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,

10th July 1855 (17 D. 1081). The following authorities were cited on the other side:—More's Notes, p. 418; Dickson on Evidence, p. 970; Brown *v.* Mitchell (M. 13,202); Walker *v.* Clerk (M. 13,230); Grant (M. 13,221); Forrester (M. 13,215); Law *v.* Johnston, 9th December 1843 (6 D. 201); Hamilton (21 D. 51). The Court adhered to the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—In regard to this claim of £181 no proof has been led and no documentary evidence has been produced by the defender. But he has referred to the oath of the pursuer, "the averments of the defender touching" the said debt. The reference made is in regard to the lending of the money, and of the loan being due at the date of the deceased's death. The question is not whether the qualification of the pursuer's oath is credible, but whether, assuming it to be true, we are entitled to listen to it. That rests upon the doctrine of intrinsic and extrinsic qualities of an oath. This doctrine arose in a great many cases formerly, but it now seems to be very much narrowed to this: All questions having reference to the discharge or settlement of a claim are intrinsic. On the other hand, counter claims of compensation requiring constitution are extrinsic. The question is whether this case belongs to the one class or the other. All the evidence we have on the matter is to be found in the pursuer's oath. I look upon it as the history of the transaction. There can be no doubt that if his disposition had been that he had repaid the money, there would have been an end of the question. If he had got back the I O U and produced it that would have been an end of the question also. If, again, the I O U had been found in the repositories of the deceased there probably would have been no reference to oath. But suppose he had said, I got back the I O U, and did not preserve it, it is difficult to say that that would be extrinsic, What is here said is that he asked back the I O U, and that the deceased said he would destroy it or bring it to him. Is that not a part of the transaction and a termination of the whole matter? It is a mode of discharging the debt, and, when I consider the relation of the parties and the whole transaction, it seems to me a not unnatural one.

Lord CURRIEHILL concurred.

Lord DEAS also concurred. He agreed that this was a reference both of the constitution and subsistence of the debt, but that did not solve the question. Two things are intrinsic in an oath—1st, whatever relates to the original transaction; and 2d, whatever relates to the extinction of the obligation in the natural manner—that is, by payment. If there had been here no document granted, and the party had admitted the borrowing, but alleged that there had been a subsequent gift made to him of the amount borrowed, I don't think that allegation would be intrinsic. I don't understand that we are now deciding that; but I think the reference, as made, fairly involves all about the granting of the I O U, and what has become of it; and if that is involved in it, this case becomes a very special one, and we must hold the qualification to be intrinsic.

Lord ARDMILLAN concurred.

SECOND DIVISION.

FINLAY'S TRUSTEES *v.* ALEXANDER AND OTHERS.

Assignation—Intimation. No formality is required in intimating an assignation, and an assignation held to have been duly intimated to a party in respect she accepted and acted as a trustee, to which office she was nominated by the deed containing the assignation.

Counsel for Finlay's Trustees—Mr Gordon, Mr Gifford, and Mr Arthur. Agents—Messrs R. & R. H. Arthur, S.S.C.

Counsel for Mr Miller—The Lord Advocate and Mr Pyper. Agents—Messrs Gibson & Tait, W.S.

Counsel for Mrs Alexander's Trustee—The Solicitor-General and Mr Shand. Agents—Messrs Webster & Sprott, W.S.

Counsel for other parties—Mr Lamond.

This is a question between Mr John Miller, accountant in Glasgow, trustee on the sequestrated estate of John Finlay, Printseller, and carver and gilder in Glasgow, and the accepting and surviving trustees nominated in the marriage contract between Mr Finlay and his wife, who is a daughter of the late Mr Alexander, proprietor of Dunlop Street Theatre, Glasgow. This contract of marriage, which was postnuptial, conveys to the trustees therein named every debt due to Mrs Finlay, and in particular "all right, title, and interest which she or the said John Finlay, her husband, now has or may hereafter have in the succession or estates, heritable or moveable, of her father the said deceased John Henry Alexander." Mr Alexander, two days before his death, and on 13th December 1851, executed a last will and testament by a notary-public, in presence of two instrumentary witnesses, and by that deed he appointed his widow, Mrs Alexander, to be his sole executrix and universal legatory. Two months before Mr Alexander's death, and on the 28th February 1852, Mr and Mrs Finlay, having been previously married in 1845, entered into the post-nuptial contract which contains the assignation above quoted. Immediately after the execution of the contract, and on the 29th February 1852, the trustees nominated accepted of the trust by a minute endorsed on the deed in the following terms—"We, the trustees within named and designed, do hereby accept of the office of trustees." (Here follow the signatures, among which is that of Mrs Alexander, the executrix of her husband.) In July 1852 the Theatre-Royal in Dunlop Street was let to Mr Glover by Mrs Alexander, the liferentrix, and in the lease the trustees under Mr and Mrs Finlay's marriage contract were made parties. The contract was recorded in the Books of Council and Session on the 7th of December 1857. The question between the parties in these circumstances is, whether the assignation in the marriage contract was effectually intimated to Mrs Alexander. The Lord Ordinary (Kinloch) found that it was, holding that the minute endorsed on the deed was an acknowledgment of intimation. To-day the Court adhered.

The LORD JUSTICE-CLERK said—As this question is presented to us by the note of the Lord Ordinary, it appears to me very simple and unencumbered by specialties. Although we have had a good deal of reference to the affairs of the late Mr Alexander, I do not see that we get any benefit from it. The real question at issue is the subject of the last finding of the Lord Ordinary, whether the assignation contained in the post-nuptial contract was effectually intimated to Mrs Alexander as the executrix of her husband. It is necessary to look at the terms of the assignation, not because I should be disposed to say that an assignation couched in ambiguous terms cannot be effectually intimated, but I look to its terms for the purpose of seeing (1) whether Mrs Alexander was the proper person to receive the intimation as debtor; and (2) how it ought to be made. The assignation which Mrs Finlay and her husband, not only with his consent, but he being cedent, made, was of all right, title, and interest which she had in the succession or estate of her father. There is no doubt whatever that so far as this is a claim against the moveable estate of the lady's father it is a claim against Mrs Alexander as his executrix. I can understand that there might be doubts as to the precise nature of the claim. I can understand that there might even be doubts as to whether it existed at all; but such as it is, it is a claim against Mrs Alexander as executrix of her husband; and I don't understand that there is any difficulty in intimating the assignation to her. It is said that the parties made no intimation because they had not a claim of legitim. But if they had not a claim of legitim they had nothing. Mr Alexander left a testament