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-

ginal, or the ordinances of Amsterdam and Stockholm? I can have no doubt of the law: it is the law of Mr Dunning, Sir Joseph Yates, Lord Camden, and Lord Mansfield.

COALSTON. The question is, Whether does a wilful deviation, without knowledge of the insured, vacate the policy? Here there are contrary authorities produced,—the foreign ordinances on the one side, and the opinions of English judges and merchants on the other. I think that the English opinions are best founded, for I can have no notion that an insurer can lose on a voyage which he did not insure: but then, in order to vacate the insurance, it must be perfectly clear that a wilful deviation was committed: *this* is the difficulty here, for the two courses were so near each other, that it is hard to distinguish them.

KAIMES. All the opinions of foreign lawyers should never convince me that insurers are liable for the risk of a voyage which they did not insure. This would be contrary to the nature of the contract itself: if so, the opinion of English merchants and lawyers can add nothing to my certainty as to the law in this respect.

PRESIDENT. Stated the evidence of the wilful deviation fully and ably; but that being a matter of fact, I do not set down his argument.

On the 16th December 1774, "The Lords sustained the defence;" altering Lord Kennet's interlocutor.

Act. Ilay Campbell. *Alt.* A. Rolland.

1775. *March* 7.—JUSTICE-CLERK. I cannot see the propriety of examining Mitchell. A proof at large was allowed: after that proof was taken, and after two interlocutors have been pronounced, this new evidence is offered. The Court might have examined Mitchell *ex proprio motu*, but this was not done. I do not think him an unexceptionable witness; but, supposing he were, I would not believe him if he were to contradict the evidence already brought: that evidence gives me full satisfaction.

GARDENSTON. Here is an attempt to revive litigation. I would not believe Mitchell were he to contradict the former evidence.

AUCHINLECK. Shall we put a snare in this man's way, who has an interest to swear falsely?

COALSTON. I had much doubt of the interlocutors pronounced in this case, because the distance between the two courses was very small, and, in my opinion, no proof of deviation sufficient to liberate the insurers. But I am against the proof; 1*st*, Because I do not like second proofs; 2*d*, Because Mitchell has a manifest interest in the cause. We might get over objections from *relation* and the like in circumstantiate cases, but not from interest in the cause.

ELLIOCK. I do not think that this cause depended on proofs, and therefore I do not think that Mitchell ought to be examined.

[He told me, that he was against the former interlocutor, as contrary to his notions of mercantile law; but he was not in Court when it was pronounced.]

On the 7th March 1775, "The Lords, having considered the proof already brought, and the particular objections to the two witnesses, refused the desire of the petition."

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

1775. *January* 18. DAVID MAXWELL of Cardness *against* JAMES GORDON of Balmeg.

PACTUM ILLICITUM—SIMONIACAL PACTION.

What deemed such, concerning a presentation to a vacant church.

[*Faculty Collection, VII.* 9; *Dictionary,* 9580.]

AUCHINLECK. If this transaction is supported in law, it is apparent that, in time to come, all presentations will be bestowed for money. The patron, here, has acted a most unworthy part towards the parish. Mr Gordon, who dealt with the patron, appears in a bad light; neither do I think that his son, the minister, is clear of blame. It is said that he knew nothing of the bargain that his father had made for his benefit; *Credat Judæus apella, non ego;* we have *verbum sacerdotis* indeed for it; but I would inquire whether the first payment of L.20 was not actually made out of the stipend. I should be sorry that, after such a shameful transaction, the parties were to get free without paying any thing. I would order the L.20 *per annum* to be paid to the charity work-house.

PRESIDENT. We have no law for that. If, however, this is thought to be simony, we may fine the parties, as was once done on a former occasion. I doubt as to a simoniacal practice here: there is nothing of that in Lord Galloway's letter, nor in Mr Thomson's right to the L.20, though there may be in Mr Gordon's letter. If there is no *turpis causa accipientis*, the *turpis causa dantis* will not bar the action.

HAILES. If a simple bond to Mr Thomson had been granted for L.20, without any reference to a bargain, action might have been sustained at his instance; but here he pursues upon letters which detect the whole plan, and prove the bargain to have been intrinsically simoniacal.

GARDENSTON. If we do not find this to be a simoniacal paction, a wide door will be opened for those practices which so scandalously prevail in England, notwithstanding so many good laws and judgments to the contrary. We shall then deal in the same wicked commerce, though upon a smaller scale; because our livings are smaller than they are in England. It is true that I do not like to see a man grant an obligation, and then plead a point of law to screen him from fulfilling it; but that can have no effect upon our determination. If a patron take a sum of money, not to himself, but to a friend, still the paction is null: