from her first husband, it would naturally have gone to the second and his heirs. Is it then unnatural to suppose that she would settle her first jointure upon him and his heirs? The woman had probably something to bring to her first husband. She took an equivalent. At her second marriage, she gave up that, and took what she considered as equivalent; and so it has turned out, for she has got a third husband. If nothing was meant to be given but a liferent during the marriage, nothing was given at all, for the husband would have had that without any contract.

ALEMORE. I have heard a good deal of negotiations between the husband and the wife, of which I see no evidence. I judge by the deed. I think the woman made a good bargain to prevent *quæstiones voluntatis*, which are exceedingly arbitrary. I judge by the words of the deed: they are express and full. There was no occasion for mentioning heirs: many deeds go in favour of heirs, although not expressed.

PRESIDENT. A simple right of liferent is not to be measured by the rules of succession in lands. Why should I imply heirs when not expressed? There is no equity to exclude the woman from her former jointure. Upon the whole of the case, I think that the provision does not go to the husband's heirs.

JUSTICE-CLERK. Nothing but the clear will of parties can lead me to put a construction upon a clause, contrary to the common course of things; and I do not see any such clear will in this case.

" On the 28th January 1768, the Lords found, that the annuity in question returns to the pursuer, and does not descend to her deceased husband's heirs."

On the 1st July 1768, they found that the assignation in the contract of marriage did carry, not only the annuity which fell due during the marriage, but also the annuities which were to fall due thereafter, during the life of the pursuer." And, on the 4th August 1768, they adhered.

Act. B. W. M'Leod, D. Rae. *Alt.* A Elphinston, Ilay Campbell. *Reporter*, Coalston.

Diss. Strichen, Justice-Clerk, Pitfour, Kennet, Monboddo, President.

Non liquet, Elliock.

1768. *August* 5. MESSRS LAWSON, JARDINE, and COMPANY, *against* ANDREW THOMPSON, Tacksman of the Meal-market at Dumfries.

BURGH ROYAL.

A Duty granted upon what sold in the Market-place, not to be eluded by selling elsewhere.

[*Faculty Collection, IV.* p. 145; *Dictionary*, 1965.]

AUCHINLECK. This duty has been immemorially exacted, and with good

reason. It is like the case of the toll at the *Bridge of Glasgow*, which is exigible, although there is at certain times no passage by the bridge.

PITFOUR. When a duty is granted on markets, the levying of it is not confined to the market-place, nor to the market days. Every part of the town is the market-place, when meal is sold in every part.

On the 5th August 1768, the Lords repelled the reasons of reduction.

Act. A. Crosbie. *Alt.* R. M'Queen. *Reporter*, Coalston.

1768. *August 5.* DUKE of BUCCLEUGH *against* The OFFICERS of STATE.

PRESCRIPTION.

An erroneous Tenure of Lands becomes good by Prescription, though the vassal had not discharged the burdens of it.

[*Fac. Coll. IV. p.* 321. *Dict.* 10,711.]

ALEMORE. I must presume that there was a blunder, if no resignation is produced. There has been no possession, consequently there is no prescription.

HAILES. Sir John Gilmour, president of the Court of Session, was called up to London on purpose to advise the Duchess of Buccleugh's marriage-contract. I would rather presume that there was no blunder in a deed advised by so able a lawyer. The pursuer's only title is as heir to Francis Earl of Dalkeith, under the charter 1742. That charter does not contain the alternative *aliisque jus habentibus*, on which the pursuer's argument is founded. He must take his own charter as it stands.

KAIMES. If the wardholding had continued, the family of Buccleugh would have clung to this feu-right. Why should they be allowed to recur to the wardholding, after they have been abolished by law.

PITFOUR. If there was no prescription, the family of Buccleugh might recur to the old right. But I cannot get over the exception of prescription. Prescription must be according to the nature of the subject. The possession of superiorities does not depend upon the levying of feu-duties: the question is, who was owned as superior? *Here* it is plainly the Crown. Sir John Ker was never owned. There is also an acknowledgment by charters that the lands held feu. We cannot give any judgment as to bygones: they must be judged of by the Court of Exchequer.

PRESIDENT. I doubt whether the feu-duties belong to the Crown; but that cannot be determined *here*. The only question is, as to the nature of the holding. Supposing that Sir John Ker had contrived to levy the feu-duty, would not the holding have been still of the Crown?

AUCHINLECK. Every charter granted was a virtual acknowledgment, on the