long before this agreement acquired, he dispones it to his son, who, pursuing a poinding of the ground against Thomson's half, he raises a reduction and declarator that the same is extinct, or must accresce to him, being in Archibald's person at the time of the transaction.

ANSWERED,—Offers to prove, by the communers and witnesses, that it was neither *actum* nor *tractatum* to be conveyed.

REPLIED,—It was unknown to him, and concealed by his good-brother, and so could not be the subject of a communing.

The Lords considered there was evident fraud in keeping up this right: and when Archibald disponed the property of the half to Thomson, that carried the lesser right and servitude of the annualrent, as has been oft decided; *in majore continetur jus minus;* therefore they ordained him to communicate the right, seeing *jus authoris accrescit successori.* *Vol. II. Page* 19.

1698. *December* 6. HENRY NISBET, YOUNGER of DEAN, *against* JOHN KINNAIRD.

[See the prior part of the Report of this case, Dictionary, page 4872.]

IN the action, mentioned 25th November 1698, between the L. of Dean and Kinnaird; the attempted settlement not taking effect, the Lords advised the cause *in jure,* and found the reasons of circumvention and fraud, both *in consilio et eventu,* not sufficient to reduce the tack; and that the tenant should have informed himself better what was the true rent, and not have relied on Dean's assertion, and tried the quality of the ground; and his eye being his merchant, he had none to blame but himself; and he had acquiesced two years. But as to the damages by not removing the stones, and not making the ponds, the Lords allowed a probation, before answer, to both parties, on their several allegeances. *Vol. II. Page* 23.

1698. *December* 6. RATTRAYS *against* JOHN DRUMMOND of NEWTON.

CHALMERS, elder and younger of Milnehorn, sell their lands to one Crighton; and the price being a sum secured by a wadset on the Earl of Strathmore's estate, they take their right to it in John Drummond's name as their trustee. Thir Rattrays being creditors to Chalmers, the father, arrest in John Drummond's hands; and, in the pursuit to make forthcoming, he depones he was only a confident and interposed person, and had applied the price for payment of debts wherein Chalmers of Milnehorn, younger, was bound as cautioner for his father.

ALLEGED,—This was an unlawful gratification, preferring one creditor to another; and that, after their arrestment, he should not have paid, but suspended on double poinding.

ANSWERED,—This falls not under the Act of Parliament 1621; for the son, whose trustee he was, being in the fee of the lands, as he had validly disponed, so the trustee might warrantably apply the price towards the payment of his

debts, and was not obliged to notice the father's creditors, who was only life-renter.

The Lords thought John Drummond, paying after arrestment, had done it on his peril; but that it was still competent to him to defend it as warrantable in the same manner as if the money were yet in his hand and the father and son's creditors were competing, who had the best right to it; and seeing that the son was fiar, and no creditors were paid, but such as had the father bound as well as the son, they found the payments warrantable, and assoilyied John Drummond from Rattray's reduction and process of forthcoming. *Vol. II. Page 23.*

1698. *December* 17. The MARQUIS of TWEEDDALE *against* HELEN HENDERSON.

THE Marquis of Tweeddale pursues Helen Henderson, relict of Dempster, his Chamberlain, for payment of the balance of his accounts, upon the passive titles, as representing her husband; and probation being led, it was proven by single witnesses, that she had intromitted with £15 Scots, and other small sums not given up by her in the inventory of the confirmed testament, as executrix-creditrix on her contract of marriage, and so presumed to be fraudulently omitted; and there was the concurring testimony of two witnesses proving she had disposed of some plough-graith and cart-wheels.

ANSWERED,—That *testes singulares nihil probant;* and where there was a conjunction of two witnesses it was *de re minimâ;* and the plough and cart-graith was confirmed, in so far as the utensils and domiciles of the house being given up, they behoved to be included in that article; at least it was a probable ground for her to think so: and passive titles, being odious, are not to be extended where the intromission is small and inconsiderable.

The Lords considered that wives had great opportunities of concealing and embezzling money and other moveables; and she had an universal intromission; and it appeared there were 1600 merks lying beside him a little before his death, and which now they would give no account of; therefore the Lords found her liable.

And our predecessors have not so much regarded the smallness of the intromission as the *animus fraudandi,*—as appears by Haddington, 8*th March* 1610, *Baillie* against *Home*; Dury, 13*th January* 1630, *Cleghorn* against *Fairly;* and Stair, 15*th June* 1675, *L. of Abercairny* against *Nicol;* where the lying on the father's bed, eating at the table, wearing his stockings, drinking in his maizer-cup, working with his tools, &c. inferred vitious intromission; and the Lords thought there was enough in this case *ad victoriam causæ.*

Vol. II. Page 27.

1698. *December* 20.

This week I sat in the Outer-House, and so the observes are the fewer.