AUCHINLECK. If Dickson sought sequestration, and the others opposed it, there might be difficulty.

ELLIOCK. The trustees have the right; but the apparent heir is actually in possession.

STONEFIELD. In the *Douglas* cause, sequestration was not allowed. A sequestration is an odious thing; it is a license to mismanage an estate.

MONBODDO. It is nothing that the apparent heir has got into possession. The trustees must *age* to turn him out again.

On the 1st August, "The Lords sequestrated."

Act. J. M'Claurin. *Alt. Ipse.*

Diss. Gardenston, Strichen, Stonefield, Monboddo.

1769. *August* 1. DUKE of BUCCLEUGH *against* The OFFICERS of STATE.

PRESCRIPTION.

Prescription of an erroneous Tenure of Lands.

[*Faculty Collection, IV.* p. 321; *Dict.* 10,711.]

HAILES. The charter 1664, was, in all probability, erroneous: a favour, however, was meant and done to the family of Buccleugh, and the family enjoyed the benefit for near a century, and would have done so still, had it not been for a change in the law. The clause, *aliis jus habentibus*, could not have been inserted from any doubt of the Crown's right; for, if Sir John Ker's right had been in the eye of parties, it was plain that the Crown had no right; and, if it was not in the eye of parties, then the Crown's right could not have been doubted. The clause may mean, to the chamberlains of the Crown. It is not improbable that there was some intention of granting the feu-duty to a trustee for the benefit of the family of Buccleugh, and then he would have been the *alius jus habens.* The family had so little idea that the clause meant any one unconnected with the King, that the late Earl of Dalkeith omitted it out of his charter. The pursuer cannot found upon a clause which is left out of the titles of his family.

MONBODDO. If the charter had been granted simply with a *reddendo* to the King and his successors, the Duke of Buccleugh would have been liable in the feu-duty; but the addition of the words, *aliis jus habentibus*, makes a difference, and lays the length of time out of the question. It is the same thing now as if the Duke had said, recently after 1664, that the King had no right, and that Sir John Ker had. And the plea is still competent.

JUSTICE-CLERK. If the *reddendo* had been still the same, and the clause of a feu-duty erroneously thrown in, there might be more difficulty; but here

there was a change of the holding introduced, and what was a favourable composition at the time. In another view of the case, the Crown changes ward into feu, without any consideration. The King might have done so, and I make no doubt that he would have done so had that favour been asked; but I do not see that the favour was ever asked or granted. There was a cause onerous for asking a feu-duty; at the same time, the non-payment of feu-duty, for so long a period, is an argument to be urged on the part of the pursuer.¶

KENNET. The charter 1664 was originally a blunder. It has been found that the pursuer cannot be benefited by it, so as to hold ward, and of consequence blench. The same argument would have been good against the Crown had there been no change introduced by the statute George II. According to the same principle, we must hold the feu-duty to be payable to the Crown. Negligence of the King's officers cannot hurt the Crown. This may answer the argument from non-payment of the feu-duties.

PITFOUR. The finding the Duke liable is a consequence of the former decision.

AUCHINLECK. It is clear that, at the date of the charter 1664, the lands did not hold of the Crown, and that the charter was erroneous. The clause *aliisve jus habentibus* is a confession, on the part of the Crown, that the right of the Crown was dubious, and like a charter *supplendo vicem* of Sir John Ker. Had any question been moved at the time, the blunder would have been corrected; but the difficulty is, that the lands have been held of the Crown so long. The only way would have been for the Duke to execute the procuratory from Sir John Ker: but even this has been cut off, by his leaving out altogether the clause *aliisve jus habentibus.*

On the 1st August 1769, "The Lords sustained the defences, and assoilyied."

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

Diss. Monboddo.

Non liquet, Strichen.

[A petition was presented against this interlocutor; on advising which, with answers, the following opinions were delivered:]—

1769. *November* 17.—PITFOUR. Prescription does not take place in this question; for there has been no possession. It is not length of time, but the acquiescence of parties which creates prescription.

COALSTON. The charter 1664 was made up erroneously, yet I think the former interlocutor right, which determined the right of superiority to be in the Crown. Had a feu-duty been paid, or had the feu-duty been taken simply payable to the Crown, the Crown would have had right also to the feu-duty; but here no feu-duty has been paid, and the clause is *aliisve jus habentibus.*

KAIMES. I think the *novodamus* is binding on both parties without the aid of prescription. Suppose that this question had occurred before the abolishing of ward-holding, could the King have claimed the lands as holding ward? No. If so, Ought not the claims of parties to be reciprocal? Shall we give the Duke

a right which he would not have had, and certainly would not have asked before the abolition of ward-holding.

JUSTICE-CLERK. In a feu-holding there must be a feu-duty payable to the superior, or to some one in his right. A great benefit has been enjoyed by the family of Buccleugh by the change of holding. The equivalent must be rendered effectual to the crown: this cannot be without payment of a feu-duty. I never can interpret *aliis jus habentibus* to be the vassal, or any one in his right. It rather means others having right from the Crown.

PITFOUR. A feu-duty is not absolutely necessary; for a feu-duty may be separated from the superiority. Thus, in the case of church-lands, the feu-right is in the Crown: but the feu-duty is in the Lords of Erection, redeemable before the statute 1707, irredeemable since. The feu-duty is not the only emolument of superiority: there are other casualties which are sufficient to maintain the existence of the holding.

KENNET. The superior may discharge the feu-duty; but, in this case, the Crown has not discharged it.

AUCHINLECK. This is an extraordinary and anomalous case, owing to blunders in the transmission of the Buccleugh estate. There could be no question were it not for the words *aliis jus habentibus*: Does not this import a confession that there was something defective in the right of the Crown?

GARDENSTON. The Crown seems to have acquired right to superiority, but not to feu-duty. *Tantum prescriptum, quantum possessum.* The vassal has held of the Crown; so far good: He must still hold of the Crown; but the Crown has been in possession of no more.

KAIMES. This is contrary to the established rules of law. A superior is secure by the granting of a charter; and, though he should never have exacted any feu-duties, he may exact them for forty years *retro*.

MONBODDO. The clause, *aliis jus habentibus*, cannot mean a person in the Crown's right: this is not style. *Aliis* means others than the Crown.

[Yet it appeared that, in the property lands of the Crown, *aliis jus habentibus* was used for the Crown's factors and receivers.]

On the 17th November 1769, the Lords altered the interlocutor of , and "found the Duke not liable in the feu-duty, in respect that the lands held originally of Sir John Ker for the same feu-duty as is now claimed; that the clause, *aliis jus habentibus*, implied some person not in the Crown's right; and that the Crown had never been in possession by levying the feu-duties."

Act. J. Dalrymple. *Alt.* H. Dundas, &c.

Reporter, Auchinleck.

Diss. Justice-Clerk, Kaimes, Kennet, Stonefield, Hailes.

N.B.—This last judgment, altering the original interlocutor, is not noticed in the report in the Faculty Collection.