JUSTICE-CLERK. When a superior stipulates a certain multure as the *reddendo* of the vassal, there can be no negative prescription. When a thirlage is constituted by acts of Court, or by possession, as in king's mills or church mills; this may be lost by negative prescription. There is a third case where a thirlage is established by covenant. Even in that case a contrary usage may derogate from the written obligation: but my difficulty is this: Here is not only an obligation in writing once expressed, but a series of feudal titles all uniform. Every renewal of the title was a fresh acknowledgment of the thirlage. Suppose Colonel Skene should admit a disuse of an hundred years, what can be said against the precept of *clare* in 1760? After a disuse of a hundred years, the parties may agree anew for a thirlage; how can the negative prescription operate against the feudal obligation in 1760?

PITFOUR. The expression, *all grain in growing on the land*, may be limited by use to *grain consumed in the family*.

[This is inconsistent with the precept 1760, which expressly excepts teinds and horse corn.]

GARDENSTON. We have here not only an ancient astriction, but this repeated down to 1760: were this a new astriction, it would be good by the precept 1760. I thought that it was an established law, that a right provided in such writing could not be cut off by disuse in whole or in part.

JUSTICE-CLERK. The family of Kinross is superior of the mill as well as of the lands, and is liable to Colonel Skene in warrandice.

On the 25th January 1774, "The Lords found that the defender was astricted as to *omnia grana crescentia*," excepting teind, seed, and horse-corn; adhering to Lord Gardenston's interlocutor.

Act. A. Abercromby. *Alt.* A. Rolland.

Diss. Kaimes, Coalston, Pitfour, Alva, who were for a farther explanation of facts.

1774. *January 27.* DAVID RUSSELL and OTHERS *against* The YORK-BUILDING COMPANY.

RUNRIG—Act 1695, cap. 38.

I. Benefit of the statute is competent to feuars even against their superior, without regard to the circumstance of some of the feuars called as defenders having their several properties in one plot, each by themselves, surrounded by the lands lying Runrig, (these particular feuars making no objections themselves,) and although the Runrig lands lay in the neighbourhood of a borough of barony.

II. Competent in the division to set off the shares of the parties on either side of the town, as shall be most convenient for the general interest, without regard to the previous local possession of individuals.

[*Faculty Collect. VI.* 265; *Dictionary*, 14,144.]

KENNET. A feuar obtains a small feu which, from its situation, does not en-

title him to insist in the action for dividing runrig. I doubt how far his acquiring another parcel of ground, at another place, can give him a title to insist.

COALSTON. The law under our consideration is a wise law, and has always received a liberal interpretation. This is the single case, where the most considerable heritor objects to the execution of the law. That, however, is of no moment. If the objection were well founded, it ought to have been made *in initio litis*, and, were it now sustained, I think the defenders ought to pay the expense hitherto incurred. There is nothing in the objection. Were it listened to, it would put an end to the Act of Parliament.

JUSTICE-CLERK. The objection ought certainly to have been made at the beginning, because it goes to the title of the pursuers.

On the 27th January 1774, "The Lords repelled the objection to the title."

Act. R. Blair, H. Dundas. *Alt.* J. Swinton.

Reporter, Kaimes.

1774. *January 27.* THOMAS FINLAY *against* THOMAS MORGAN.

INFEFTMENT.

I. A precept of *clare constat*, having been granted to the person who was the apparent heir, in liferent, and to his son in fee, infeftment taken thereon to them in the same terms, in so far as it was granted to the son in fee, found to be an erroneous infeftment.

II. Nor is it a good title of prescription to support adjudication without a special charge, led against the person so erroneously infeft, within 40 years from the date of said infeftment, and challenged within 40 years of its own date, and of the charter and infeftment thereon, though after the expiration of its legal, so as to cut out the claim of his heir to the lands adjudged.

[*Fac. Col. VI.* 274; *Dict.* 6904.]

COALSTON. The objection may be a legal objection, but it is a thin one. A vassal is not bound to take a precept of *clare constat*, if it contains any variation from the former investiture. If he consents to take it to himself in liferent, and to his son in fee, there is no great impropriety in this. If the case of *Landales* is not in point, which I have had no opportunity of considering, I would review the interlocutor formerly pronounced in this case. As to the second point; the title may be good by the positive prescription, which has the effect to establish the right of the grantee. An heir of entail makes up his titles, leaving out the irritant clauses, possesses for 30 years, then sells, the purchaser may impute the 30 years to make up his right by prescription.

KAIMES. All this is very right, if there was a *titulus habilis ad transferendum dominium;* but a superior cannot grant a precept of *clare*, except to the