1776. *January* 19. HELEN MILLER *against* HENRIETTA BROWN.

IMPLIED DISCHARGE AND RENUNCIATION.

Jus relictæ cut off by a Renunciation executed by the wife, upon a voluntary separation of the husband and wife.

[*Fac. Coll. VII.* 164; *Dict.* 6456.]

KAIMES. In the form of the words, nothing was renounced but what the woman had right to as a wife: but that is not the meaning of the deed.

PRESIDENT. Here was a total separation *bona gratia*. The woman could not, in consistency with good faith, renounce this and betake herself to her legal provisions.

On the 19th January 1776, "The Lords assoilyied the defender;" adhering to Lord Kennet's interlocutor.

Act. G. Clerk. *Alt.* Hugo Arnot.

Non liquet, Gardenston, Hailes, [who was moved by former decisions.] This case was very favourable in its circumstances, for the woman did not revoke till her husband was actually *in extremis*.

1776. *January* 20. JAMES CARSTAIRS, Merchant in St Andrew's; CATHERINE GRAHAM his Spouse; JANET and THOMAS CARSTAIRS, and OTHERS, their Children; HENRY RHYMER, Borrowstounness, and HENRY and OTHERS, his Children; DAVID NEVAY, late Merchant in Edinburgh; the Reverend WILLIAM FALCONER, and the Reverend DAVID LINDSAY.

JURISDICTION—TRUST.

Certain trustees, after having accepted of a trust, applied to the Court to be relieved of it, and prayed for the appointment of a *factor toto tutoris*. The Lords refused to interfere.

THE petitioners applied to the Court, stating that Mrs Elizabeth Carstairs having, by a disposition dated 15th June 1768, conveyed to the petitioners, Mr Nevay, Mr Falconer, and Mr Lindsay, as trustees, certain sums of money for behoof of the other petitioners, the said trustees accepted of the trust, and had ever since continued to act. That the chief burden of the management had fallen upon Mr Nevay, the other two trustees being clergymen, and unacquainted with business. That Mr Nevay having retired from trade, in consequence of age and infirmity, the trust was in danger of being evacuated; and therefore praying the Court to appoint certain persons suggested in the petition, to take up and execute the trust, in room of the said trustees, or otherwise to appoint one or more of them factors *loco tutoris*. In support of the application, the petitioners referred to the case of *Lord Monzie* and others,

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,