1710. *November* 17. PATRICK CRAWFORD *against* DAVID BOSWEL.

THE deceased Mr John Boswel of Craigston being debtor in £500 Scots, by bond, to Patrick Crawford, merchant in Edinburgh, he pursues David Boswel, his brother, for payment; and refers the passive titles, and particularly by meddling and intromitting with the writs and evidents of the lands, to his oath; who depones, That, on his brother's death in 1692, a bill was given in to the Lords, for opening his cabinets and searching his papers; and, in regard he was an agent, that the client's writs lying beside him might be restored to their respective owners, and the rest inventaried; and my Lord Rankeillor being named, he employed Crawford of Crawfordston, writer to the signet, to inspect them, which he did as to them lying in Edinburgh; but that there was another chest lying in his house in the West Country, which Crawfurdston in the vacance opened, and delivered the writs to him on his receipt; and that they were his father's papers, and never knew any thing of his brother's right thereto, or his having the key thereof, his mother dwelling there; and so he never judged himself concerned in his brother's debts, who never entered heir to his father, but, under the pretence of apparency, continued his father's possession. At advising this oath, it was contended for Patrick Crawford, that meddling with their predecessors' writs, without authority of a judge, was always sustained as a relevant passive title, even before the 24th act 1695, for obviating the frauds of apparent heirs. And though my Lord Rankeillor gave warrant to open the trunks and inspect the writs lying in Edinburgh, yet it is not so much as pretended that the warrant extended to the chest in the country; and Crawfurdston's taking them out, and delivering them to him on receipt, is all one as if he had opened the chest himself; for *qui per alium quid facit per se facere videtur;* and if such sham conveyances and transmissions be once countenanced, an apparent heir shall ever employ another, and so evite the penalty of the law. Likewise, Mr John his debtor was more than three years in possession of his father's estate, and so is liable by that clause in the Act 1695; and David, the defender, cannot now pass by his brother John, the interjected person, and so shun and skip over his debt.

ANSWERED,—The only medium to bind the passive title on him is by his oath; which expressly bears, that any intromission he had was with his father's writs, and not his brother's; so that, if the debt had been owing by his father, he confesses he would have been liable. But he has no manner of concern with what debt his brother contracted; and the act 1695 does not reach him, his brother having deceased before that act was made.

The Lords, by plurality, found the case too narrow, and therefore assoilyied; seeing his oath did not prove the allegeance that he had intromitted with his brother, the debtor's writs, but only with his father's, who died last infeft. Yet many of the Lords thought this might open too great a door and license for apparent heirs to embezzle writs, and yet escape; and remembered both *Sir William Sharp's Case*, and likewise *Murray of Livingston* against *the Laird of Blair*, where he deponed the writs were not his father's, but disponed to him in his contract of marriage; yet the Lords found him liable. *Vol. II. Page 598.*