

1766. *January 22.* SPENCER BOYD *against* ———.

IN this case Lord Pitfour gave his opinion, and it was the unanimous opinion of the Court, that, if an heir of tailyie possesses without the tailyie ever having been completed by infestment, and is not the heir of the investiture, his right upon this personal deed of entail will be affected by all the qualities and conditions of the entail. This, he said, was decided in the last resort in the case of *Denham of West-shiels*, upon this ground,—that no creditor or purchaser can say that he deals with such an heir upon the faith of the records; and a personal right to lands, like every other personal right, is affected by every quality or condition, though not appearing upon record. In short, neither the records nor the Act of Parliament 1685 have any thing to do with personal rights to lands; but, as the heir of tailyie in this case had been likewise the heir of investiture, he might have been charged to enter as heir of the investiture, and upon that ground the lands might have been adjudged.

*N.B.* The question here was concerning the validity of tacks granted by the apparent heir beyond his own life, when by the entail he was restrained from granting tacks for a longer space than his own life. But, by a majority of votes, these tacks were sustained, because it did not appear that tacks granted contrary to the prohibitions of the entail were expressly irritated, but only the debts. See *infra*, 4th March 1766.

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1766. *February 7.* MARY DICKSON *against* MILLARS.

[Kaimes, No. 239; *Fac. Coll.*, IV. p. 367.]

THIS case was before the Court, 7th August 1765, and this day the Lords unanimously altered the judgment then given. Lord Pitfour said that the prescription in favour of heirs among themselves was of very great consequence, as well as prescription with respect to purchasers and creditors: that the benefit of the statute was general, and extended to the one as well as the other; that, if it were otherwise, the consequences would be terrible, for, supposing an heir is ill advised in making up his titles, which often happens, he and his successors, for hundreds of years, would be in a state of apparenacy, and all their marriage-settlements devising their estates to certain heirs would be good for nothing. The same, he said, would have been the case with respect to creditors and purchasers, if it had not been for the Act 1695, which ought not to be considered in a case that is to be decided upon the principles of common law. He further said that a *non valentia agere* did not at all apply to the positive prescription, from which nothing was to be deduced but minority, mentioned in the Act. Lord Coalston said that, notwithstanding the Act 1695, creditors would not be safe if this decision were to stand. This his Lordship did not explain, but I take his meaning to have been that the creditors of George

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