

Muirhead in this case would not have the benefit of the Act 24th, 1661, by which the creditors of the defunct are preferred to the creditors of the heir, provided they do diligence within three years, and by which the apparent heir is forbid to alienate the estate within a year of the death of his predecessor; and in this sense I think his Lordship was in the right, as I never understood that the creditors of the intermediate heir, whose debts are made effectual by the Act 1695 had the benefit of the Act 1661, as it would be most unreasonable to give the creditors of one apparent heir such an advantage over the creditors of another apparent heir, and even the creditors of a succeeding heir entered. His Lordship further said, that the case of *Gray* against *Smith* did not apply to this case; because, there, the person who was said to have prescribed had two titles in his person, one an infestment as heir of line to his predecessor, the other a disposition to him and his heirs-male, and there was no reason for setting up the one title to destroy the other; and accordingly it has been often found that when a man purchases in an adjudication, or any other collateral right, to secure his property, his possessing upon any other title does not operate a prescription of those rights. But I go so far as to say that the decision in the case of *Gray* was wrong, and that, in a question betwixt heirs, whatever a man chooses to make his title of possession will be likewise a title of prescription; as in that case, the heir having rejected the disposition and made up his titles upon the old investiture, the disposition was thereby lost by prescription in a question with heirs, though, if it could have secured the estate against any claim which might be made upon it, it would be still effectual. And if a man, in such a case, can prescribe, in favour of himself, an immunity from fetters imposed upon him by one of the titles, I do not see why he may not likewise prescribe in favour of his heirs of line,—it being supposed to be every man's interest to have an estate in fee-simple rather than in a fee-tail.

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1766. *February* 10. M'LELLAN, Messenger, *against* ———.

IN this case the Lords sustained as competent an action of damages and oppression against a messenger for having apprehended a man without having the caption, as it was said, in his possession, and obliging him to give his watch to the creditor as a pledge for the debt and the messenger's fee; and they decerned him to pay L.1 in name of damages, with the costs of suit; *dissent.* Auchinleck, who thought the action frivolous, and the grounds of it not proven.

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1766. *February* 10. ——— *against* ———.

A MAN made a disposition to his wife and named her executrix. She accordingly intromitted, and being called to an account by the creditors she said she was willing to account, but must have allowance of the annualrent of 4000 merks, to