of her society, and ordered to make payment of money to her periodically. It is said that he was born in Scotland. The domicile of origin may have a great deal to do with a question of succession, but has nothing to do with an action of damages for misconduct similar to the present. I should have thought that a case of this kind admittedly new and unique was too serious and important to be determined by a majority of the Court, but might very well have merited further consideration, and possibly a reference to a larger Court than the present. In my opinion the judgment of the Lord Ordinary is right.

LORD TRAYNER—I do not consider what decree the pursuer may be entitled to under the conclusions of the summons and the proof which she has led, because the only question at present for us to decide is whether the pursuer is entitled to convene the defender before us. The sole question is whether the defender is subject to the jurisdiction of the Scottish Courts. Upon that question I entertain no doubt. I think the defender is subject to the jurisdiction of the Scottish Courts. The defender is a Scotsman by origin, and has never lost his Scottish domicile. He has never acquired or shown any intention of acquiring an English domicile. I am therefore of opinion that the Lord Ordinary is wrong.

LORD MONCREIFF — I agree with the majority of your Lordships.

The Court recalled the interlocutor of the Lord Ordinary and remitted the case back to him to dispose of the merits.

Counsel for the Pursuer—Gunn. Agent —John Mackay, S.S.C.

Friday, June 18.

SECOND DIVISION.

GILHOOLY *v.* M'HARDY.

Process—Jury Trial—Abandonment—Act of Sederunt, 16th February 1841, *sec.* 46.

In an action of damages for slander a verdict in the pursuer's favour was set aside, a new trial granted, and a diet for the new trial fixed. Thereafter counsel and agents for the pursuer proposed to lodge a minute of abandonment, on the ground that no new evidence was obtainable, but the pursuer refused to consent to this, and they in consequence withdrew from the case, and the diet for trial was discharged. The defender then lodged a note praying the Court to grant decree of absolvitor in his favour with expenses, a copy of which was sent to the pursuer with an intimation that it would be moved on a certain day. The Court, on the motion being made in terms of the note for the defender, there being no appearance for the pursuer, delayed consideration of the case for two days, and ordered intimation to be made to the pursuer, and on this being done, and no answer from the pursuer received, *granted* the prayer of the note.

On 16th January an issue for the trial of an action of damages for slander was approved. On 4th February the trial took place before Lord Moncreiff, when the jury returned a verdict for the pursuer. On 3rd March the Second Division granted a new trial, which was fixed to take place before the Lord Justice-Clerk on Monday, 14th June. On the morning of Saturday, 12th June, the defender's agents received from the pursuer's agents a copy of a note to the Lord Justice-Clerk on behalf of the pursuer, which, *inter alia*, stated—"The pursuer has been unable to procure further evidence in the cause than that upon which he procured his former verdict, and in these circumstances he accordingly begs leave to state that he does not intend to proceed with said new trial, and consents to absolvitor of the defender with expenses." The pursuer's agents stated in their letter sending the copy-note that the principal note would be lodged with the Clerk of Court, and moved on that day. This was not done, and the pursuer's counsel appeared and informed the Court that after the said note had been intimated the pursuer had himself refused to sign it or allow it to be signed, and that his counsel and agents had consequently ceased to act for him. The diet for the trial of the cause was accordingly discharged, and the trial did not take place on Monday 14th June. No appearance was made for the defender on 12th June, and the jury was countermanded without the defender's consent.

In these circumstances a note for the defender was presented to the Lord Justice-Clerk, in which the facts were set forth as above narrated, with this exception, that the reason why the note for the pursuer was not presented on 12th June, as explained by the pursuer's counsel on that date, was not given, and it was stated that the defender's agents had been informed by the Clerk of Court that no such note had been lodged, but that on that day the trial had been countermanded on the motion of counsel for the pursuer, and that no notice of that motion had been given to the defender. It was further stated that in consequence of the trial being countermanded without due notice to the defender, considerable expense had been incurred by him; that his witnesses had been cited for Monday 14th June, and their attendance had to be countermanded; that counsel had been instructed, and that the defender himself had come from Tomintoul, Banffshire, to attend the trial. The note concluded with a prayer that his Lordship would move the Court to assoilzie the defender with expenses, or otherwise to find the pursuer liable in the expenses incurred by the defender in preparing for trial on 14th June, and to ordain that these expenses should be paid as a

condition-precedent to his proceeding to a new trial.

The note was enrolled in the Single Bills for 16th June, and on 14th June the defenders sent a registered letter to the pursuer enclosing a copy of the note, and intimating that the case had been enrolled for 16th June, when the Court would be moved in terms thereof.

The Act of Sederunt of 16th February 1841 enacts as follows:—Sec. 25—"That until the jury is empanelled and sworn to try a cause, it shall be competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause to the satisfaction of the Court, and supported by oath or affidavit if the Court shall so require, or in vacation by the judge before whom motions are to be heard as before directed, and upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial. But if the inability of a material witness to attend at a trial, or any other cause for putting it off becomes known to the party during the session, the motion to put off the trial must be made in the session upon notice to the opposite party, and copies thereof being lodged as aforesaid, and such motion must be supported by oath or affidavit if the Court shall so require." Sec. 46—"That if it shall be made to appear to the Court that a party has abandoned his suit, or if the pursuer or the party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for the delay to the satisfaction of the Court. And in case either party shall not appear at the trial of a cause after due notice of trial has been given by the opposite party, the party appearing, if pursuer in the issue, shall be entitled to lead his evidence and go to the jury for a verdict; and if the party appearing be the defender in the issue, he shall be entitled to obtain a verdict in his favour without leading evidence, but if the party appearing shall decline to proceed in this manner, then the judge presiding at the trial shall certify to the Division the fact of the other party not appearing, and the Division shall thereupon proceed as in cases in which parties are held as confessed, unless it shall be shown to the satisfaction of the Court that the failure of the party to appear at the trial was occasioned by some sufficient cause."

The Act of Sederunt of 24th February 1846 enacts, *inter alia*, as follows:—"That as soon as the issue or issues in the cause are finally engrossed and lodged in the office in the Register House, it shall be competent to the pursuer in the issue or issues to give notice of trial; and if the pursuer does not give notice of trial within ten days from the time the said issue or issues are so lodged as aforesaid, or, after giving notice of trial, countermands the same and does not renew the notice of trial within ten days after such countermand, it shall thereafter be competent to the defender to give notice of trial to the pursuer, and also to countermand such notice of trial in like manner as is competent to the pursuer. But if the defender countermands then the pursuer's right to take the lead shall recur for other ten days from the date of such countermand. . . . And the party who shall be served with a countermand shall be entitled to such expense as may have been incurred in consequence of such notice of trial, and which may not be available for the trial of the cause when it afterwards takes place."

The Court of Session Act 1850 (13 and 14 Vict. cap. 6), section 40, enacts as follows:—"Where an issue or issues is or are approved as aforesaid, it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues, such time being as soon after the date of such approval as with reference to the proper trial of such issue or issues conveniently may be, and, except upon special cause shown, not later than three weeks from the date of such motion." . . .

On 16th June counsel for the defender moved in terms of the prayer of the note, and argued—When it appeared that a pursuer had abandoned his suit the Court was bound to hold him as confessed—Act of Sederunt, 16th February 1841, section 46. Although it had been held that the provisions of that section as regards delay for twelvemonths did not now apply in respect of the right given to either party by the Court of Session Act 1850, section 40, to move for a time and place to be appointed for the trial of the cause—*Macfarlane* v. *Beattie & Sons*, July 1, 1892, 19 R. 953 (see also *Baird* v. *Cornelius*, July 16, 1881, 8 R. 982)—it had been decided that the first clause of section 46 regarding abandonment was still in force—*Ross* v. *Mackenzie*, June 26, 1889, 16 R. 871. It appeared here that the pursuer had abandoned his cause. Apart from that he was at least bound to pay the expenses which had been caused to the defender by the countermand as a condition-precedent to his being allowed to proceed with a new trial—Act of Sederunt, 16th February 1841, section 25.

There was no appearance for the pursuer, but the counsel who had formerly represented him appeared and stated in answer to inquiry from the bench that he had no instructions, but that he understood the agents who formerly represented the pursuer had ceased to act for him.

The Court intimated that they would dispose of the case on the 18th of June, and directed intimation to be made to the pursuer.

On 16th June the defender's agents sent a registered letter to the pursuer intimating that the case had been before the Second Division, and that their Lordships were to give their decision on 18th June.

Copies of the two registered letters referred to were lodged in process. Post Office receipts for the letters were appended.

On 18th June counsel for the defender

appeared and stated that no answers had been received to the letters of intimation sent to the pursuer.

There was no appearance for the pursuer,

The Court without delivering any opinions assoilzied the defender.

Counsel for the Defender—Baxter—J. R. Cosens. Agents—Gordon, Petrie, & Shand, S.S.C.

Saturday, June 26.

FIRST DIVISION.

[Lord Pearson, Ordinary.

DESSAU *v.* DAISH.

Process — Mandatory — Judgments Extension Act 1868 (31 *and* 32 *Vict. c.* 54), *sec.* 5—*Impecuniosity.*

The rule of practice, since *Lawson's Trustees* v. *British Linen Company*, June 20, 1874, 1 R. 1065, has been that, irrespective of domicile or nationality, parties resident in the United Kingdom furth of Scotland are not to be required to sist a mandatory unless under circumstances which would justify an application being granted against a party within the jurisdiction of the Scottish courts to compel him to find caution for expenses.

This rule *followed* in the case of a pursuer who was a citizen of the United States of America resident in London, and whose residence there was alleged by the defender to be merely temporary.

Observed (*per* Lord Kinnear) that mere impecuniosity is no reason for requiring a party either to find caution for expenses or to sist a mandatory.

On 2nd December 1895 Morland Micholl Dessau, "sometime of No. 32 Hawlay Street, Boston, U.S., and at present residing at No. 45 Weymouth Street, Portland Place, London," raised an action against Robert Evers Daish, Edinburgh, to have it declared that the defender had broken an agreement with the pursuer with regard to the sale in this country of a copyright calendar of the pursuer's. There was also a conclusion for payment of £500 in name of damages for the said breach of agreement.

The defender, in his answers to the pursuer's condescendence, referred to the agreement, and continued—"Explained that the pursuer is a citizen of the United States of America, and is residing in England for temporary purposes. He has no domicile in this country or in England. Explained that in the pursuer's correspondence with defender he repeatedly alluded to his being pressed for money, also to his being worried by his creditors, and apprehensive of diligence on judgments obtained against him. He further indicated his intention of returning to America. The lease of the house referred to stands in the name of a Miss Alice Emily Percy Smith, whom the pursuer is believed to have married. It contains a prohibition against sub-letting or assigning except with the landlord's written consent first obtained. An informal, invalid, and unstamped memorandum is endorsed on said lease, bearing to be dated 28th September 1895, and purporting to transfer all her rights therein to the pursuer. No document has been produced by pursuer instructing that he has any valid right to said lease in favour of Alice Smith, or is now the lessee thereunder. The pursuer is called on to produce in process the said lease and any documents on which he founds his allegation that he is now lessee. It is believed said premises were used by the said Mrs Alice Smith or Dessau prior to her marriage with pursuer, and are still used by her for the purpose of being let as apartments. From pursuer's correspondence in 1895 it appears that he dated his letters from 45 Weymouth Street several months prior to 1st June 1895, being the date on which he informed defender he was to marry Miss Smith, and it is believed he was then occupying apartments there. It is believed that the furniture in the house, until assigned in security as after mentioned, belonged to Mrs Dessau. On or about 20th February 1896, at or about the time when the present action was brought, pursuer and his wife gave a bill of sale of the said furniture for securing a loan of £300, and the rate of interest payable is 15 per cent."

The pursuer, in answer to these averments of the defender, explained that he was "lessee of the house in London in which he resides at a rent of £235, under a lease which still has seventeen and a-half years to run, and that he is interested in a large number of British patents. The defender's averments as to Mrs Dessau's use of said house are unfounded, and are denied. Reference is made to a letter from the lessor of said house to Mrs Dessau dated 31st January 1896, herewith produced. The furniture in said house is the property of the pursuer, and has been valued at over £1000. The said furniture was the property of the pursuer at the date of the bill of sale referred to in the answer. The rate of interest there stated covered both interest on the loan and the expenses connected therewith. A considerable portion of said loan has been paid off. Denied that the pursuer ever agreed to grant the defender one-half interest in the patents and others as stated in the answer. Explained that the defender undertook and represented himself as being both willing and able to form a company to take the said patents belonging to the pursuer. He has never done so, although repeatedly pressed by the pursuer to implement his undertaking. The obligation in question was granted by the pursuer solely for the purpose of enabling the defender to conduct negotiations with a view to the formation of said company, and as part of the agreement between pursuer and defender, whereby the latter agreed to form said company."

The defender pleaded, *inter alia*—"(1) The pursuer ought, *ante omnia*, to be or-