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.

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*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.

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