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

part of the Crown, that there was some other person in the right of the superiority: *aliis jus habentibus* is a very singular clause, and is of that import.

COALSTON. I always supposed that the charter 1664 was erroneous, and that the family of Buccleugh might have been restored, if a demand to that effect had been timeously made. I should have thought that the Crown would have acquired right had there been no specialty here. The only difficulty is from the clause *to those having right.* While such a clause is in the charter, how can the Crown be said to have acquired a right?

On the 5th August 1768, the Lords sustained the defence of prescription as to the holding, and remitted to the Ordinary to hear parties as to the feu-duties.

On the 16th November 1768, "refused a reclaiming petition, and adhered."

Act. A. Lockhart. *Alt.* A. Dundas.

Reporter, Auchinleck.

Diss. Alemore, Elliock.

Non liquet, Kaimes.

1768. *November* 15. JAMES, ANDREW, &c. WEMYSSES *against* DAVID WEMYSS.

MUTUAL CONTRACT.

Marriage-contract, though not signed by the wife, may bind her and her issue.

[*Faculty Collection, IV. p.* 324. *Dictionary,* 9174.]

HAILES. The one party pleads that the marriage-contract is effectual in part, and void in part; the other, that it is void altogether. I agree with neither: I think that it is effectual altogether. The wife did not sign it, but the other parties did: the father-in-law performed what was incumbent on him. The husband always supposed himself bound: the wife performed the only obligation prestable upon her,—she solemnized the marriage. After a homologation of more than thirty years, she comes too late to object against this contract as not binding. It is as much required in law that a woman sign her marriage-contract before witnesses, and that she heard it read over: neither solemnity is well observed; and if ladies are permitted, after the celebration of the marriage, and even upon its dissolution, to object to the conventional provisions, on account of these solemnities having been omitted, nineteen of twenty of the ladies in Scotland will be found entitled to their legal instead of their conventional provisions.

MONBODDO. If the wife is bound by the marriage-contract, both my interlocutors will, of course, be altered; but I see no principle of law upon which she can be bound. There is a decision in the *Dictionary,* title *Privileged Writs, Duke of Montrose* 1728, whereby the contrary was decided.