trustees appointed by the Minister of Weem, and to *Tutors of Niddry, 3d July* 1711.

The following opinions were delivered :—

HAILES. The Court cannot grant what is here sought. The trustees have accepted, and they must continue to act. Indeed, what they ask from the Court is no more then they can do for themselves. They want a factor,—they themselves can name one. Besides, they are absolutely assignees to the subject; why may they not assign the subject to the petitioners for their several rights of liferent and fee?

KAIMES. This is not like the case of *Weems*, where the trustees were all dead or refused to accept, and where, if the Court had not interposed, the subject must have been lost to the trust: but here is a trust actually exercised, which the trustees wish to rid themselves of, and to throw it on the Court.

GARDENSTON. All the cases mentioned as precedents, respected trusts of a public nature, and meant to be perpetual: here there is no more but a private temporary trust. If the trustees give up the right of trust, there is no harm done; it will fall to the persons for whose behoof the trust was at first created.

PRESIDENT. The Court cannot interpose: the trust-right has taken effect, and is actually exercised. Trustees must not imagine, that, whenever they are tired of their office, they can slip their necks out of the collar, and leave the trust to be extricated by the Court. At this rate, tutors, whenever they incline to be no longer tutors, may apply to the Court for the nomination of a factor *loco tutoris.*

On the 20th February 1776, "The Lords refused the petition."

For the petitioners, Henry Erskine.

1776. *January* 23. WILLIAM WILSON and COMPANY *against* ALEXANDER ELLIOT and OTHERS.

INSURANCE.

Deviation.

[*Fac. Coll., VII,* 208; *Dict., App. No. I.*; *Insurance, No. I.*]

HAILES. In the case of *Steven* and *Douglas*, we had the opinion of Mr Dunning, and no opinion to the contrary. Now we have again the opinion of Mr Dunning, and also that of Mr Wallace, who has great experience in maritime matters, and we have no opinion of lawyers to the contrary. I must therefore hold, that they speak the opinion of the Courts where questions of insurance have been more frequently agitated, and are better understood than with us.

GARDENSTON. I prefer the opinion of practical merchants to that of lawyers,

however eminent: and here we have the opinion of merchants opposed to that of lawyers. Instead of touching at Leith, the ship went on to Morrison's Haven; it suffered nothing there, but came out safe, and afterwards was lost when it was in the course confessedly insured. In the case of *Steven* against *Douglas*, the loss was during the deviation. I think that, on a fair construction of the policy, the insurers are liable.

KAIMES. My simple opinion is, that insurers and insured ought to act strictly, and that courts of justice ought to observe the same exactness. As to this particular voyage, it matters little; but it is of moment that a general rule be observed: if it be broke through here, it will, by degrees, be broke through in other cases, and this will open a door to lawsuits, which are always to be avoided, especially in mercantile matters.

KENNET. There is a difficulty here, because the deviation was small, and that the ship was not lost till after it had returned into the course insured. The ship had liberty to call at Leith; this excludes the liberty of calling at any other port. She went to Morrison's Haven, which lengthened the voyage and increased the risk.

COVINGTON. The insurers are liable if the deviation was not the cause of the loss.

ELLIOCK. I was not present at the determination of the case of *Steven* against *Douglas*, and I doubted as to the judgment. If the policy was once forfeited by the deviation, it could not afterwards revive by the ship's returning into its course.

JUSTICE-CLERK. In *Douglas's* case, the vessel was lost in the course of the deviation. If we go into so judaical an interpretation of a policy of insurance as that here contended for, we shall ruin all insurance in this country, and oblige our merchants to insure in England, where the notions of underwriters are more liberal. In this case we have the opinion of the most eminent underwriters at London that the insurers are liable.

MONBODDO. I should have great respect for those opinions, had I seen the case on which their judgment was founded. If there was a deviation, the insurance was voided.

AUCHINLECK. Insurance is a *bona fide* contract: he who insures one voyage is not liable for another; but I do not see any deviation here.

KAIMES. If the policy had said, "You have liberty to touch at Leith, but nowhere else," could the insured have gone *bona fide* to Morrison's Haven? Is not what has happened equivalent to the case put?

PRESIDENT. In the case of *Steven* against *Douglas*, I thought, at first, that the underwriters were bound, but I altered my opinion on seeing the sentiments of the merchants in England. I perceive we have the opinion of some of those very merchants on the side of the insured, and that on a good ground of equity: a certain degree of deviation was allowed in this case; and, besides, the insurers here signed a policy not in the terms of the order of the broker. They ought to have signed it as presented to them, or not at all.

On the 23d January 1776, "The Lords repelled the reasons of suspension."

Act. A. Crosbie. *Alt.* Ilay Campbell. *Reporter,* Alva.
Diss. Hailes, Monboddo.
[More should have dissented, from the tendency of their arguments, but they were moved by specialties.]
Reversed on appeal.

1776. *January* 24. JOHN MALLOCH *against* TRUSTEES of BARBARA BLAIR.

HUSBAND AND WIFE.

Wife preferable for the interests of a sum in a bond belonging to herself, until she is taken home and alimented by her husband, and even then for repayment to her of a sum not falling under the *jus mariti* which the husband had uplifted.

[*Faculty Collection, VII.* 167; *Dictionary,* 5846.]

GARDENSTON. The trust-deed itself mentions the purpose of marrying. It was fraudulent in the woman to make such a deed.

PRESIDENT. I see no fraud here. The husband had not any right *jure mariti* to the principal sum. The interest was secured to the wife, for very good causes,—that she might not starve. This might have been done in a marriage-contract.

KENNET. The husband was allowed to uplift part of the money belonging to his wife, in consequence of this deed, and he cannot now be heard against it.

KAIMES. A man makes his addresses to a woman upon the supposition that she has a fortune to a certain extent. After the parties are agreed, it would not be just that the wife should have it in her power to disappoint the *jus mariti.* But, here, nothing was done that was not agreeable to the former communing.

JUSTICE-CLERK. It is a hard case if the law stands against this poor woman. I cannot lay so much stress on the nullity of the bans, as thrice proclaimed on one Sunday; for such is the practice, though I observe that the trustees rest much of their argument here. The only effect of this would be to set aside the trust-right. This was by no means an onerous debt. A provision, made by a wife for satisfying former creditors, might be an onerous deed, but it is impossible to term a deed onerous which is merely in her own favour. I incline to hold the trust-deed to be void and null. But then here is L.100 bearing annualrent by bond. The principal sum was heritable as to the husband, although he was entitled to the interest: but there was great reason that the woman in this case should be preferred to the interest of her own money. The law has not said that the husband shall have the whole benefit of the *jus mariti,* and yet not be liable to perform his part. See case of *Ogilvie* against *The Creditors of Hedderwick.* L.80 has been uplifted: this was a donation which the wife may still revoke. The husband is bound to aliment the wife; she