the fraud of a person whose representations had been trusted to, but whose fraud would have been at once discovered if the parties had taken the trouble to read over the document before signing it.

MP.—NIVEN *v.* STOCKS AND OTHERS.

Trust Settlement—Construction—Intestacy. It is no part of the duty of the Court to make a provision in regard to a truster's estate which he has not made himself, and therefore the fee of his estate which he had not destined to anyone in an event which did occur, held (alt. Lord Ormidale) to be intestacy, and to belong to his heir-at-law.

Counsel for Niven—Mr Gordon and Mr John Hunter. Agent—Mr W. N. Fraser, S.S.C.

Counsel for Stocks—Mr Patton and Mr Mackenzie. Agents — Messrs Morton, Whitehead, & Greig, W.S.

This was an action of multiplepoinding and exoneration raised by Mr Niven, C.A., as judicial factor on the trust-estate of the deceased William Kirkland, innkeeper at Kinross. The question involved had reference to the construction of Mr Kirkland's deed of settlement and certain codicils thereto.

By the deed of settlement, dated in 1825, it was provided that after the death of the truster's widow the estate should be held by the trustees for the purpose of paying over the yearly produce thereof to his only child Mary Kirkland or Stocks, and in the event of her death that the trustees should denude and make over the whole estate to her issue, if only one child, on his or her attaining the age of twenty-five, and if more than one, on the youngest attaining majority or being married. In the event of the truster's daughter dying without lawful issue, or her only child (James Stocks) dying before attaining twenty-five years without issue, the truster directed his trustees to sell the whole estate and pay over the residue to his brothers and sisters in equal shares. By a codicil dated in 1831 the truster so far altered his settlement as to declare that in the event of his daughter having no other child than the said James Stocks, he should, even though he shall have attained the age of twenty-five years of age, have no more than a liferent interest in the estate, unless he married and had lawful issue, on the occurrence of both of which events the trustees were to denude in his favour.

The truster died in 1836. His widow died in 1842. His only child, Mary Kirkland or Stocks, died in 1863, leaving only one child, James Stocks, who now claimed the whole fund *in medio*. He is a widower, but has never had issue, and therefore is excluded from the fee of the estate by the terms of the codicil. He maintains, however, that as the conditions on which the truster provided that his estate should be divided among his brothers and sisters can now never occur, he being now forty years of age he is entitled to the fee as his grandfather's heir-at-law and sole next-of-kin, the succession having by force of circumstances become intestacy. The judicial factor, with concurrence of the representatives of the brothers and sisters of the truster, opposed this claim, and contended that James Stocks was only entitled to a liferent, and had no right to the fee, in respect one of the conditions on which he was to succeed thereto, namely, his having lawful issue, had not been fulfilled. He also pleaded that in the event of the liferent lapsing by the death of James Stocks without having lawful issue, the residue fell to be divided among the brothers and sisters of their descendants.

The Lord Ordinary (Ormidale) held that James Stocks was entitled under the codicil to no more than a liferent. He also indicated an opinion that on Mr Stocks' death without issue the brothers and sisters would be entitled to succeed, but he held that it was premature to decide this matter as Mr Stocks might yet have issue. He thought any other view was inconsistent with the plain intention of the truster. Mr Stocks reclaimed; and the Court to-day unanimously altered Lord Ormidale's interlocutor.

The LORD PRESIDENT said—The deed of settlement here, taken by itself, is not difficult of construction. The trustees were to denude in favour of the only child of the truster's daughter on his attaining the age of twenty five; and in the event of his dying before twenty five, and leaving no issue, they were to denude in favour of the Kirklands. But the question is whether the alteration in the codicil had the effect of not only limiting Mr Stocks to a liferent unless he married and had issue, but also of giving the fee, in that event, to the Kirklands. This is a trust-deed, and these codicils and writings must be read as instructions to the trustees. Such instructions do not require to be expressed in formal words of conveyance. The truster had perfect power to deal with his estate as he pleased; and he has provided, in regard to the fee, for the event of James Stocks dying without issue before twenty-five; but for the event of his attaining twenty-five, but not marrying or not having issue, there is no provision. The original deed did not say that in the latter event, which has occurred, the Kirklands were to get the fee. Does the codicil say so? It does indeed contemplate such an event and on its occurrence deals with the liferent; but it does not say what is to be done with the fee. Now, it is a settled principle that the Court cannot interfere either in the way of instructing trustees or otherwise, in order to do what the truster has not done. The estate in such a case became intestacy. I am therefore of opinion that the heir's legal rights must prevail.

The other Judges concurred, and the claim of Mr Niven was accordingly repelled, and that of Mr Stocks sustained.

SECOND DIVISION.

SCEALES *v.* SCEALES AND OTHERS.

Practice. Motion by defenders in a declarator of marriage that the pursuer should be ordained to furnish them with her present address or place of residence (alt. Lord Ormidale, diss. Lord Cowan), *refused.*

Counsel for Pursuer—Mr Scott. Agent—Mr Scotland, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

This is an action of declarator of marriage, at the instance of Ellen Darsie or Sceales, who is designated in the summons as "residing in London, widow of the deceased Stewart Sceales, formerly of Customs, Leith, latterly residing in Aberdeen." The pursuer alleges that she became acquainted with Mr Sceales about the end of 1852, while she was in the service of his sister; that he then commenced a courtship, and afterwards made her a promise of marriage, upon the faith of which she allowed him to have carnal connection with her. The pursuer alleges further that a child was born of the marriage, and that in 1860 she separated from her husband, who had delayed to make a declaration of his marriage, *in facie ecclesiæ*, from fear of his relatives. Between the period of her first acquaintance with Sceales and her separation from him in 1860, she says that they lived as man and wife in different places in Scotland and in England. Sceales is dead, but his representatives and others who defend this action deny the promise of marriage, and say in answer to one of the pursuer's statements, that "before her intimacy with Stewart Sceales, and during and after that intimacy, the pursuer led a loose and irregular life."

A motion was made in the Outer House by the defenders that the pursuer should be appointed to state her present residence or give her address, and

the Lord Ordinary (Ormidale) granted the motion. The object of the defenders is alleged to be the wish to get information from her as to the kind of life which she is and has been living in London. The pursuer reclaimed; and to-day the Court, Lord Cowan dissenting, recalled the interlocutor, and remitted the case back to the Lord Ordinary to refuse the motion.

The LORD JUSTICE-CLERK said—The only difficulty that I feel in disposing of the reclaiming note against the interlocutor in this case is that the thing is utterly unprecedented. But, as the case stands before us, the motion of the defender is that the pursuer should be ordained to furnish the defender with her present residence or address, and the Lord Ordinary has granted the motion. Now, I can conceive circumstances that might justify such an application; but these must be very special, and none such have been alleged in the present case. On the contrary, the defenders' counsel have not made it intelligible to me what possible advantage they could get by the information which they desire; and the pursuer's counsel contends that as a general rule a party is not bound to say where his place of residence is merely at the bidding of his opponent. It may be extremely inconvenient to make such a statement. I see no ground either in fact or in law why this motion should be granted and I am therefore for recalling the Lord Ordinary's interlocutor.

Lord NEAVES and Lord BENHOLME concurred.

Wednesday, Jan. 17.

BEFORE THE WHOLE COURT.

GORDON *v.* GORDON'S TRUSTEES (*ante*, p. 69)

Declinator. A judge is not entitled to decline on the ground that his grandniece is married to one of the parties.

This case was debated before the whole Court some weeks ago, when the Judges took time to consider their judgment.

The LORD PRESIDENT to-day mentioned that since the debate the pursuer had been married to his grandniece, and that as he was thus related by affinity to one of the parties, he desired to decline giving his vote.

The LORD JUSTICE-CLERK said that the point raised by this declinator was an important one, but it had been already settled by several decisions. In the case of Sir William Erskine *v.* Robert and Henry Drummond, 28th June 1787 (M. 2418), the Lord President declined in respect Mr Henry Drummond was married to his brother's daughter. The declinator was repelled, and the determination was ordered to be marked in the Books of Sederunt, which proves that it was intended that it should be followed as a precedent in future. It had been previously decided, in the case of Calder *v.* Ogilvie, 31st January 1712, that a judge might vote in the cause of one who was married to his niece, unless where the niece was the proper party, and the husband was only called for his interest. These decisions proceeded upon the statute 1594, c. 212, which only prohibited judges from voting where their father, or brother, or son was a party; and the Act 1681, c. 13, which extended the prohibition to all relations in the first degree, whether by consanguinity or affinity, and farther provided that no judge should sit or vote in any cause where he is uncle or nephew to the pursuer or defender. The latter part of the Act of 1681 did not, however, like the former, exclude uncles or nephews by affinity. The same decision was pronounced in three cases referred to in Brown's Supplement, vol. 5, p. 424.

The other Judges concurred, and the Lord President's declinator was therefore repelled.

FIRST DIVISION.

BAIN *v.* BROWN.

Practice—Decree for Expenses. Where the estates of a party found liable in expenses have been sequestrated, the Court will not qualify their decree by finding in it that the other party is entitled only to a ranking on his estate for the amount.

Counsel for Pursuer — Mr Scott. Agent — Mr Michael Lawson, S.S.C.

Counsel for Defender—Mr Cattanach. Agents—Messrs Paterson & Romanes, W.S.

In this case the jury returned a verdict for the defender. The pursuer moved for a new trial, but his estates were afterwards sequestrated, and the trustee declined to sist himself as a party. The Court to-day therefore applied the verdict, and found the defender entitled to expenses. It was proposed for the pursuer that the Court should qualify the decree for expenses, to the effect of finding that it would only entitle the defender to a ranking on his sequestrated estate. It was said that if this precaution was not taken the defender might keep his decree until after the pursuer was discharged, and then charge him to pay the full amount. reference was made to the case of Jackson & Co. *v.* Keil and Others, 22d November 1862 (1 Macph. 48), where Lord Kinloch had in a note expressed a doubt as to whether such a motion as the present should not be urged before the decree was pronounced.

The Court, in respect the only authority for inserting the qualifications asked seemed to be a doubt by a Lord Ordinary, refused to do so, leaving the question of the defender's right to a ranking or to full payment for after-discussion if it should ever arise.

Thursday, Jan. 18.

GALBRAITH *v.* CUTHBERTSON.

Proof—Oath on Reference—Intrinsic and Extrinsic. Qualification of an oath which held intrinsic.

Counsel for Pursuer—Mr G. H. Pattison and Mr A. C. Lawrie. Agent—Mr Thomas Ranken, S.S.C.

Counsel for Defender—Mr Gordon and Mr Lorimer. Agents—Messrs Wotherspoon & Mack, S.S.C.

In an action of count, reckoning, and payment at the instance of Mrs Barbara Cuthbertson or Galbraith, spouse of Robert Galbraith, tinsmith in Glasgow, with concurrence of her husband, against her brother James Cuthbertson, formerly farmer in Toponthank, now in Kilmaurs, as executor of his deceased brother George, the defender claimed a sum of £180, which he said was due by the male pursuer to the estate. A reference having been made in regard to this sum to the pursuer's oath, he admitted that he borrowed £180 from the deceased George Cuthbertson, for which he gave him his I O U, but he added—"Within three weeks, to the best of my recollection, after I had borrowed the £180 I went up to the bazaar market in Glasgow, and held out £180 to him, saying, 'Here is your money,' and asked him to give up the I O U. He said he did not want it, and 'I make you a compliment of it.' I asked him what was to come of the I O U. He said he would either destroy it or bring it to me, and he never asked the money from me after that." The pursuer further deponed —"I never saw the I O U since I granted it." The I O U was not produced, and was not now to be found.

The Lord Ordinary (Kinloch) found that the qualification contained in the deposition of the pursuer, that the deceased had made a gift of the money to the pursuer was intrinsic, and that the deposition was therefore negative of the reference.

The defender reclaimed, and contended that the qualification was extrinsic. He cited Gordon, 3d January 1764 (M. 13,234), and Thomson *v.* Duncan,