1739. *February* 20. Rose *against* Earl Moray.

No 64.
The universal passive title of behaviour restricted to actual intromission.

In the contract of marriage between James Lord Down, eldest son to Alexander Earl of Moray, and Lady Catharine Talmash, the Earl disponed his lordships of Down and Pettie 'to the said James Lord Down, and the heirs-male of the marriage, which failing, to the Lord Down's heir-male of any other marriage, which failing, to return to said Earl himself, his heirs-male and assignees whatsoever.'

Upon James Lord Down's death in 1685, without heirs-male of his body, the Earl his father took up the estates of Down and Pettie upon the clause of return in the Lord Down's infeftment, without serving heir to him; and upon Earl Alexander's death, Earl Charles his son served heir to him therein; and the present Earl Francis served heir therein to his brother Earl Charles.

Colonel Rose having right to a debt due by the Lord Down, pursues Francis the present Earl of Moray upon the passive title of behaviour as heir to Lord Down, to whom he is apparent heir by the infeftment 1678, and whose estate he possesses; at least, 2*do*, on this ground, That Earl Alexander having possessed the estate of Lord Down several years, without making up any title, whereby he became liable for Lord Down's debts, though the passive title, so far as penal, did expire, and did not bind his heirs, yet to the extent of the real value of Earl Alexander's intromission, Earl Charles his second son and heir served to him was liable; for so far the passive title was not penal. And on the same principles, Earl Charles having also intromitted, the defender, as heir served to him, is liable to the extent of the intromissions of both Earl Alexander and Earl Charles; and 3*tio*, upon the same principles for his own intromissions.

The Lords gave no judgment upon the *first* point, How far the defender was liable upon the universal passive title of behaviour; but it appeared to be there opinion, that he was not universally liable, as behaviour is *animi*, and that the defender's possession upon a service, however erroneous, discovered no intention of representing Lord Down. But then it was thought to admit of no doubt, that the defender was liable to the extent of his own and his predecessors intromissions with the *hæreditas jacens* of Lord Down.

Accordingly 'so the Lords found;' which was all that the pursuer had occasion for, as a small part of one year's intromissions was sufficient to answer his debt.

Whereas some of the Lords had pointed at the defender's being liable upon the act 1695, the Court was of opinion that the present case did not fall under it, as there was neither here any right purchased, nor any passing by of an immediate predecessor and serving to a remoter; nor was there a possessing without a title, though the possession was upon an erroneous one; and that therefore it was a case not provided for by the act.

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