the diet was called Macrae did not appear personally, but there appeared as prosecutor Mr Peter Sinclair Heddle, who held a commission, which had been recorded in the diet-book of the Sheriff Court of Orkney on 11th July 1876, by which the Sheriff of the county, without prejudice to all appointments as Procurator-Fiscal already made, appointed him Procurator-Fiscal of Court, and appointed the commission to be recorded in the Court books of the county. Mr Heddle had at the time of recording duly taken the oath *de fideli administratione officii.*

The agent for Cooper objected to the diet being proceeded with in respect of the absence of the prosecutor, and moved the Court to desert the diet. It was explained by Mr Heddle that Mr Macrae was unavoidably absent from Court. He further contended that his own commission entitled him to appear as prosecutor. The Sheriff-Substitute found that the appointment of Mr Heddle did not confer upon him the character of a representative of Mr Macrae, and therefore in respect of the absence of the prosecutor deserted the diet *simpliciter.*

Macrae then presented this bill of advocation to the High Court of Justiciary.

The respondent did not appear.

BRAND for the advocator stated the facts.

LORD YOUNG—The Sheriff has plainly erred. If there had not been a commission held by someone who was present entitling him to insist, it would have been the duty of the Sheriff to have issued one. We advocate the proceedings in terms of the prayer, reverse the judgment complained of, and remit to the Sheriff to proceed in terms of law. There may perhaps require to be a new libel raised.

Counsel for Advocator—Brand.

COURT OF SESSION.

Saturday, February 11.

FIRST DIVISION.

[Lord Fraser, Ordinary.

D'ERNESTI *v.* D'ERNESTI.

Process—Mandatory—Jurisdiction—Divorce.

Where the averments of a pursuer are *prima facie* such as to render the jurisdiction of the Court doubtful, and where the nature of the action is such as makes it desirable that it should be defended, the ordinary rule that a defender resident abroad shall sist a mandatory will not be enforced so as to prevent the action being defended.

An Austrian was married to a Frenchwoman in London in 1874. The husband was a teacher of music, who in pursuit of his avocation had for many years been absent from his native country, living in various Continental cities. After their marriage the spouses lived for some time in Paris with the wife's brother. From August 1876 till June 1877 they resided in Aberdeen, the husband having got a situation as a teacher of music there. From August 1879 till June 1880, and again from August 1880 till June 1881, the husband was in Aberdeen alone. His wife, who remained in Paris, alleged that he committed adultery in Aberdeen in 1879, and founding on that allegation she raised an action of divorce against him in the Court of Session. At the date of the action she was resident in Aberdeen. He was cited personally in Paris. *Held* that the defender was not bound to sist a mandatory, because the action affected status, and raised, even upon the statement of the pursuer, a doubtful question of jurisdiction, and because the defender's position and circumstances made it plain that to require a mandatory to be sisted would prevent the action from being defended.

This was an action of divorce on the ground of adultery. The pursuer Louise Bader, by birth a Frenchwoman, was married to the defender Titus D'Ernesti, an Austrian, in London, on the 26th May 1874. The defender had left Austria several years before his marriage, but without, as the pursuer averred, having acquired a permanent home anywhere else. He was a teacher of music, and in pursuit of his avocation travelled to various Continental cities, always living, according to the pursuer, in hotels. He averred that since 1867 he had had his ordinary residence in Paris. After the marriage the spouses went to Paris, where they lived with the pursuer's brother, the defender, according to the pursuer's statement, doing no useful work, but spending her money in gambling and debauchery. From August 1876 to June 1877 they resided in Aberdeen, where the defender had obtained a situation as teacher of music in a school. They then returned to Paris. In the end of 1878, differences having arisen between the parties, they separated, and did not thereafter live together. In August 1879 the defender returned to Aberdeen, and remained there till June 1880, returning from Paris, to which he had gone, in the following August. He finally left Aberdeen in June 1881 for Paris, where he had since resided. At the date of the action the pursuer was living in Aberdeen. The defender was cited personally in Paris. No children were born of the marriage.

The wife had some fortune of her own, but the husband had no means, and at the time of the marriage his debts had been paid by his wife.

It was when the defender was staying at Aberdeen that the adultery upon which this action was founded was alleged to have been committed.

The defender, besides denying the averments of adultery, pleaded—"(1) No jurisdiction. (2) *Forum non competens.*"

The pursuer, with reference to these pleas-in-law, "explained, that in the eye of the French law the defender is an Austrian subject, and that the pursuer by her marriage with him, which took place in a foreign country, viz. England, has lost her right as a Frenchwoman, and that consequently the French Courts would not listen to an action for separation or divorce at the pursuer's instance. Further explained, that the marriage not having been registered in Austria, the pursuer could obtain no remedy in an Austrian Court."

The case was at first sent to proof as an undefended cause, but the defender subsequently

tendered defences. Before the record was closed the Lord Ordinary (FRASER) appointed the defender to sist a mandatory. In doing so his Lordship delivered this opinion:—"The rule requiring the pursuer of an action in the Scottish Courts who is resident in England to sist a mandatory has been modified, in consequence of 'The Judgments Extension Act 1868,' to the effect 'that as a Scotch decree for expenses can now be enforced in any part of the United Kingdom, the Court will always deem it to be an important consideration in judging of the question whether or not a mandatory is to be sisted, that the party who is called upon to sist is resident in the United Kingdom, and unless there are other circumstances in the case requiring that a mandatory should be sisted, will refuse the motion' (*Lawson's Trustees* v. *British Linen Company*, 20th June 1874, 1 R. 1065).

"In England, before the statute passed, a Scotsman who was suing in an English Court required to give security for costs. But this rule was held, in consequence of the provisions in 'The Judgments Extension Act 1868,' to be abolished (*Raeburn* v. *Andrews*, 27th January 1874, L.R. 9 Q.B. 118), thus going further than the Scotch Courts have done, who reserve to themselves the right in special cases to order a mandatory to be sisted.

"But no further relaxation of the law as to the sisting of mandatories has been made so as to entitle a person residing out of Scotland, but not within the United Kingdom, to appear as pursuer or defender in an action in the Scottish Courts. The defender in this case is resident in France, and he claims exemption from the rule on the ground—first, that he is a defender in the cause; secondly, that he is a defender in a divorce suit; and thirdly, that he objects to the jurisdiction of the Court over him. Now, all these points have been made the matter of express decision. In the case of *Tingman* v. *Tingman* (2d December 1854, 17 D. 122) a husband, the defender in a divorce case, was appointed to sist a mandatory. The case was reported by Lord Deas to the Second Division, with a statement of his own opinion that a mandatory must be sisted, bringing under the notice of the Court at the same time the prior decisions. With reference to the alleged peculiarity of divorce cases Lord Wood observed—'I think the view taken by Lord Deas is the sound one. If I could see grounds for a distinction in favour of a party defending in an action of divorce, that might alter the case, but any distinction seems to me to be exactly the other way. I know no class of cases where it is more proper that a mandatory should be sisted than that to which the present one belongs—a wife suing for a divorce against a husband who chooses *pendente processu* to leave the country.'

"Then, with regard to the plea of no jurisdiction, the point has also been expressly determined in *Ranken* v. *Nolan* (26th February 1842, 4 D. 832) and *Grant* v. *Pedie* (30th November 1825, 4 S. 237). These certainly were not cases of divorce, but they were cases where the defender objected to the jurisdiction of the Court. Lord Fullarton in the case of *Ranken* expressed himself as follows:—'I confess I always thought that it was going far to require a defender resident abroad to sist a mandatory. But that is the settled rule, and there is no distinction as to the nature of the pleas which he may urge. He is not allowed to appear to state them without a mandatory; he is not entitled to require a judgment of any kind. The cases are very strong. In *Pedie* the House of Lords found that this Court had no jurisdiction, but the party was not allowed even to get their judgment applied without sisting a mandatory.'

"There are weighty grounds of expediency and justice in requiring that a husband called as defender in an action of divorce, who is resident in a foreign country, shall be made to sist a mandatory before he shall be heard in his defence. He is not obliged in such an action *in initio litis* to contribute anything to assist the wife in the carrying on of her action. It is only after she has led a *semiplena probatio* that she can ask that an order should be made upon her husband to contribute to the costs of suit. It is different where she is the defender. In that case she is entitled to demand that her expenses of litigation shall be paid as the suit progresses. When pursuer, therefore, she is at great disadvantage, and certainly she would be in a very helpless case if the defender, her husband, were in such an action resident abroad, and held entitled to oppose her without sisting a mandatory. Destitute of means, as the pursuer in the present case says she is, and as most women so deserted are, it would be impossible, or at all events very difficult, for them to procure professional assistance and to get persons to advance the necessary outlay in carrying on a lawsuit, if at the end of the day, when victory has been obtained, the decree for expenses goes out against a man who is resident in a foreign land, to which the diligence of Scotch law does not reach. A very troublesome and expensive defence may be set up in this way by a foreigner, the penalties of which in the imposition of expenses he cannot be made to suffer, and this is a state of things which it is desirable, if it can be done consistently with legal principle, to avoid.

"No doubt it may be said that it is hard that a man whose status is impeached, as it is by an action of divorce, should not be allowed to defend himself without coming under the burden of finding caution for his wife's expenses; but it is still more hard that his wife should be deprived of her remedy of divorce by reason of her inability through his desertion to provide for the necessary legal expenses attendant on such an action."

The defender reclaimed. After his counsel had stated the case, the Court called on the pursuer's counsel, who argued that the general rule was that a foreigner resident abroad must sist a mandatory—*Sandilands* v. *Sandilands*, May 31, 1848, 10 D. 1091. With reference to the plea of no jurisdiction, there was jurisdiction here, for a slighter amount of residence in and connection with Scotland would constitute a matrimonial domicile where the husband had had no fixed residence anywhere, than in cases where he had. He had had in fact more connection with Aberdeen than with any other place.

At advising—

LORD PRESIDENT—I think it may be conceded to the pursuer that the liability of an absent party—whether pursuer or defender—to sist a mandatory in a process of divorce depends

generally on the same grounds as in other processes of a civil character. But in all cases it is quite settled that the question whether a mandatory should be sisted or not is a matter for the discretion of the Court, particularly in cases in which the absent person is the defender in the action. In the present case I have come without any hesitation to the conclusion that the defender ought not to be called on to sist a mandatory. It is quite plain on the face of the pursuer's own statements that the defender is a person in very embarrassed circumstances, and therefore I think we may take it for granted that this order, if it is allowed to stand, will not be obeyed, and no mandatory will be sisted. The necessary consequence of that will be that this divorce will proceed substantially as an undefended cause. But I think that it is very inexpedient and undesirable that actions which raise questions of status, and particularly actions of divorce, should be undefended. It is always more to be desired that both parties should appear in such a process, and I think that in the present case it is more than usually desirable that the defender should be allowed to appear without a mandatory, because there is a question raised as to the jurisdiction of the Court about which I abstain from saying anything except that it is, to say the least of it, a very doubtful jurisdiction. I therefore think that the Lord Ordinary's interlocutor ought to be recalled.

Lord Deas—This is a very hard case for the pursuer—one of the hardest I have ever met. If I thought that the Court had jurisdiction I do not say to what conclusion I might come on the question of requiring the defender to sist a mandatory. But on the question of jurisdiction I have no doubt whatever. I am clear that on the face of this record we have no jurisdiction. That being so, if the defender were ordained to sist a mandatory, it would prove a mere farce. It is quite settled that in this matter of requiring a mandatory we have a discretion, but before we exercise that discretion we must look at the nature of the case, and at the consequences of requiring the party to sist a mandatory. It would be too extravagant to pronounce an order for sisting a mandatory when it is quite clear that we have no jurisdiction.

Lord Mure—I apprehend that there is no doubt that the rule regarding the sisting of a mandatory applies to actions of divorce as well as to other actions. But we must keep in view that it is in the discretion of the Court to say, especially in the case of a defender, whether or not a mandatory should be sisted. Now, I am of opinion, without expressing any definite view on the question of jurisdiction—for that would be to prejudge the merits,—that in the circumstances of this case no reason has been shown for requiring the defender to sist a mandatory at present and before the action goes further; but if at a future stage of the case it should appear to the pursuer desirable, from any change of circumstances, that the defender should be made to sist a mandatory, it is open to her to ask the Court that that should be done.

Lord Shand—There is no doubt of the general rule that a party litigating in this Court who is resident abroad, or who has during the course of the action gone abroad, may be required to sist a mandatory. But that general rule has now been so far modified that in exceptional circumstances the Court will decline to apply the rule, and I am clearly of opinion that this is a case of that exceptional class. Suppose that it was quite plain that the Court had no jurisdiction—suppose that the pursuer had averred merely that the defender had committed adultery in this country, and that the only ground of jurisdiction was that adultery combined with personal citation in Scotland—would it not be out of the question to ask the defender to sist a mandatory before allowing him to proceed further in his defence? This is not so clear a case. I am not expressing any final opinion on the question of jurisdiction raised here, but taking a *prima facie* view of what is stated on the record, the difficulties in the way of sustaining the jurisdiction of this Court appear to me to be very serious, and I think the defender ought not to be called on to sist a mandatory when on that question he seems to have very much the stronger case. No doubt, as Lord Deas has said, this is a very hard case for the pursuer, but to some extent the hardship is of her own seeking in bringing her action here. I think she should consider well whether she ought to proceed any further with it.

The Lords recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to proceed with the cause.

Counsel for Respondent (Pursuer)—W. Campbell. Agent—R. C. Gray, S.S.C.

Counsel for Reclaimer (Defender) — Lang. Agent—Thomas Carmichael, S.S.C.

Thursday, December 22, 1881.

OUTER HOUSE.

[Exchequer Cause—Lord Fraser.

THE LORD ADVOCATE *v.* M'KERSIES.

Succession-Duty—Beneficial Interest—The Succession-Duty Act 1853 (16 *and* 71 *Vict. cap.* 51), *sec.* 7.

A father, in anticipation of the share of the residue of his estate provided to his sons by a *mortis causa* deed, assigned and made over to them his whole right and interest in certain moveable property on condition that they paid to him an annuity during the remainder of his life. *Held* (*per* Lord Fraser, Ordinary) that this transaction was not a *bona fide* sale, that on the death of the father the sons obtained thereby an increase of beneficial interest in the property conveyed to them, and therefore became liable for succession-duty on such increase under the 7th section of the Succession-Duty Act 1853.

This action was brought by Her Majesty's Advocate, for Her Majesty's interest and on behalf of the Board of Inland Revenue, under the Succession-Duty Act 1853, against John M'Kersie and William M'Kersie junior, both distillers in Campbeltown, Argyllshire, to have the defenders ordained to pay the sum of £280, 11s. 5d. as suc-