interim arrangement during a process the Court must proceed upon a *prima facie* view of the facts, and I am of opinion that we must take this course in dealing with the wife's liability to the husband.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer — Maconochie. Agents — Pearson, Robertson, & Maconochie, W.S.
Counsel for the Defender — Macfarlane. Agent—W. S. Farmer, S.S.C.

Friday, June 27.

FIRST DIVISION.

[Sheriff Court at Campbeltown.

DUKE OF ARGYLL *v.* CAMPBELTOWN COAL COMPANY, LIMITED.

Process — Removing — Conventional Irritancy — Action of Removing without Declaratory Conclusions —Competency— Lease Constituted by Several Documents, including Draft Agreement.

An action of removing was based upon a conventional irritancy for non-payment of rent contained in a lease which was constituted by a series of documents consisting of an original lease, in which were the irritant clauses, and several subsequent agreements, the last of which was an unsigned draft agreement upon which, it was alleged, the parties had acted. There had been no previous action of declarator of the lease or of the irritancy, and there were no declaratory conclusions in the action of removing. *Held* that the action was *competent.*

Observations on the necessity of declaratory conclusions in an action of removing proceeding upon a conventional irritancy when there is a serious question as to the existence or legality of the irritancy.

The Duke of Argyll, *pursuer*, brought an action in the Sheriff Court of Argyll at Campbeltown against the Campbeltown Coal Company, Limited, Glasgow, *defenders*, in which he craved the Court "to ordain the defenders forthwith to remove themselves and their servants furth and from the minerals, colliers' houses, and whole colliery premises and others let to the defenders by lease dated 16th and 25th June 1900 granted by the late John Douglas Sutherland Campbell, Duke of Argyll, Marquis of Kintyre and Lorne, to the defenders, and by relative agreements between the said Duke of Argyll, &c., and the defenders dated 17th February and 2nd March 1905, 24th July and 10th August 1907, 19th and 28th November 1907, and 2nd December 1911, that the pursuer or others in his right may then enter to and possess the same, and in the event of the defenders failing to remove, to grant warrant to eject them."

The averments were, *inter alia*, as follows (those in condescendence 2 which are printed in italics having been added by amendment when the case was in the Inner House):—"(Cond. 1) By lease dated 16th and 25th June 1900 the late John Douglas Sutherland Campbell, Duke of Argyll, Marquis of Kintyre and Lorne, &c., as first party, let to the defenders as second party the ironstone, coal, shale, and fireclay within that part which lies in the parish of Campbeltown of the lands and estates now known by the general name of the Inveraray and Kintyre estates of the dukedom of Argyll belonging in property to the said Duke, and also such coal as might belong to him within any other lands in the said parish belonging to other proprietors, and particularly within the lands of Kilkivan and Drumfin. The lease is for twenty-eight years from Whitsunday 1899. The rent is a fixed rent of £250 for minerals, or in the option of the Duke certain royalties, and £50 for colliers' houses. (Cond. 2) The provisions of said lease were in certain respects altered by subsequent agreements entered into between the said Duke and the defenders, which are dated respectively (1) 17th February and 2nd March 1905, (2) 24th July and 10th August 1907, (3) 19th and 28th November 1907. *The parties having agreed on certain alterations on and additions to the said lease and subsequent agreements, the same were embodied in a draft minute of agreement and lease dated 2nd December* 1911. *Under this* final agreement the defenders were to pay as from Whitsunday 1911 a fixed rent of £800, or in the Duke's option certain royalties, and this fixed rent of £800 or royalties was to be payable so long as the company should continue to work certain undersea minerals, of which they had arranged a lease from the Crown. The defenders were also granted permission to convey the undersea coal through the Duke's coal mines for a period of sixteen years from and after Whitsunday 1911, thus having a termination with the principal lease, but under the declaration that in the event of the principal lease being brought to an end at any time prior to its natural termination, the 1911 agreement and the lease should likewise come to an end at the same time and that without any notice. For the wayleave thus granted the company were obliged to pay a royalty of ½d. per ton over and above the fixed yearly or other royalties. It is understood that the undersea coal has not been worked since Whitsunday 1921. *The said draft minute of agreement and lease was prepared by the pursuer's agents, approved of by the defenders, and acted on by both parties.* In particular, the defenders made use of the wayleave thereby granted for the passage of the undersea coal, made payments to account of their obligations thereunder, and obtained a grant of the amount of said rent of £800 from the Coal Controller. So far as inconsistent herewith the statements in answer are denied—(*Ans.* 2) Admitted that by subsequent agreements (hereinafter specified) entered into between the said Duke and

the defenders the provisions of the said lease were in certain respects altered. The said agreements are dated respectively (1) 17th February and 2nd March 1905, (2) 24th July and 10th August 1907, and (3) 19th and 28th November 1907, being the first three agreements specified in article 2 of the pursuer's condescendence, and are the only agreements supplementary to the principal lease entered into between the parties. The documents produced by the pursuer are referred to for their terms. *Quoad ultra* denied. Explained and averred that there is not any agreement between the said Duke and the defenders of date the 2nd December 1911. . . . (Cond. 4) By the said lease the parties, *inter alia*, agreed as follows :—'And it is hereby specially provided and declared that these presents are entered into with and under the further express conditions and provisions hereinafter written, viz.—(*First*) That if the second party shall become bankrupt or insolvent or shall fail in the regular payment of the said fixed rent or lordship for the minerals hereby let or of the said rent for colliers' houses or for ground taken or occupied aforesaid at the terms at which the same become due so that two half-yearly payments of the same shall at any time be due when a third becomes current, then and in that event, but only after seven days' notice in writing demanding such payment, the present lease may in the option of the first party or his foresaids be held by them as having become *eo ipso* void and null without the necessity of any declarator or process of law to be used for that effect and such nullity shall not be purgeable by payment after the first party or his foresaids shall have exercised his or their option of holding said lease void reserving right to the first party or his foresaids notwithstanding his or their exercising such option of declaring these presents null to recover all arrears or rent or lordship then due to him or them. (*Second*) That it shall be in the power of the first party or his foresaids if and when they shall have voided the said lease to enter into possession of the property on the premises, including the pits, furnaces, pit fittings and furnace fittings, and haill and other articles whether heritable or moveable, and to use or dispose of the same as they shall think proper without hindrance in any way or being liable to account to the second party for the value thereof except that they shall be obliged to hold it to the extent of its value to be ascertained by two persons mutually chosen or their oversman as compensation for any arrears of rent or lordships then due by the second party. . . . (Cond. 5) The defenders having failed in the regular payment of the fixed rent or lordship for the said minerals and the rent of the said colliers' houses at the terms at which the same became due, so that there was due by them considerably more than two half-yearly payments of the same when the third became current, the pursuer by his agents, Messrs Lindsay, Howe, & Company, W.S., Edinburgh, did on 17th May 1923 by notice directed by registered post to the defenders at Campbeltown and by post to their agents, Messrs Symington & Blair, solicitors, 94 Hope Street, Glasgow, require the defenders to make payment within seven days from the said 17th day of May 1923 of the sum of £3013, 11s. 2d. as the amount of the arrears of rent then due by them. The said arrears, as already stated, largely exceed the amount of two half-yearly payments of rent. . . . *Quoad ultra* the explanations and averments in the answers are denied, and the defenders are called on to produce the receipts for the rent and royalties alleged to have been paid—(*Ans.* 5) Admitted that Messrs Lindsay, Howe, & Company, W.S., Edinburgh, posted on or about the 17th day of May 1923 to the defenders at Campbeltown and to Messrs Symington & Blair, solicitors, 94 Hope Street, Glasgow, a notice. . . . *Quoad ultra* denied. Explained and averred that the defenders are not due to the pursuer any sum, and that the rents and royalties payable to the pursuer were settled by the defenders with him or his factor at Campbeltown regularly as they fell due, and that these payments were accepted as in full of all the pursuer could claim from the defenders under said lease and relative minutes of agreement. . . . (Cond. 6) The said seven days having expired without payment being made by the defenders of the said arrears of rent due by them or any part thereof, the pursuer exercised the option conferred upon him by said lease, and by minute dated 1st June 1923 declared that the said lease and minutes of agreement following thereon were held by him as having become *eo ipso* void and null as from and after the date thereof without the necessity of any declarator or process of law to be used for that effect, said nullity not being purgeable by payment after the date of the said minute, being the date of his exercising the said option, reserving always and without prejudice to the pursuer's right to recover all arrears of rent due to him, and also reserving all claims by him against the defenders of whatever kind arising out of their working of the minerals and others let by the said lease and minutes of agreement, and any other claims competent to him in virtue of the said lease and minutes of agreement or otherwise."

The pursuer pleaded—"1. The pursuer having in terms of the said lease and relative minutes of agreement declared the same to have become *eo ipso* void and null, and the said lease and agreements being therefore now at an end, the pursuer is entitled to decree of removing against the defenders as craved. 2. The defenders' right to occupy the subjects let having terminated, the pursuer is entitled to decree as craved."

The defenders pleaded, *inter alia*—"2. The action is incompetent."

On 28th January 1924 the Sheriff-Substitute (CAMPBELL) sustained the second plea-in-law for the defenders and dismissed the action.

The pursuer appealed, and argued—An action of removing, proceeding upon an irritancy in a lease, was competent without a

declaration of the irritancy—*Gordon*, 1805, M. *voce* Tack, App. No. 11; *Hall* v. *Grant*, 1831, 9 S.612; Mackay's Practice, vol. ii, p. 98. The presence of declaratory conclusions in such an action was merely a question of expediency. Here they were unnecessary because the question between the parties could be tested without any declarator. The old cases quoted by the defenders referred to a time when declarators were incompetent in the Sheriff Court, but now such conclusions were competent in that Court, and could if necessary be added by way of amendment —Sheriff Court Acts 1907, sec. 5 (1). These cases, therefore, could not be applied. In any event the objection was a technical one. The same arguments applied as regards the necessity of declarator of the lease. The following cases were also referred to—*Scottish Property Investment Building Society* v. *Horne*, 1881, 8 R. 737, 18 S.L.R. 525; and *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115.

Argued for respondents—The action was incompetent without declarator (1) that the draft lease of 1911 constituted a valid lease between the parties; (2) that the irritancies in the original lease applied to the later agreements; and (3) that the leases had been irritated. These facts were all in dispute. The old rule was that where an action of removing proceeded on a conventional irritancy the irritancy required to be declared—Stair, Inst. iv, 18, 3; Bell, Leases, vol. ii, p. 16; *Cassels* v. *Lamb*, 1885, 12 R. 722, *per* Lord Kinnear at p. 759, 22 S.L.R. 477—and was only relaxed later in cases of insolvency where there was sequestration or where trust deeds for creditors had been granted—*Gordon* (*cit.*); *Stewart* v. *Watson*, 1864, 2 Macph. 1414; *Scott* v. *Wotherspoon*, 1829, 7 S. 481; *Forbes* v. *Duncan*, 2nd June, 1812, Fac. Coll.; *Taylor* v. *Boyle*, 1824, 2 Sh. App. 30; *Hall* v. *Grant* (*cit.*). But even in these cases conclusions for declarator were necessary where the irritancy was not instantly verifiable—*Hog* v. *Morton*, 1825, 3 S. 617, *per* Lord Alloway at p. 618; Rankine, Leases (3rd. ed.), p. 546; Hunter, Landlord and tenant, vol. ii, pp. 134 and 135; Mackay's Practice, vol. ii. p. 98 (*Barbour* v. *Chalmers*, 1891, 18 R. 610, 28 S.L.R. 446, was referred to by the Lord President). The dispute as to the agreement of 1911 and the application of the irritant clauses could not be tried without appropriate declaratory conclusions—*M'Farlane* v. *Campbell*, 1857, 19 D. 623; *Wylie* v. *Heritable Securities Investment Association*, 1871, 10 Macph. 253, 9 S.L.R. 184; *Bathie* v. *Lord Wharncliffe*, 1873, 11 Macph. 490, 10 S.L.R. 308; *Wright* v. *Newton*, 1911 S.C. 762, 48 S.L.R. 637; Mackay's Practice, vol. ii, p. 99.

LORD PRESIDENT (CLYDE)—The pursuer in this action craves the Court to ordain the defenders to remove from the mineral subjects which they hold under certain agreements of lease, and in the event of the defenders not removing to grant a warrant to eject them. The grounds of the action are that a conventional and therefore non-purgeable irritancy contained in the lease has been incurred by the defenders. The proceedings, accordingly, take the form, not of a summary application for ejection, but of a properly libelled action of removing, and the condescendence and answers which have been made up upon it are appropriate for its trial.

In the defence, as maintained before the Sheriff a large number of pleas were founded on. Two of these pleas, viz., that the questions at issue between the parties should be referred to arbitration, and that all parties interested have not been called, were not insisted on before us, and it is therefore unnecessary to say anything about them.

In this Court the defenders rested their case firstly on the plea to the competency of the action (under which two points were raised), and secondly, on the plea to the relevancy of the pursuer's averments. Under the head of competency the first point was that, to make an action of removing founded on an irritancy competent it must be preceded or at least accompanied by a declarator of the irritancy obtained either in a separate action or in terms of preliminary declaratory conclusions. The second point arises in this way—the lease on which the pursuer founds is constituted, not by one, but by a series of documents—there having been an original lease which was from time to time amended and extended by subsequent agreements—and the last of these is one which, so far as formal execution is concerned, never got beyond the preparation of a draft, and the binding character of which accordingly depends upon the sufficiency of the draft as evidence of a parole agreement, and on proof of *rei interventus* following on it. The defenders maintained that in these circumstances a declarator of the lease (as the title on which the pursuer sues the action) was a necessary preliminary to any decree of removing. Then, as to the relevancy of the pursuer's averments, the argument was concerned with the scanty explanations contained in the printed record regarding the part played by the draft agreement in the negotiations between the parties. The pursuer has, however, tendered an amendment of his record upon that subject which, if allowed, will have the effect of disposing of the defenders' objections on the score of relevancy. I therefore move your Lordships to allow that amendment, and if your Lordships concur in that course no more need be said on that head.

Returning to the questions of competency, there is ample authority for the rule that a declarator should precede decree in an extraordinary removing—that is, in a removing (like the present one) which is not merely the sequel of a notice of termination of tenancy at the ish or at a break in the term of a let. In Bell on Leases (vol. ii, 17) it is said to be the "general rule" that irritances, whether legal or conventional, must be judicially declared, and in More's Notes on Lord Stair's Institutes (p. lxxx) this "general rule" is said to apply to all irritant clauses whereby a party is deprived of any benefit or right vested in him. Where the irritancy is a legal—as distin-

guished from a conventional — one, the function of the declarator approximates to that of a reduction. It gets the title. by which the benefit or right is held, out of the way, and in this respect formal declarator of irritancy becomes in some cases an indispensable step of progress. Thus the tinsel of feu-rights *ob non solutum canonem* (a legal irritancy introduced into all feu-farms by the Act 1597, cap. 250), requires a declarator to give it effect—though it is interesting to note that by section 32 of the Sheriff Court Act 1853 a simple action of removing in the Sheriff Court was made enough in cases in which the feu-duty did not exceed £25 — *cf.* Dove Wilson's Sheriff Court Practice, 4th ed., 436, 437— with regard to this section and the effect of the subsequent Sheriff Court Act of 1877. The Sheriff Court Act of 1907 repealed this enactment, and it would appear from section 5 (4) of the Act just referred to that declaratory conclusions are now as indispensable in all feudal actions of irritancy *ob non solutum canonem* in the Sheriff Court as they have always been in the Court of Session. In the analogous case of the irritancy of a lease by non-payment of rent for two successive years (a legal irritancy derived from the civil law—*cf.* Ersk. ii, 6, 44) enforcement was, by the remarkable Act of Sederunt of 14th December 1756, made competent in the Sheriff Court by action of removing without declarator.

Apart, however, from Acts of Parliament or of Sederunt it was decided as early as 1805 (*Gordon*, M., *voce* Tack, App. No. 11) that a conventional irritancy in a lease on the bankruptcy of the tenant was enforceable by removing in the Sheriff Court without declarator. It has to be kept in mind that until the Sheriff Court Acts of 1877 and 1907, to insist on an action of removing being prefaced by or accompanied with declaratory conclusions was the same thing as excluding the jurisdiction of the Sheriff Court from the case. The rather general grounds given in 1829, in the case of *Scott* v. *Wotherspoon* (7 S. 481) for sustaining a simple removing from leasehold subjects (without declarator of irritancy) in the Sheriff Court suggests that the "general rule" as explained in the preceding paragraph of this opinion had already acquired considerable elasticity. In 1864 the Sheriff-Substitute in *Stewart* v. *Watson* (2 Macph. 1414, at p. 1415) enunciated a general dictum on the subject which was frequently repeated by higher authorities and text-writers in subsequent years—"The competency in the Sheriff Court of an action of removing such as this, founded on an express agreement of parties, where the act inferring nullity of the lease is admitted or instantly proved is a point fixed in practice and by decisions." In 1893 Sheriff Mackay describes the practice as he knew it in a way which clearly indicates the direction and extent of the relaxation of the older "general rule." He says (Manual, p. 78) that where a removing is pursued in the Sheriff Court on the ground of conventional irritancy, and there is "serious" question as to the legality of the irritancy or its existence, it will be "proper and is perhaps still necessary to bring a declarator in the Court of Session." The extension of the jurisdiction of the Sheriff Court by the Act of 1907, to include matters of heritable right generally, makes it immaterial—on the question whether a removing without declarator of irritancy is competent — whether the case depends in that Court or in the Court of Session. There are certainly many extraordinary removings (that is, removings which do not proceed on notice of termination of tenancy at the end of the term of let) in which declaratory conclusions are both appropriate and expedient; and whenever the questions to which Sheriff Mackay alludes in the passage quoted above are sufficiently serious to make it expedient and necessary in the opinion of the Court that they should be made the subject of express declaratory conclusions, the Court—this Court or the Sheriff Court—is entitled to insist on declarator, and will do so, to the effect of treating the action as incompetent unless or until proper declaratory conclusions are brought before it. It will be seen, however, that the grounds on which this practice rests are grounds not of absolute legal competency or incompetency but of convenience and high expediency.

Now we are asked by the defenders to sustain the absence of a declarator of irritancy in the present case as fatal to the competency of the removing. In my opinion the pursuer would have been well advised in his own interests to have used declaratory conclusions. They would certainly have been appropriate and convenient. But having regard to the state of the authorities and to the course of practice in this matter, as I have endeavoured to state it, I am not prepared to say that this action is incompetent because it does not contain a declaratory conclusion. View the circumstances of this case as I may, I cannot see that the defenders suffer any prejudice, or that the Court is presented with any undue aggravation of the difficulties of the case, by the absence of such a conclusion. If I thought otherwise, I should have suggested to your Lordships to take a different course from the one I am about to propose.

It would also, I think, have been convenient to have had the validity of the final agreement (forming part of the lease of the mineral field) determined by means of a declaratory conclusion. If the title upon which an operative decree, of whatsoever kind, is asked requires investigation or proof before it can be satisfactorily made out, a preliminary declarator may be highly expedient, and it must not be understood that the declaratory form of process so useful in such cases has been wiped out from modern practice, or that the Court—this Court or the Sheriff Court—is not as much entitled to-day as ever it was to hold the action incompetent without it. But, as was pointed out so long ago as 1854 by Lord President M'Neill and by Lord Robertson in *Cruickshank* v. *Irving* (17 D. 286), the question whether a declarator to clear up

the obscurities affecting the title of an applicant for interdict is necessary or not is one of degree — a remark which in my opinion is of very extensive application to declarators generally. In the present case the fact that one of the documents constituting the lease is not probative but requires *rei interventus* to set it up, does not *per se* make a declarator necessary. The facts averred with regard to it present no complexity.

There is only one other topic in the case with which I must deal. The importance of the draft document to which I have referred more than once is that under it a rent of £800 was substituted for the rent of £250 in the original lease if and so long as the defenders availed themselves of certain rights which they had acquired, or expected to acquire, to work undersea coal adjoining the minerals let to them by the pursuer. The defenders argued that, assuming this document to form a part of the lease and to be binding on them, the conventional irritancy is not on a sound construction of its terms made applicable to the £800 rent. So far as regards the construction of the draft document, I see no reason to doubt that its effect (if made binding on the defenders) is to apply both penalty and irritancy clauses to the £800. But the draft also stipulates for certain royalties as wayleave in respect of undersea coal brought to the surface through the minerals let to the defenders by the pursuer, and the pursuer is entitled under the other agreements forming part of the lease to royalties on sandstone. The defenders found on the circumstance that the irritancy only applies to the fixed coal rents and the coal lordships and to the rents of the workmen's houses. It does not apply to the wayleaves or the royalties on sandstone. In giving notice to the defenders that the irritancy had been incurred the pursuer referred to a note bringing out a sum of £3013 as due to him. This notice includes not only the fixed coal rents and house rents but also the sandstone royalties and the wayleaves, and then gives the defenders credit for a number of deductions described generally as being to account of these various items. The resulting sum of £3013 is said to be arrears of rent, non-payment of which involves irritancy. All I can say at this stage is that I can see if this matter is inquired into that the terms of this notice may involve the pursuer in some difficulty. They may not do so, of course. Whether they do or do not may depend on the results of inquiry. Meanwhile the defenders deny that they are due anything to the pursuer. In argument before us they stated that some of these deductions are payments to account of coal and house rents, and if they prove that, it is possible that it may turn out that the irritancy has not really been incurred or that the pursuer has disabled himself from enforcing it. But it is impossible to determine these questions at this stage of the case, and I express no opinion upon them.

I am of opinion that the amendment tendered by the pursuer ought to be allowed, and that, subject to any amendment the defenders may propose, it would then be necessary to send the case back to the Sheriff for the purpose of allowing a proof. That proof ought to be expressly a proof before answer.

LORD SKERRINGTON — This action falls within a well-known category known as extraordinary or summary actions of removing. It is extraordinary because the pursuer's case is that the defenders' title of possession being that of tenancy, has been brought to an end not in the ordinary way by their lease running out and by legal warning, but by the occurrence of an irritancy. He therefore maintains that he is entitled to have the defenders ordained to remove summarily, that is, without any warning at all. Even if the Court should hold that an irritancy has been incurred, it will have power, if it thinks fit, to allow the defenders a reasonable time in which to carry out their removal.

The primary difficulty in the case is one for which the pursuer is responsible. For some reason he has chosen to deviate from the ordinary practice, which would have been to ask the Court to declare that the defenders' title of possession has come to an end in consequence of their having incurred an irritancy of their lease for reasons specified in the conclusions of the action. A declarator of this kind is convenient because it focusses the attention of the parties and of the Judge upon the facts which the pursuer undertakes to prove. For obvious reasons such a declarator is unnecessary if the facts which bring the irritancy into operation are admitted by the defender or are so simple and notorious that they admit of instant verification. For my own part I think that some of the obscurity which surrounds this case would have been avoided if the pursuer had been compelled to formulate appropriate declaratory conclusions. Accordingly, if I had been sitting alone, I should have been disposed to give the pursuer an opportunity to amend his initial writ, failing which I should have dismissed the action. I do not, however, dissent from the course which your Lordship proposes.

LORD CULLEN—I concur with the opinion of your Lordship in the chair.

LORD SANDS — I agree with your Lordships that in a case of this kind declaratory conclusions are convenient. They focus matters and make for clarity and precision. But we have here undoubtedly a question between the parties to try, and a record which has already been for a year before the courts in which the question may be tried. It is not suggested that the defenders are in any way prejudiced by the absence of declaratory conclusions. All that they can say is that the absence of such conclusions is contrary to the rules of the game. If the law had prescribed declaratory conclusions because no conventional irritancy could be incurred until it had been judicially declared, the requirement of declaratory conclusions could not have been dispensed with as merely a matter of prac-

tice within the control of the Court. But this consideration has not been accepted as the basis and the explanation of the old rule, for it has been recognised that no declaratory conclusions are necessary if the irritancy be one instantly verifiable. There is therefore no inflexible rule based upon legal principle which renders declaratory conclusions necessary. In these circumstances, for the reasons indicated by your Lordship in the chair, I do not think that it is incumbent upon us to hold that the proceedings are abortive in respect of the absence of declaratory conclusions.

Upon the other matters urged before us I agree with the conclusions reached by your Lordship in the chair.

The Court recalled the interlocutor of the Sheriff-Substitute dated 28th January, allowed the amendment referred to above, repelled the second plea-in-law for the defenders, and remitted the case to the Sheriff-Substitute to proceed.

Counsel for the Pursuer and Appellant—Macphail, K.C.—Kinross. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Defenders and Respondents—Brown, K.C.—Patrick. Agents—W. & J. Burness, W.S.

Friday, June 27.

FIRST DIVISION.

[Lord Morison, Ordinary.

SCOTT *v.* SCOTT.

Process—Mandatary—Action of Divorce—Pursuer Resident Abroad.

An action of divorce on the ground of desertion at the instance of a domiciled Scotsman, resident in Canada, having been dismissed, the pursuer reclaimed. The defender having moved that he should be ordained to sist a mandatary, the Court in the circumstances *refused* the motion.

William Scott, Melita, South-Western Manitoba, Canada, *pursuer*, brought an action against Mrs Janet M'Dougall or Scott, Gordon, Berwickshire, his wife, *defender*, concluding for divorce on the ground of desertion.

At the time of the action the pursuer was employed in Canada as a police constable. He had gone to Canada in 1907 in search of work, and remained there. He was married to the defender when on a visit to Scotland in 1913, and lived with defender for a few weeks, after which he returned to Canada, the defender, by arrangement, then remaining in Scotland. The pursuer averred that he was a domiciled Scotsman.

The Lord Ordinary (MORISON) dismissed the action, and the pursuer reclaimed.

While the case was pending in the Inner House the defender presented a note in which she prayed the Court for an interim award of expenses, and for an order on the pursuer to sist a mandatary.

In the discussion in the Single Bills the following cases were referred to on behalf of the defender in support of the contention that the pursuer should be ordered to sist a mandatary—*Tingman* v. *Tingman*, 1854, 17 D. 122; *Low* v. *Low*, 1905, 12 S.L.T. 817; and *Taylor* v. *Taylor*, 1919, 1 S.L.T. 169.

Counsel for the pursuer referred to *D'Ernesti* v. *D'Ernesti*, 1882, 9 R. 655, 19 S.L.R. 436, and *Campbell* v. *Campbell*, 1855, 17 D. 514.

The opinion of the Court (LORD PRESIDENT, LORD SKERRINGTON, LORD CULLEN, and LORD SANDS) was delivered by the LORD PRESIDENT (CLYDE)—The wife (defender) in this action of divorce on the ground of desertion moves that her husband (pursuer) should be ordained to sist a mandatary. It appears that the husband is a domiciled Scotsman who was before the action was raised, and still is, serving as a police constable in Canada. The appointment of a mandatary is in all cases, but particularly in consistorial ones, a discretionary matter—*D'Ernesti* v. *D'Ernesti*, 9 R. 655. In the case of a defender who left this country during the dependence of a consistorial action, the Court has ordered appointment of a mandatary—*Tingman* v. *Tingman*, 17 D. 122. But here the husband was making his livelihood in Canada at the time of his marriage, and has been doing so ever since. His absence from this country cannot be supposed to have any connection with the action. Moreover, he has supplied his wife during his absence with sums of money which appear substantial in view of his own position in life. As was pointed out in *Campbell* v. *Campbell* (1855, 17 D. 514) it is desirable, where it is possible, that consistorial actions should be defended rather than pass through in absence. But in the present case there is a serious risk that an order for appointment of a mandatary might have the effect of making it impossible for the pursuer to carry his reclaiming note to judgment. This would be an unjustifiable penalty for the *bona fide* absence of a pursuer whose domicile makes appeal to the Consistorial Courts of this country imperative. Each case must depend on its own circumstances, but I think in the present case we should refuse to pronounce the order asked by the defender.

The Court refused the prayer of the note *in hoc statu*.

Counsel for the Pursuer and Reclaimer—Macdonald. Agent—William Brotherston, W.S.

Counsel for the Defender and Respondent—W. A. Murray. Agents—Wallace, Begg, & Company, W.S.
