dane, his son, upon the father's death, made up a proper and legal title to the personal right, which was in his father, by obtaining himself served and retoured heir in general to his deceased father; whereby he is cognosced *legitimus et propinquior hæres dict. Patricii Haldane, ejus patris,* which ascertained upon record not only his universal right, but also that he was heir-male of the body of Patrick, and superseded the necessity of a service as heir-male: And finds the disposition by John Haldane to his second son Patrick, his heirs and assignees whatsoever, bearing delivery to a trustee, and dispensing with the not delivery to Patrick himself, habilely conveyed the estate to the said Patrick, and his heirs general, which must now be taken up by the heirs general of Patrick, or by his assignees. And as the six defenders against Mr Patrick Haldane's reduction, who are the daughters of John, and sisters of Patrick, are both heirs to Patrick their brother, and have a disposition from him, assoilyies them from the reduction brought against them by Mr Patrick Haldane; and finds he has no right to the lands and estate of Lanark, and others, described in the summons and in the title-deeds of that estate; but that the same belongs to the said six heirs and disponees of the deceased Patrick; and decerns and declares accordingly.

PITFOUR. Before the year 1738, this difficulty did not occur; it then occurred in the case of *Eshieshiels.* A service of heir-male to his father did not carry a right as heir-male of a marriage; for the one title did not necessarily imply the other: but here *legitimus et propinquior hæres patri,* implies heir-male, though it does not necessarily imply heir-male and of line: Thus, suppose a man to have two sons, the eldest dies, leaving a daughter; the daughter will be the heir of line, the second son will be heir-male. In the case of *Sir Robert Hay of Limplum,* it was found that a general service might imply *of provision,* though there was no reference to the provision.

PRESIDENT. Here no mistake could be: *constabat* what the person served was. Dangerous to overturn investitures upon specialties.

The Lords adhered without a vote.

For Mr Haldane, H. Dundas. *Alt.* D. Græme.

1766. *December* 2. ARCHIBALD STEWART *against* THOMAS FOGGO and WILLIAM GALLOWAY.

LEGAL DILIGENCE.

Poinding by an indorser, in name of an indorsee, knowing him to be dead, is null, and not even capable to afford retention.

[*Faculty Collection, IV. p. 277; Dictionary,* 8136.]

PITFOUR. Poinding is null, as executed in name of a dead person. Retention is not a good plea. Compensation, and even retention, may be good

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