No 64.

But there was another point about which the reporter doubted, how far, although in the case of the moveable passive titles it is usual to allow a pursuer, insisting on the universal passive title, to restrict his libel to actual intromission, the same was to be allowed in the case of an heritable passive title, of which he knew no instance; though in the vote he concurred with his brethren, who unanimously found as above.

It is *indubitati juris*, that with respect to the method of the disponer's making up his title in the event of a clause of return's taking effect, there is no difference between such clause of return and a common substitution; for the fee being once vested in the disponee, the estate, upon failure of him and the heirs substitute to him, cannot in either case be otherways taken up than by infeftment as heir to him; and which in this case was supposed to be no question, which is rather stronger than a decision.

It is no less true, that where an estate is disponed to a presumptive heir and the heirs of his body, with a clause of return to the granter on failure of such heirs, such clause of return is held as no other than a simple substitution, and does not restrain the disponee even from gratuitously alienating the estate directly, or indirectly, by contracting debt; though where such clauses are in a conveyance to a second son and the heirs of his body, to return to the family on the failure of such heirs, the second son is understood to be limited from doing gratuitous deeds in prejudice of the clause of return; but even in that case, where there are no prohibitory and irritant clauses supperadded, such clause of return has no effect against an onerous creditor.

Fol. Dic. v. 4. p. 41. Kilkerran, (PASSIVE TITLE.) *No* 3. *p.* 367.

1742. *January* —. RENNY *against* BALLENY.

No 65.
How far the maxim extends, that proponing a peremptory defence infers a passive title.

IN a process upon the passive titles, before the inferior Court, for payment of a bill accepted by initial letters, the defender having denied the passive titles, and also proponed an exception to the validity of the bill as only accepted by initial letters; the ~~Judge sustained process,~~ the pursuer proving that the defunct was in use to subscribe by initials; and upon advising the proof, 'found, that the defunct was in use to subscribe by initials, and sustained the bill, and found the defender's proponing a peremptory defence was an acknowledgment of the passive titles, and decerned.'

When in a suspension of this decree, the case came before the LORDS by petition against the interlocutor of an Ordinary, finding the letters orderly proceeded, the LORDS demurred pretty much.

It was on the one hand *observed*, that it had been of old established, that proponing of payment was an acknowledgment of the passive titles; that it had been long a disputed point, whether or not that was to be extended to the proponing of prescription, and that at last it had prevailed that it should; but

No 65. as to the question now before the Court, whether it should be extended to the objecting of a nullity, it was new and the rule had never yet been so far extended.

It was on the other hand said, That where no proof was necessary, the defender might safely object a nullity appearing *ex facie* of the deed; but that no man could, without acknowledging the passive titles, put the other party to a proof.

All however agreed to allow the petition to be seen; and upon advising the the petition with the answers, wherein there was nothing new said, the Lords, without further argument, 'found that the proponing the said defence was not an acknowledgment of the passive titles, and remitted to the Ordinary to proceed accordingly.'

Fol. Dic. v. 4. *p.* 43. *Kilkerran,* (Passive Title.) *No* 4. *p.* 368.

1743. *July* 2. Hutchison *against* Menzies.

No 66.

Hutchison obtained decree in absence, against Menzies of Troloss, to whose oath the passive titles having been referred, he did not depone. Menzies raised a reduction of the decree, wherein a proof of the passive titles was allowed, and accordingly a disposition was recovered, by which Menzies, under the character of apparent heir, disponed the estate belonging to his father, to trustees, for behoof of his creditors. He thereby also bound himself to make up his titles, and gave the trustees full power to infeft him. He delivered over to them the writs in his possession, and empowered them to pursue for the rest. And lastly, he took the trustees bound for the surplus after payment of the creditors. In the end of the disposition he declared, that this deed was by no means to subject him personally, or his other estate, to pay of his father's creditors. The Lords found the disposition a passive title.—*See* Appendix.

Fol. Dic. v. 4. *p.* 42.

No 67.
Whether, although a decree had been pronounced *declaratorie*, finding a person liable on the passive titles, he could be distressed on a bond?

1745. *January* 29.
Elizabeth Ramsay *against* The Creditors of Clapperton of Wylliecleugh.

Both parties in this question founded on apprisings affecting the lands of Easter-Wylliecleugh, and mutually objected to each others titles, Elizabeth Ramsay the heiress of the family, on an apprising deduced by Hope-pringle of Torsonce, 4th June 1645, which was now in her person, and the Creditors of the deceast Richard Clapperton on one deduced by Alexander Kennier, which came into the person of a predecessor of their debtor.