Sheriff to give expenses, does nothing unless the Sheriff has in himself a jurisdiction. The law does not encourage unnecessary processes. The expense here ought to have been asked in the original process.

KAIMES. Every Court should determine as to the expense incurred in that Court. The rule applies not here, for the process was never in this Court. On the contrary, it was, in effect, found that the cause ought not to have been removed into this Court.

AUCHINLECK. Supposing the bills of advocation to have been frivolous, redress is due. I think that the Court ought to remit with an instruction as to expense, because this Court is the proper judge of the expense, the nature of which it has seen.

PITFOUR. I have no difficulty as to the power of this Court to remit with an instruction to give expenses. There may, however, be cases where a bill is refused, and yet expenses not to be awarded.

JUSTICE-CLERK. True; and therefore the Ordinary on the Bills ought to have the power of determining and taxing expenses, when a bill is refused.

On the 16th January 1772, the Lords found the new process not competent, reserving to the pursuer to insist in the original process before the Sheriff.

Act. Ilay Campbell. *Alt.* J. M'Laurin.

Reporter, Kennet.

1772. *February 5.* MR JOHN ARBUTHNOT *against* JAMES COLQUHON.

TACK—PERSONAL AND TRANSMISSIBLE.

Clause in a Tack, that the tenant, at his removal, shall be paid the expense of inclosing, effectual against a singular successor in the land.

[*Fac. Col. VI. 5*; *Dict.* 10,424.]

GARDENSTON. This precise question was determined in favour of the purchaser, as the Ordinary has determined it, *December* 1760, *M'Dowal of Logan* against *M'Dowal of Glen*. I was lawyer on the losing side, the Ordinary on the winning; but I thought the decision erroneous.

MONBODDO. The decision in 1760 is certainly erroneous. A purchaser has a right to exact rent from the tenants, although the tacks are not assigned. He must therefore perform every intrinsic obligation in the tacks, though not extrinsic. Suppose the lease to last 900 years, would you deny action against the purchaser and his heirs, and oblige the tenant to seek his relief from the heirs of the seller? If this interlocutor stands, no tenant will ever improve his farm, for he will have no security for improvements bestowed, although there be a provision in the contract of lease to that effect.

COALSTON. If a purchaser has the benefit of tacks, he must undergo their

burden. Obligations to uphold houses, to furnish great timber, to bear the joint expense of maintaining fences, are all usual obligations on the proprietor. If they do not pass as obligations on the purchaser, a tenant has no security. A high rent is often stipulated upon the proprietor becoming bound to furnish lime. In such case the purchaser would be liable.

AUCHINLECK. If the seller becomes bankrupt, what will become of the tenant?

PITFOUR. When a contract is mutual, and the prestations are not divisible, the assignee comes in the place of the original obligant, and must take the contract as it stands. There is indeed a difference between clauses in a tack which are intrinsic and those which are extrinsic. A clause essential *ad bene esse*, though not *ad esse* of a tack, may be held intrinsic.

On the 5th February 1772, the Lords found Sir James Colquhon, the purchaser, liable to perform the obligation in the tack; altering Lord Hailes's interlocutor.

Act. J. Douglas. *Alt.* J. Colquhoun.

1772. *February* 11. ROBERT M'NAIR, Merchant in Glasgow, *against* JOHN COULTER and OTHERS.

INSURANCE.

Valued Policy.

JUSTICE-CLERK. A valued policy is, when goods are specified, as so many hogsheads or bales. We are not to inquire judicially as to the quantities shipped; but still there must be a value. We cannot value £2000 upon a cable. This would be contrary to the spirit of the statute, 19th Geo. II. I will not suffer myself to be misled by any reference to the opinion of a judge (Lord Mansfield) in a case quite different from the present case. Insurers will never ask more evidence than a fair bill of lading: but there is no such thing here. There is much evidence to the contrary. It is probable that the vessel did not contain, and could not contain, the quantities specified in the bill of lading. I doubt whether the prime cost of the qualities proved, or the value at the port of destination, ought to be the rule.

KAIMES. I have no notion of a valued insurance here. The bill of lading is so false that no credit can be given to it. M'Nair, the person insured, must prove his damage. I doubt whether Hood's invoice, and the naval officer's certificate, are sufficient to prove the damage.

AUCHINLECK. There was no valued insurance; for neither the insured nor the insurers knew what was on board. We cannot depend upon the bill of