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.

No 35.

predecessors decided, as far back as the practiques go, as appears from Haddington, 8th March 1610, Baillie against Home, No 13. p. 9658.; Durie, 15th January 1630, Cleghorn against Fairly, No 21. p. 9664.; and Stair, 28th June 1670, Ellies against Carse, No 27. p. 9668.; and Innes against Duff, No 28. p. 9670.; and since the Revolution, in the Laird of Blair's case, No 34. p. 9675. the LORDS expressly found them liable, if they did not apply to a Judge, and get them inventoried. And the accurate French Lawyer, in his *Traite des Lois Civiles*, in handling heirs making inventories, lays this down as a rule, that if a son immix without getting the papers sealed or inventoried, he renders himself purely and simply heir; and that eminent English Civilian Swineburn affirms, an executor omitting to make inventory is even bound to legatars, and so much more to creditors. THE LORDS, by plurality, found his accepting the key, and taking the papers to which he was specially assigned, did not infer the passive title of behaviour. But all were generally convinced, that it was of a dangerous consequence to allow such intromissions; and, therefore, deserved amendment and regulation, by an act of sederunt, *pro futuro*.

Fol. Dic. v. 2. p. 29. Fountainhall, v. 2. p. 483.

SECT. V.

Husband's Intromission in name of his Wife.

1680. *January* 15. DINGWALL *against* IRVINE.

No 36.

THE LORDS refused to sustain the husband's intromission to bind behaviour upon her (his wife) as heir to her father; yet women heirs may thus shun debt by marrying; only the husband will be liable as intromitter. *Quæritur*, If a confirmation *ante metam litem* will purge it, being of heirship.

Fol. Dic. v. 2. p. 29. Fountainhall, MS.

1703. *December* 17. LINTHILL *against* DICKSON.

No 37.

It was the opinion of the Court, that

HOME of Linthill being creditor to Dickson of Overmains, pursues Phillis Dickson, daughter and apparent heir to his debtor, and William Stewart her husband, on this passive title, that she had behaved as heir, in so far as she had