

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-creditrrix 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 minimā*; 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, *8th March 1610*, Baillie *against Home*; Dury, *13th January 1630*, Cleghorn *against Fairly*; and Stair, *15th 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.