that the pursuers are the majority of the congregation: he must therefore discharge the duty of trustee and denude.

On the 13th December 1771, "The Lords ordained the denomination which the pursuers give themselves, to be expunged; and, in respect the defender has admitted, in his deposition, that he understood the right of the meeting-house in question to be a trust in his person, for behoof of the congregation, at the time of the trust, and that it appears that the pursuers, with those that concur with them, were a majority of that congregation at the time of the trust,—sustained the pursuers' title to carry on this action; and found that the defender is bound to denude himself of said trust, in their favour, upon being reimbursed of the money laid out by him whereof he is not already indemnified."

Act. A. Lockhart. *Alt.* R. M'Queen.

Reporter, Monboddo.

Diss. Coalston, Hailes, for the reasons assigned in their opinions, but no vote was put.

1772. *January* 16. JOHN ADAM and WILLIAM SHAW *against* JOHN ALSTON and WILLIAM FLEMING.

PROCESS—ADVOCATION.

Defender's claim for expenses incurred in a successful opposition to a bill of advocation at the pursuer's instance, ought to be made in the original action still pending, and not by a separate one, though before the same judge.

[*Fac. Coll. VI.* 1; *Dict.* 12,239.]

BARJARG. When a bill of advocation is refused, the proceedings on it may be considered as a branch of the proceedings before the Sheriff, and the expenses incurred concerning it may be properly given by the Sheriff. I have more doubt as to the expenses in a bill of suspension.

COALSTON. Any expenses incurred before the Sheriff may be awarded in the original process. As to expense of bills of advocation, most just that there should be indemnification. The practice is not uniform. A general regulation is necessary. Cannot blame the parties for going before the Sheriff.

KENNET. Here there was a depending action. The new action was irregular. How far the Sheriff could give the expense of a bill of advocation, cannot be tried here. If the new action is incompetent, I should think that in the old action the Sheriff might have given expenses.

JUSTICE-CLERK. I do not like Acts of Sederunt where common law is sufficient to give remedy. It is wrong to present a groundless advocation. There is no wrong without remedy. The Ordinary on the Bills, by remitting to the

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