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

rental; but here there is not a judicial rental, only an inquiry into the rent. If we sustain this, we set tacks of the gentleman's whole estate. The rental ascertains nothing more but a verbal agreement:—this the heirs may safely admit.

ALEMORE. The rental, joined with the other evidence, is sufficient to secure the tenant. A judicial compromise is binding.

AUCHINLECK. Here there have been communings and a jotting, but no tack or minute; for, if that had been the case, the witnesses would have subscribed. The only difficulty is as to the second point; of the rental. If one refers the rent and the title to possess to the oath of the tenant, this is sufficient. The referring the rental to the oaths of the tenant must have been in order to bind them down to that rental. The tenants could not afterwards have denied the tack or its terms, for the answer by the master would have been *juratum est*. If the tenant was bound, how could the master be free?

BARJARG. The oath emitted in Leith-hall's presence is not sufficient; for it does not mention a written agreement.

KENNET. The interlocutor, allowing a diligence for proving, related singly to havers, so that the proof taken by witnesses was irregular.

GARDENSTON. Leith-hall verifies and approbates what the tenant says, by his conduct during the whole of his life; and, in terms of the supposed agreement, he orders a tack to be made out.

KAIMES. There is no evidence that the minute was signed by the parties in order to be obligatory: but the judicial rental was taken in presence of Leith-hall, was received by him, and according to it rent was paid. A verbal agreement about a sale of lands does not produce action about a tack, only for the possession of one year: but, if a man is put into possession and pays rent &c., a personal objection lies against the landlord, because it is unjust in him to except. The landlord's acquiescence proves that the oath was true. Writing is necessary to make a tack, that is to say, to make it good against a purchaser. Were the tenant insisting for performance, the verbal agreement would go no further than for a year; but, here, how can the master go against his own deed? The verbal contract cannot be proved by witnesses, but here the agreement is proved by the rental. A personal exception would have lain against Leith-hall, and consequently lies against his representatives.

PITFOUR. Here is presumptive evidence of a writing, but this will not prove the tenor; because, in an action for proving the tenor, the writing must be proved formal. There is, however, here a *rei interventus*, and an approbation on the part of the master. Were Leith-hall alive, he would be precluded from the action *exceptione doli*. In the case of *Baron* against *Duncan*, *6th March* 1752, an informal writing was found homologated; but then there is a difference here that there is no writing. There is, however, an oath put to the tenant by the master, and this judicial document may be taken as an informal writing.

PRESIDENT. The law of Scotland inclines for writing: a verbal agreement for a tack is not good beyond a year. The tenant contracting may insist for a tack with the legal solemnities—otherwise confusion would be introduced. The decision 1629 has been overruled. If the tenant possesses in dear years

without a tack, it is his own fault. The case of *Baron* was upon other principles: *there*, there was writing,—informal but homologated; *here*, there is no evidence of writing,—no proof of *rei interventus*. The master is not bound by the judicial rental,—the whole resolves into a verbal agreement, and there is still *locus pœnitentiæ*.

On the 5th August 1766, the Lords sustained the reasons of suspension. On the 25th November 1766, they found the letters orderly proceeded. On the 5th December 1766, they refused a petition from the tenant and adhered [to Lord Kennet's interlocutor,] but remitted to the Ordinary to hear parties, as to the claim of meliorations made by the tenant.

For the Charger, C. Gordon. *Alt.* R. Blair.

1766. *December* 17. GEORGE BAILLIE *against* MRS JEAN ROSS.

PROCESS,—FORTHCOMING.

A Decreet of forthcoming was reduced, because the circumduction of the term against the arrestee proceeded on an Act and Commission, in which the blanks were not filled up, and was obtained when the process was asleep.

[*Faculty Collection, IV.* 85; *Dictionary*, 12,210.]

JUSTICE-CLERK. If this were to be held a decreet *in foro*, no man, however rich, could be sure of leaving a sixpence to his family.

COALSTON. This is a decreet *in foro*, because a lawyer appeared, and his gown is his warrant. Lawyers and agents ought to be cautious how they appear: but here two plain nullities appear in the decreet. 1*st*, The commissioner left blank, and no judge-ordinary substituted. 2*d*, Circumduction taken when the process was sleeping. The Act of Parliament occasioned by the surcease of justice has no place here.

AUCHINLECK. We have good nullities, and therefore I am for sustaining them.

PRESIDENT. This is a catch altogether. A single appearance of a lawyer taking a day without making a defence, certainly does not imply a decreet *in foro*.

The Lords sustained the reasons of reduction and defences, found expenses due, and modified them to L.12: 12s.