original title refers, or whether part of it has been lost to the pursuer by adverse possession on the part of an adjacent proprietor. Nor can it be ascertained whether the pursuer has possessed more than was originally conveyed by the title under which he holds. If he has, any land so possessed may be reclaimed, because beyond his boundary he could not acquire by prescriptive possession. Without the plan therefore, it is impossible for the defender to ascertain whether the subjects now offered by the pursuer are more or less than those covered by his title. The necessity for production of the plan is rendered all the greater by the declaration that part of the land undoubtedly covered by the pursuer's title is declared to be his, not in absolute property, but in common only with others, as well as by the declaration that certain lands are excluded from his conveyance.

"The defender having stipulated for a valid progress is entitled to one on which no reasonable doubt or question can be raised. In such a case as this 'the point is not so much whether there is much probability of eviction or of any party challenging the title as whether it would be such a title as would be taken by a purchaser (from the defender) without objection or without some further guarantee, or at least a diminished price'—*per* Lord Mackenzie in *Brown* v. *Cheyne*, 12 S. 178. The defender says that the title offered to him by the pursuer has been rejected by a person to whom he applied for a loan over the subjects in question, and I think that statement may be accepted without proof, its probability is so obvious. But that shows that the title now tendered by the pursuer is not of that character which he is entitled to insist upon in return for a full price—*Dunlop* v. *Crawford*, May 26, 1849, 11 D. 1062."

Counsel for the Pursuer—Dickson. Agent—J. Smith Clark, S.S.C.

Counsel for the Defender—Shaw. Agent—Andrew Newlands, S.S.C.

Wednesday, June 6, 1888.

OUTER HOUSE.

[Lord Fraser, Ordinary.

A B *v.* C D.

Jurisdiction—Declarator of Marriage—Acceptance of Service by Agents under Reservation of all Pleas competent to Defender.

An action was brought against a domiciled Englishman to have it declared that he had entered into a marriage in Scotland by declaration *de præsenti*. The defender had returned to England, and his agents in Scotland accepted service of the summons, but under reservation of all pleas competent to him. *Held* that the Scottish courts had no jurisdiction over him.

A B, a widow, raised an action against C D to have it declared that they were lawfully married to each other in Scotland on or about 24th January 1888, or alternatively for damages for seduction.

The pursuer averred that on the morning of Tuesday 24th January a written declaration of marriage *de præsenti* was drawn out and subscribed by her and the defender before two witnesses, and that in consequence of such declaration of marriage the pursuer permitted the defender to have intercourse with her, which she would not have permitted had she not considered herself legally married to him.

Service of the summons was accepted by the agents of the defender in Scotland, but under reservation of all pleas competent to him, and defences were lodged for him.

In the defences it was averred that the defender, who was born in England, never acquired a domicile in Scotland, and was not subject to the jurisdiction of the Scottish courts.

The defender pleaded—No jurisdiction.

Argued for the pursuer—(1) The contract had been entered into in Scotland, and the matrimonial domicile of the spouses was there. Residence in Scotland for forty days was sufficient to found jurisdiction in actions of declarator of marriage. It was only in actions of divorce that the plea of no jurisdiction had been sustained—Fraser on Husband and Wife, ii. 1275. (2) But here there had been acceptance of service, which was equivalent to personal citation in Scotland. Whatever pleas were reserved, the acceptance of service barred the defender founding upon want of citation, and pleading no jurisdiction—Campbell's Law of Citation—pp. 66, 67.

Argued for the defender—(1) Where an action of declarator of marriage was raised against a foreigner there must be personal citation upon the defender in Scotland—Fraser on Husband and Wife, ii. 1272 (note *a*); *Wylie* v. *Laye*, July 11, 1834, 9 F.C. 495, and 12 S. 927. (2) There had been nothing here equivalent to personal citation, and all pleas, including that of no jurisdiction, had been reserved in the acceptance of service.

The Lord Ordinary on 6th June pronounced the following interlocutor:—"Having heard counsel on the closed record on the procedure roll, sustains the first plea-in-law stated for the defender of no jurisdiction: Dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

Counsel for the Pursuer—Baxter. Agent—William Black, S.S.C.

Counsel for the Defender—Comrie Thomson. Agents—Hope, Mann, & Kirk, W.S.

Friday, July 20.

SECOND DIVISION.

(Before Seven Judges.)

[Lord M'Laren, Ordinary.

RAES *v.* MEEK AND OTHERS.

Trust—Bad Investment—Liability of Trustee and of Law Agent in Trust—Title to Sue.

Trust funds, which were held in terms of an antenuptial marriage-contract, were lent on the security of houses in the course of erection, and were lost through the insufficiency of the security. The marriage-contract empowered the trustees to lend on heritable securities, or personal securities or obligations, and contained a clause which declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." An action was raised by the beneficiaries, who had a contingent right to the fee of the trust-estate, against the trustees and the law agent in the trust, "conjunctly and severally, or severally, or in such other way or manner" as should seem just, to restore the money to the trust. Defences were lodged for one of the trustees and for the law agent.

The Court, after a proof, unanimously *held* that the security was bad, but, by a majority of seven Judges (*diss.* Lords Mure, Shand, and Rutherfurd Clark), *assoilzied* the trustee, and (*diss.* Lord Young) *assoilzied* the law agent.

The Lord President, Lord Justice-Clerk, and Lord Adam were of opinion that gratuitous trustees are only liable for such diligence, prudence, and knowledge as they actually possess in the management of their own business, and that, judged by this standard, the evidence showed there had been no negligence on the part of the trustee.

Lord Young was of opinion that the trustee was not liable, as he had acted on what he considered the best advice, that of the law agent.

Lord Mure, Lord Shand, and Lord Rutherfurd Clark were of opinion that gratuitous trustees must show the same reasonable care that a man of ordinary prudence would exercise in the management of his own business, and that the trustee was liable, as the evidence showed he had failed in this.

Opinion per the Lord President that the indemnity clause in the marriage-contract protected the trustee—*Opinions contra per* Lords Mure, Shand, and Young.

The Lord President, Lord Justice-Clerk, Lords Shand, Rutherfurd Clark, and Adam, were of opinion that the pursuers had no title to sue the law agent, (1) because he was under no contract of employment with them, and (2) because they might never become entitled to the trust-estate, and would in that event suffer no damage.

Lords Mure and Shand were of opinion that there was no liability, even assuming a title to sue, because a law agent is not responsible for the sufficiency of a security, unless there is a special undertaking to that effect, which was not averred in the present case.

Lord Young was of opinion that as all the parties were before the Court the liability of the law agent should be determined in the present action, and, on the evidence, that he was liable, as there had been a failure of duty on his part.

In 1852 the Rev. Robert Reid Rae, minister of the parish of Avondale, was married to Miss Jessie Croil, daughter of James Croil, Esq., a merchant in Glasgow. They entered into an antenuptial contract of marriage, by which Mr Rae settled his furniture on his wife, and bound himself to pay punctually the rates to the Ministers' Widows' Fund; Mrs Rae conveyed property of the value of £5000 to the marriage-contract trustees, for the following purposes, viz.—"(First), for behoof of the said Jessie Croil herself in liferent during the subsistence of the said marriage, exclusive of her husband's *jus mariti* and powers of administration as aforesaid, and in order that she may, by herself, without her husband's concurrence, receive, discharge, use, and dispose of the whole rents, interest, and profits of the said means and estate, and in case of the dissolution of the said marriage by the decease of the said Reverend Robert Reid Rae, for behoof of the said Jessie Croil, and her heirs and assignees whomsoever in fee; (secondly) in case of the dissolution of the said marriage by the decease of the said Jessie Croil, for behoof of the said Reverend Robert Reid Rae in liferent from and after her decease, so long as he shall survive her, and remain unmarried, and in order that he may, during the said period, receive, discharge, and enjoy the said rents, interest, and profits; and (lastly) in the case of the dissolution of the said marriage by the event last mentioned, and of there being a child or children thereof surviving at the decease or second marriage of the said Reverend Robert Reid Rae, and attaining twenty-one years of age, or (if a daughter or daughters) being married, for behoof of such child or children so surviving, and attaining majority, or (if female) being married, in fee."

The trustees had a power of sale of all or any part of the trust subjects, "they being bound always to invest or re-invest the proceeds of such sales, and all other principal sums to be realised by them, either in the purchase of heritable property, feu-duties, or ground annuals, or Government or bank stocks, or heritable securities, or even upon such personal securities or obligations as they may approve of as good and sufficient, taking the titles, securities, and obligations always in favour of themselves as trustees for the purposes of these presents." There was a clause of indemnity, which declared "that the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only, under deduction of all payments *bona fide* made in fulfilment of the premises." Amongst the trustees appointed were Mr and Mrs Rae, the latter being a *sine qua non*, John Meek, Esq. of Fortissat, and the Rev. John Ellis Rae, minister of Duntocher, near Glasgow,