident. THE LORDS repelled the defence, and found his intromitting with and disposing on the said renunciation, after his mother's death, on prospect of money, was sufficient to infer the passive title of behaviour, and that the gift of escheat nor *dispositio omnium bonorum* did not purge; and thought this way of evacuating the predecessor's fee by renunciations, was a more dangerous invention to the prejudice of creditors in redeemable rights, and might cover the intromissions of apparent heirs more than any of the former contrivances had done.

Fol. Dic. v. 2. *p.* 29. *Fountainhall, v.* 2. *p.* 121.

1706. *June* 15. DIGGLES and his FACTOR *against* STEWARTS.

No 34.
An apparent heiress and her husband, mean persons, having received from the defunct's man of business, the

THOMAS STEWART, merchant in Newcastle, being debtor to John Diggles, merchant in Manchester, in L. 80 Sterling, by bond, the said Diggles, and Andrew Dennet, his factor, pursue Janet Stewart, sister and apparent heir to the said Thomas, and John Stewart her husband, for payment on the passive titles; and insisted on this ground, that she and her husband had granted a receipt to John Knox writer, of her brother's writs and evidents, and, particu-

No 34.
writs and evidents of his real estate, upon inventory, for which they granted receipt; the Lords, in this case of poor ignorant people, who made no use of these papers, assoilzied from the passive title.

larly, of an heritable subject belonging to him, by adjudication from one Jamieson, his debtor, and had paid Knox an account to get them up, and make themselves masters of his papers; and the husband having signed the receipt, must be liable as well as the wife. *Alleged*, 1*mo*, *Absolvitor*, *quoad* the husband; because the passive title of *gestio pro hærede* can reach none but those who are nearest heirs *et alioqui successuri*; whereas he, though the apparent heir's husband, is himself a stranger to the debtor; 2*do*, As to the wife, *esto* she did represent, yet being *vestita viro*, she can be liable only in the event of the dissolution of the marriage; but, 3*tio*, She can never be liable for taking up these papers; for though intromission with rents of lands, and other moveable goods, and the defunct's charter-chest *per aversionem*, without warrant or making inventory, infer a passive title of behaviour; yet she is not in that case, for here she receives only papers up from her brother's writer upon inventory, mentioning every individual writ, and never made use of them; and so there can be no fraudulent design, nor prejudice to the creditors, seeing she is ready to make them forthcoming for their behoof; and being poor rustics, their simplicity is sufficient to exoner them from such an odious passive title as vitious intromission, seeing they have done a favour and benefit to the creditors, by preserving the papers, and so there was no *animus immiscendi universaliter*, but only for custody and conservation. It is true, intromitting with the defunct's goods, without a title, is what the law calls *crimen expilatæ hæreditatis*, and looks like stealing from the dead; but the taking up a few papers can admit of no such construction; and the LORDS, on the 28th June 1670, Ellis against Kerse, No 27. p. 9668. found the receipt of a charter-chest, by an apparent heir, without inventory, inferred this passive title; *ergo a contrario sensu*, the taking up of a few papers, upon inventory, can never import it. And the reason of this passive title, for fear of embezzling and abstracting the writs, cannot take place here, because they were received by inventory, and are now offered *re integra* to the creditors. *Answered*, If this be not sufficient as a passive title, it will open a door to apparent heirs to intromit with their predecessors writs, and defraud their creditors, and yet not be liable; whereas all such intromission, without authority or warrant of a Judge, is vitious and clandestine; and was so found since the Revolution, in the case of Murray and Drummond against the Laird of Blair, No 32. p. 9675.; and before it, betwixt Innes of Coxtown and Duff of Drummore in 1682, No 28. p. 9670. And the LORDS demurred on it in the case of Urquhart of Knockhill and Sir William Sharp, No 31. p. 9673. And the producing the papers now *non relevat* to assoilzie, no more than if one who had intromitted with his predecessor's rents should offer to restore them; and the reason of law is clear, for the apparent heir has year and day to deliberate, and if he apprehend danger, he may abstain; but if he will put to his hand and meddle, it is just he should be liable, he having so easy a remedy to forbear, and will not; especially seeing they paid money for getting them up; and the defunct's order for delivering them makes against them,

No 34. for that is as much as if he had disponed the adjudication to them; in which case, she would have been liable *per præceptionem hæreditatis*. It is true, in 1628, No 26. p. 9668. one was assoilzied, though he had intromitted with his father's evidents; but there the specialty was, that it was done in his minority.—The Lords, by a plurality of five or six against four, found, in this circumstantiate case of poor ignorant people granting a receipt of papers upon inventory, without qualifying any use they had made of them, that it was not a passive title.

Fol. Dic. v. 2. *p.* 28. *Fountainhall, v.* 2. *p.* 334.

1709. *January* 25. Mr John Chalmers *against* Sir William Sharp.

No 35. Accepting of a key, and taking papers particularly assigned, found not to infer behaviour.

Mr John Chalmers, writer, having right to a bond of Sir William Sharp's of Stonnyhill, pursues Sir William Sharp of Scotscraig, his nephew, and apparent heir, on the passive titles, and refers them to his oath; and he having deponed, it was *contended*, That he had acknowledged as much as inferred a *gestio pro hærede*, in so far as he owned, that, being at London the time of his uncle's death in 1686, on his return, Sir James Cockburn gave him the key of a room which the defunct had desired him to deliver to him, and that he had gone in several times, both alone and in company, and viewed the papers there contained; which searching and intromission was sufficient to infer behaviour as heir. *Alleged*, His uncle having disponed to him several particular funds and subjects, he had all the reason in the world to try for the grounds of the debts to which he was assigned, without which his right would have been ineffectual; and his oath being the sole mean of probation, he has denied intromission with any other writs whatsoever, except those especially disponed to him. And that which both the Roman law and ours pitch on as the great characteristic of behaviour, being the *animus adeundi et abstrahendi*, there is no pretence for this fancy here, seeing it is plainly ascribeable to his singular right and title of a special assignation from his uncle; which being *titulus probabilis et coloratus*, is more than sufficient to assoilzie from an odious and unfavourable passive title; and thus a tolerance from a donatar of escheat or recognition has been sustained to assoilzie the apparent heir's intromission, in July 1665, and July 1666, and January 1667.* *Answered* for Chalmers, That the laws of no nation had more strictly provided against the frauds and embezzlements of apparent heirs than ours, and it was *pessimi exempli* to allow them access to charter-chests, and ransack their predecessors papers summarily at their own hand, when law had provided an easy remedy, by applying to a Judge, and entering by his warrant and authority, and inventorying the writs; which method he having neglected, *pessimum* is to be presumed against him, that he has abstracted the writs; and creditors must not be put to impossible expiscations of the particulars, where he had a promiscuous intromission *per universitatem*. And thus have our wise

* See Appendix.