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

lading. We must then take the only evidence that remains. I would rest upon the certificate as a probative writing.

GARDENSTON. I still incline to think that *here* is a valued insurance. If the value proved is near the value insured, every thing was fair on the part of old M'Nair. Had the ship come to port, the premium would have been exigible, and no inquiry would have been made as to the value.

KAIMES. The father is not to blame for his son's offence, but he must not profit by it. The son's fraud is proved, so that there is no necessity of recurring to other evidence.

GARDENSTON. Suppose that I insure a value of £1000, there is some evidence that the value was greater, some that it was less. This, the case here, very different from an elusory value, which is gaming.

PITFOUR. Here a valued policy, unless an exorbitant excess appears.

ELLIOCK. Here a valued policy. If M'Nair had, *bona fide*, value on board, it would be good. It is not sufficient to object that the cargo was not just equal to that value. If you hold otherwise, you will make place for endless lawsuits. If there is a gross overvalue, the policy may be set aside.

On the 11th February 1772, the Lords found that M'Nair is not entitled to his full insurance. That the certificate must be the rule as to quantity: Hood's invoice as to value. That the real sum recovered by Smith must be deducted. They also allowed him the value of the freight and charges, and interest from the date of the Admiral's interlocutor.

Act. J. Swinton, jun. *Alt.* R. Cullen, &c.

Reporter, Auchinleck.

Diss. As to first point,—Gardenston, Barjarg, Elliock, Stonefield.

Reversed on appeal.

1772. *February* 14. SIR JOHN SINCLAIR *against* JAMES BRODIE of Brodie.

SUPERIOR AND VASSAL.

Title to insist in a reduction of a decree of tinsel of superiority and casualties thereof.

[*Faculty Collection, VI.* 11; *Dict.* 15,082.]

COALSTON. Where a superior remains unentered, the vassal must have a remedy; for, until he obtains a charter, he can neither remove tenants nor burden his estate. Here the requisition is not proper, being a charge to enter to the predecessor not the last infeft. This objection would be good at the instance of the heir-of-line. But Brodie is not heir-of-line; he is nothing more than a creditor.

KAIMES. I cannot discover what interest Brodie has to move the objection.

JUSTICE-CLERK. There is an extraordinary defect in the law of Scotland if a vassal shall not have it in his power to procure a title to dispose of his estate.