against an arrester; but, if the subject be wrongfully apprehended, I do not see how retention can be good. This would take away all difference between regular and irregular diligence.

PRESIDENT. This case may be differenced from that of Magbiehill, but I do not like that decision. Arniston's opinion, as stated upon that case, in the collection of remarkable decisions, is different from what I understood to be his opinion.

AUCHINLECK. A man in the East Indies sends home a bill, diligence is done upon it, money is recovered;—it afterwards appears that he was dead when the diligence was used:—What will be the consequence? Again, at a poinding, it may be objected, that the creditor is in the East Indies, and is dead, yet no remedy in this case,—the diligence is null.

KAIMES. Here there are no *termini habiles* for retention; the money is in the hands of Oliver and Scott.

COALSTON. This case may be attended with very important consequences. Diligence may very innocently go on in the name of a dead man; yet it is hard to get over the interlocutor. When I come to the possession of my debtor's effects, in a lawful manner, I may retain. In the case of *Yeates*, where goods, without authority, were put into the hands of a creditor, he was allowed to retain; but here the diligence itself was unlawful, and hence the possession was unlawful.

The Lords adhered to Lord Gardenston's interlocutor.

Act. R. Sinclair. *Alt.* D. Armstrong.

1766. *December* 2. WILLIAM MACKECHNIE *against* WILLIAM WALLACE.

FOREIGN.

Action for the Penalties of Usury in Scotland is not limited by Act 31st Elizabeth.

[*Fac. Coll. No.* 275; *Dictionary*, 11,144.]

STONEFIELD. Action is competent before the inferior court, and the procurator-fiscal is the proper pursuer. The statute of limitations does not extend to Scotland.

ALEMORE. The penalties may be sued for in any court—before the justices of peace. Of penalties inflicted, half goes to the Crown. As to the question itself, the decisions are directly opposite.

PITFOUR. Laws made in England, before the Union, have no authority in Scotland; but all of us must be of opinion, that laws made since the Union have authority. The question then, is, whether must the limitation in the statute of Queen Elizabeth be implied in the statute 12mo Annæ? I cannot doubt that it is implied: it certainly is as to England. I would have required an express declaration of the legislature for proving to me that they meant to put the subjects of Scotland in a worse situation than those of England. A

penal law may be just when attended with a short limitation, because the proof of defence will thereby be entire; but it may be unjust with a long limitation, because the proof of defence may be thereby lost. The making a difference between the one country and the other would have been extraordinary, but we must have submitted: we are not, however, to presume a thing so extraordinary. He quoted the case of the *London Booksellers*.

BARJARG. We are not to be regulated by the English law, except in cases where it is particularly provided that we are.

GARDENSTON. Upon the first view of the case I thought the statute qualified every British statute. I am now of opinion that it does not. The Parliament of Great Britain is the Parliament of Scotland as well as of England: we have many Scots statutes of limitation before the union. Thus, the laws concerning spuilyie, ejection, and wrongous imprisonment, are limited to three years. Now, I suppose that there may be laws in England which establish a different limitation in those offences, Would any future British statute regulate the execution of the law of Scotland in those matters? Better to remedy the evil complained of by a good statute than by a bad decision.

COALSTON. If we are to interpret a British statute by an English one, before the Union, why not a British statute by a Scots:—this occasions a collision. If the question were as to expediency, I should be clearly of opinion for introducing the limitation: but we are not to determine upon expediency. No statute can have effect beyond the jurisdiction of the power statuting. It is dangerous to say, that, if an action is laid down by a British statute, it must be explained by the law of England. In this case, by the law of England, one witness would be sufficient, and the case behoved to be tried by a jury.

AUCHINLECK. Penal laws ought to be subject to a short prescription. The legislature, had they foreseen the inconveniency of having different limitations in the different parts of Britain, would have obviated it: but here lies the difficulty,—a law is made without having any limitation, and the question is, how far a limitation can be introduced from an English statute? Shall we, because of inconveniences, take upon us to adopt a new law? We are to apply, not to make laws.

KAIMES. Usury by statute is part of the common law: the statute of Queen Elizabeth affects every subsequent statute: it speaks only of English statutes, and it might be a doubt whether it can affect any British statute, even as to England. Here is a *casus incogitatus*, What must be done? When there was no intention in the statute, shall we give it effect?

JUSTICE-CLERK. The limitation extends to Scotland. This question was argued in presence, in 1747, *Booksellers of London*. I am more at liberty to follow that decision than if I were to make a new one. In construing a law, the enactment of the legislature must be so explained as not to involve the legislature in injustice. There is no incongruity in passing a general enactment, and leaving the execution to the law of each country. If all the penal statutes passed since the Union were not to prescribe in less than forty years, the consequence would be dreadful,—they would require a remedy, and I trust in God they would be remedied.

PRESIDENT. As to competency—*pursued in the county* means that a jury be brought from the county. A defence, upon an English statute, may be founded on in an action on a contract in England, but not when the prosecution is in Scotland, upon a Scots offence. The statute of limitation is good as to English people or English contracts, but not as to Scots. The case of the *Booksellers* had something of legal favour, but there was also a difference between it and the present case. There the trial was upon a statute carried into execution in England, by an entry at Stationer's Hall. If the offence was thus charged upon an English statute, it was right to give a defence upon the same law. This, however, is but a subtlety. There are difficulties on either side: I must however find this case to be within the statute or not. When the statute of Elizabeth was enacted, it was merely an English statute. The method of trial in the Act 12mo Annæ is by the law of England, and so execution passes. In trying the crime in Scotland the defence pleadable in England is not pleadable, because the offence is local. In the case of the *Duke of Douglas* against *Lockhart of Lee*, it was laid down as law in the House of Peers that the statute there founded on was to be explained according to the law of Scotland. If a statute is grievous, the legislature must correct it.

The Lords repelled the defences of incompetency and of prescription.

Act. D. Dalrymple. *Alt.* J. M'Claurin. A. Lockhart. *Rep.* Justice-Clerk. *Diss.* as to prescription, Kaimes, Pitfour, Strichen, Justice-Clerk.

1776. *December 5.* PATRICK LEITH, *Suspender, against* The FACTOR on LEITH-HALL, *Charger*, CAPTAIN JAMES STUART.

TACK.

Tenant's Oath in a judicial rental cannot supply the want of a written tack, so as to support his possession under a verbal lease for nineteen years.

[*Dictionary*, 15,178.]

COALSTON. The dislike I have at an heir's pleading upon a *locus pœnitentiæ* may mislead me in my judgment. The charger agrees that there was a verbal bargain for 19 years, and that this bargain was minuted,—why put the minute into the hands of Wardhouse if it was not signed? Besides, here there was *rei interventus*. The law gives *locus pœnitentiæ* when the bargain is *nudis finibus contractus*; not where there is *rei interventus*,—the case mentioned by Spotiswoode and Auchinleck in 1629. According to the charger's argument, a tenant may be suffered to possess in years of famine, and may be removed as soon as the rent may be easily obtained upon a profitable possession.

JUSTICE-CLERK. Here there is no evidence of a written agreement. If there had been a rental sworn to upon a *lis contestata*, it would have been a judicial