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

heir: no, not with the consent of the heir; *that* was the case of *Landales*. As to the case of the heir of entail, it is rightly put by Lord Coalston, because an heir of entail is a fiar absolute, though limited by clauses: when he departs from the entail, there is no more but a ground of reduction. There is a certain distinction between grounds of reductions and grounds of nullity.

PITFOUR. I cannot call back the judgment of this Court. The distinction was thin, but still there was a distinction.

JUSTICE-CLERK. The Court found the infeftment erroneous, and properly; but, in effect, that resolves into a nullity: the precept is no title on which prescription could begin to run, for it gave the liferent to one who was fiar, and the fee to one who had no right at all. After the long course of time during which this right has remained, without challenge, I would support the diligence for the accumulated sums and penalty.

KAIMES. I cannot go so far in support of the adjudication: it was deduced not against a feudal debtor, but against an apparent heir.

HAILES. I have the same difficulty: How can we give such effects to an adjudication which we must, however unwillingly, find to be intrinsically erroneous?

KENNET. The word erroneous was put into the interlocutor, that the separate defence of prescription might remain entire. The case of *Landales* does not apply; *there* there was a *titulus habilis ad transferendum dominium*, but no prescription. Here the title is erroneous, and would always have continued so: besides, if it were a title for positive prescription, yet here another and a proper title was made up within the 40 years.

On the 27th January 1774, "The Lords restricted the right of the defender to principal sum, interest, and necessary expenses, accumulated at the date of the adjudication;" varying Lord Kaimes's interlocutor.

Act. R. M'Queen. *Alt.* A. Wight, A. Lockhart.

1772. *August* 11. DOCTOR ANDREW HERON *against* CAPTAIN WILLIAM DICKSON.

MEDITATIO FUGÆ.

[*Faculty Collection, VI.* 248; *Dictionary,* 8550.]

HAILES. If a man may be thus summarily arrested upon no other evidence but the oath of the supposed creditor, without production of the ground of debt, we are in no better situation than the English are, by whose law a man may be imprisoned for debt where there is no debt.

AUCHINLECK. Although the grounds of debt were not produced at first, they are produced now; which comes to the same thing. The only caution asked is *judicio sisti.*

PITFOUR. This is an improper use of the diligence of the law.