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 infeftment 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.

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.

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

which she was provided in liferent by her contract of marriage. It was answered by the creditors, That she had had a great sum of money in her hand, without paying any interest for it for six or seven years, out of the interests of which she must pay herself the annualrent. But to this she replied, that no executor is bound to pay interest for sums not bearing annualrent, uplifted by him, because he is obliged to keep the money by him to pay any creditor who shall recover decreet against him; and she was to be considered as any other executor though she happened to be likewise a creditor: Which the Lords sustained, *dissent.* Auchinleck. In this case the relict claimed no preference for her debt because she was executrix; and my Lord Pitfour said that she was not entitled to any, notwithstanding the decision in a case which he mentioned, observed by my Lord Kaimes in his late Collection.

1766. *February* 12. MARY BLAIR *against* ——.

THIS was a question about proving a marriage by the acknowledgment of the husband. The fact was, that a man and a woman had been long in the way of cohabiting together privately, but not at all as man and wife. One night, as they were together, two women, not of any rank, listened at the door, and deponed that they heard him say, that he would never deny her as his wife.

Lord Gardenston said that there were four ways in this country of making a marriage: the first was by the religious ceremony, the second was by a promise and subsequent *copula*, the third by living publicly as man and wife, and the fourth was by acknowledgment of a woman as a man's wife. As to the last method, he thought it must be solemn and public, and not at all equivocal or ambiguous, and not transitory or occasionally, but deliberate; whereas what the man said in this case, supposing it proved by unexceptionable witnesses, which he did not think it was, was not, properly speaking, an acknowledgment, as it was not spoken before witnesses, and it was very plain, from some circumstances that followed after, that the man would not have said it if he had thought any body had been hearing him. And all the Court were of this opinion, *dissent. tantum* Pitfour.

1766. *February* 18. FACTOR upon the SEQUESTRATED ESTATE of KELHEAD.

SIR John Douglas of Kelhead, after a ranking and sale of his estate was raised, set a tack to a tenant in possession, to endure for 15 years, and to commence at the expiration of the current tack, which was at the distance of four or five years. Two or three months after setting this tack, Sir John's estate was sequestrated, and a factor appointed by the Court, who now pursues reduction of the above tack; and the Lords unanimously reduced it, (*dissent. tantum* Pitfour,) upon this ground, that it was not an ordinary act of administration, and therefore Sir John could not do it after