

1697. February 2. RAMSAY of Cairnton *against* CARNEGIE of Phineven.

No 171.

Found in conformity with Johnston against Ker, No 166. p. 9848.

CROGERIE reported Ramsay of Cairnton against Carnegie of Phineven, for payment of a debt due to him by Kinfauns, with whose moveables Phineven intromitted. *Alleged*, Any intromission he had was as tutor to his brother's daughter, and who was executrix confirmed *qua* creditrix on her bond of provision to her father, which was sufficient to purge an odious passive title of vitious intromitter. *Answered*, The defence ought to be repelled, because he offered to prove the intromission was prior to the confirmation, and the goods and plenishing so intromitted with were never confirmed, but a sham-confirmation of some other particulars made up; so that here was not only a vitious super-intromission, but likewise a fraudulent omission and concealment, which, by the principles of law and reason, must make him *passive* liable to the whole. *Replied*, Any intromission made prior to the confirmation was necessary; and the new act of Parliament 1696, declaring that the confirmation of an executor-creditor shall not defend another intromitter farther than the subject confirmed, shews it was a total exception before that act.—THE LORDS having considered the tract of decisions, that fraudulent concealment inferred this universal passive title, and that a dative *ad omissa* was only allowed to make them liable *in quantum* the value of their intromission extended, if it was not omitted *dolose*; therefore they found it relevant to make him liable *passive*; especially seeing it was offered to be proven, that he had raised his process, and used citation before the confirmation, though after the decerning him to be executor; though the intervening of a creditor's citation betwixt the two, if there were not a considerable distance of time, or delay in confirming after the obtaining themselves decerned, would not be much regarded; yet here the Lords found Phineven in this case a vitious intromitter. See 13th February 1627, Kneeland *contra* Bailie's Relict, No 167, p. 9848.

*Fol. Dic. v. 2. p. 42. Fountainhall, v. 1. p. 762.*

1697. February 17.

MARQUIS of TWEEDDALE *against* The RELICT and CHILDREN of ROBERT DEMPSTER, his Chamberlain.

No 172.

Found again in conformity with Johnston against Ker, No 166. p. 9848.

IN the Marquis of Tweeddale's pursuit against the Relict and Children of Robert Dempster, his chamberlain, for clearing his accounts; *alleged*, Absolver, because she was executrix confirmed *qua* creditrix upon her contract of marriage. *Answered*, This could not purge the passive title of vitious intromitter, because they offered to prove super-intromission. *Replied*, That could