1775. *March* 11. PATRICK SCOTT of Rossie *against* JAMES SCOTT of Brotherton and OTHERS.

TUTOR—CURATOR—PUPIL.

Whether the father's nomination hath fallen by the supervening incapacity of the mother, whom he appointed one of the quorum, and *sine qua non*, so as to make way for the service of the tutor of law.

[*Folio Dict., VII.* 86; *Dictionary*, 16,371.]

JUSTICE-CLERK. We must inquire what a man did, and, if his words are clear, we cannot inquire what he would have done. The wife is appointed *tutrix sine qua non.* If the wife had refused to accept, there was an end of the tutory. The testator seems to have had another event in his view, his wife's predecease. *That* is a case totally different; the will of the defunct *there* is equally clear.

PRESIDENT. This is not consistent with the decision in Lord Kilkerran, *Lord Dunmore and Others* against *Mrs Isobella Somerville*, p. 581.

PITFOUR. The general point is clearer than any precedent can make it. The earlier decisions in Dury and Stair, are concerning a case which was more frequent then than now. When a man named tutors *jointly*, the meaning of such nomination was, that each tutor was *sine quo non.* This case still clearer; because the nomination *here* expresses what it *there* implied. If the meaning of the testator should appear different, the case would be altered.

MONBODDO. There is no doubt as to the general point. The question comes to this: the defunct has said that the tutors shall not act without the consent of a certain person. We cannot authorise them to act without the consent of that person. I hesitate as to specialties. It appears that it was the will of the defunct that the tutors might act without the wife. If the nomination might subsist, as to children of a second marriage, it is difficult to make a distinction between them and the children of the first marriage.

AUCHINLECK. If the wife had died, it is plain that she could not have been *tutrix sine qua non.* I consider that that case was an exception from the rule. The case now before us does not fall within the exception.

KAIMES. I hesitate as to this particular case. The meaning is, I will not allow any act to have effect without my wife: another sense is, I declare her to be so essential, that, if she does not act, every thing shall fall to the ground.

COALSTON. I am clear as to the general point. A nomination to tutors *jointly* implies that all shall act. This is still clearer in the case of the nomination of a *tutrix sine qua non.* It is strange that *this* should have been called in question. The father has provided for *two* cases in which the tutory was not to fall, but he has not declared his will as to a *third* case, which has happened. My difficulty is, How can we supply the will of the testator?

PRESIDENT. If the wife had died before the husband, the tutory would

have subsisted: this shows that he did not put so singular a confidence in the wife that the deed could not subsist without her. Suppose that she had died a month after the tutory commenced, could the tutory have been set aside? Why then should it, if she married a twelvemonth after?

GARDENSTON. There is no doubt as to the general point. It certainly was no principle of the civil law. When the nomination fell, the civil law admitted a tutor dative, but ordered that the persons *nominated* should be the tutors *dative*. We have departed from this rule; but still a liberal construction, as to the nomination, ought to be observed. The will of the testator was, that, while the widow could act, she should be *tutrix sine qua non*. This case is very like that of *Lord Drummore*: there is a *casus improvisus here* as there was *there*.

On the 1st March 1775, "The Lords found the nomination had fallen."

[On the 11th March 1775, That it had not.]

Act. R. M'Queen. *Alt.* Ilay Campbell. *Reporter*, Gardenston.

Diss. At first hearing, Kaimes, Gardenston, Hailes, President.

Non liquet, Alva, Monboddo.

[I was not present at the second hearing, being in the Outer-house.]

1774. *December* 16. JOHN STEVEN and COMPANY *against* JOHN DOUGLASS.

INSURANCE.

What deviation sufficient to vacate the Policy.

[*Folio Dict. III.* 328; *Dict.* 7096.]

HAILES. A wilful deviation is as well proved as the nature of the thing will admit. On that supposition I proceed. We in Scotland are in the helpless infancy of commerce; England is in the perfect age of commerce. On a mercantile question, especially concerning insurance, I would rather have the opinion of English merchants, than of all the theorists and all the foreign ordinances in Europe. The opinion of the English merchants is for the defender on the point of law, without one contradictory voice. To the same purpose we have the judgment of English Courts, and the opinion of an eminent lawyer, Mr Dunning. It is vain to say that Mr Dunning does not understand the laws of commerce: That Sir Joseph Yates determined ignorantly: That the opinion of the great judge, as delivered in Burrow's Reports, is crude and indefinite. Every authority might be set at nought by such sort of reasoning. If the pursuers are dissatisfied with the opinion of English merchants, law-reports, and lawyers, Why do they not oppose to them the opinion of any one practical lawyer or judge in England? Our Scottish insurances are copied from the English: for the interpretation of words in such a copy, am I to go to the ori-