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-

dained to sist a mandatory."

The following are specimens of the letters from the pursuer to the defender founded on by the latter as showing the pursuer's impecuniosity:—"Your letter of yesterday duly received. I know just how you feel in regard to sending me money, but it is so essential that I know you would only be too glad to do as suggested by me in my last letter, *i.e.*, to send me £10 or £15. It is too bad that the orders have not come to hand as yet, but patience, dear fellow, will do much." . . . "Yours of yesterday has been received. . . . In regards to money I am overdrawn at bank at this time, and it is highly essential that you send me what I require. You know you promised some time ago to send me the £15 balance on bill, and I calculated on that, so you see just where you place me. Will you, without further writing, get me £25 here by Tuesday morning?" . . .

The last of these letters was dated 3rd August 1895.

The Judgments Extension Act 1868 (31 and 32 Vict. c. 54), sec. 5, enacts—"It shall not be necessary for any plaintiff in any of the aforesaid courts in England, resident in Ireland or Scotland, or any plaintiff in any of the aforesaid courts in Ireland resident in England or Scotland, in any proceeding had and taken on such certificate [of judgment], to find security for costs in respect of such residence, unless on special grounds a judge or the court shall otherwise order, nor shall it be necessary for any party to such proceeding in Scotland, resident in England or Ireland to sist a mandatory, or otherwise to find security for expenses in respect of such residence, unless on special grounds the court shall otherwise order."

On 29th May 1897 the Lord Ordinary (PEARSON) appointed the pursuer to sist a mandatory within fourteen days.

"*Opinion.*—This is an action upon a minute of agreement, dated in 1894, in which the pursuer is designed as 'of 32, Hawlay Street, Boston, United States of America, manufacturer.' In the summons, which was raised in December 1895, he describes himself as 'sometime of 32 Hawlay Street, Boston, United States of America, manufacturer, and at present residing at No. 45 Weymouth Street, Portland Place, London'; and he explains in the condescendence that he is lessee of that house at a rent of £235, under a lease which has seventeen and a-half years to run. It was, however, explained at the bar that he has given up that lease, and is residing at Ealing, near London, in a house which he has from year to year. The defender avers that the pursuer is a citizen of the United States, and that he is residing in England for temporary purposes; and, as I read the pursuer's qualified denial at the end of condescendence 1, it does not extend to a denial of these averments. On these statements, and on the further ground that the pursuer's letters produced show him to have been pressed for money and apprehensive of diligence, the defender moves that he should be ordained to sist a mandatory. I do not proceed on the latter ground. But I hold that the pursuer, being alleged to be domiciled in the United States, and having failed to show that his residence in England is such as to bring him within the rule laid down in the case of *Lawson's Trustees* (1 R. 1065), ought to sist a mandatory as a condition of being allowed to proceed.

"The only difficulty I have felt in arriving at this conclusion arises from the action being one in which a foreigner is seeking implement of a contract made with a Scotsman, and damages for alleged breach of that contract. But I do not find that this consideration has ever been recognised as a reason for not applying the rule.

"I shall therefore allow the pursuer a reasonable time within which to sist a mandatory, and on this being done I shall proceed to dispose of the other preliminary questions which were argued."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. Whatever the practice may have been prior to the Judgments Extension Act, it had been settled since by *Lawson's Trustees* v. *British Linen Company*, June 20, 1874, 1 R. 1065, which ruled the present case. The decision there was to the effect that where the party called upon to sist is resident, not abroad but in some part of the United Kingdom, the Court will not compel him to sist a mandatory unless there are other circumstances in the case requiring him to do so. The *ratio* of the judgment there was altogether independent of the domicile or origin of the party. All that was required to make it applicable was residence in some part of the United Kingdom. It was irrelevant to say that the pursuer here meant to return to America. If he did so, the defender's application could be renewed. Nor were there such averments of poverty as would justify the Court in the case of a Scotsman in ordering him to find caution for expenses. There was no averment of bankruptcy, for instance, or even of a trust for creditors.

Argued for the defenders—The Lord Ordinary was right. The general rule at common law was that a pursuer resident abroad, *i.e.*, furth of Scotland, must sist a mandatory—Ersk. Inst. iii. 3, 56, note 140; Shand's Practice, p. 154. This rule had not been relaxed by *Lawson's Trustees* to the extent contended for by the pursuer—*D'Ernesti* v. *D'Ernesti*, February 11, 1882, 9 R. 655, *per* Lord Fraser, 656. But in any event there was the circumstance of the pursuer's manifest impecuniosity here to make it proper that he should be required to sist.—*Powell* v. *Long*, July 3, 1896, 23 R. 955.

LORD ADAM—This is a reclaiming-note against the judgment of the Lord Ordinary appointing the pursuer to sist a mandatory. The action is by a Mr Dessau, who is designed in the summons as "sometime of No. 32 Hawlay Street, Boston, United States of America, manufacturer, and at present residing at No. 45 Weymouth Street, Portland Place, London," and the ground upon which the Lord Ordinary has proceeded is that the pursuer, "being alleged

to be domiciled in the United States, and having failed to show that his residence in England is such as to bring him within the rule laid down in the case of *Lawson's Trustees* (1 R. 1065), ought to sist a mandatory as a condition of being allowed to proceed." It appears, therefore, that the Lord Ordinary has not proceeded on the alleged impecuniosity of the pursuer, but upon the fact that he is a foreigner only temporarily resident in the United Kingdom.

It appears to me that the question whether a pursuer should be appointed to sist a mandatory is now, as it has always been, a matter in the discretion of the Court, but in the exercise of our discretion we have rules and decisions to guide us, and one of these decisions is the case of *Lawson's Trustees*, which is referred to by the Lord Ordinary, and was the case most discussed in debate. Prior to the Judgments Extension Act (31 and 32 Vict. c. 54) and the case of *Lawson's Trustees* the general rule was—there may perhaps have been some exceptions, but I do not remember any—that every foreigner was bound to sist a mandatory, but then it is to be borne in mind that prior to the Judgments Extension Act "foreigner" meant any person not domiciled in Scotland, and included Englishmen or Irishmen just as much as a citizen of the United States or other foreign country. At least I do not remember that prior to the Act in question any distinction was taken between an Englishman and a foreigner. But the effect of the Judgments Extension Act as explained in the case of *Lawson's Trustees* was to make a material difference between them, because it was then decided that although a pursuer was resident in England he was not on that account alone bound to sist a mandatory, the reason being that the Judgments Extension Act made a decree for expenses pronounced by the Scottish Court as enforceable in England and Ireland as in Scotland, and so made it immaterial whether the pursuer was resident in England, Ireland, or Scotland. I do not see that there is any ground for the distinction sought to be taken between an Englishman and a foreigner resident in England, both being subject to the decree of an English Court, and therefore of the Scottish Court under the Judgments Extension Act.

There were two other grounds upon which the defender maintained that the pursuer should be required to sist a mandatory—(1) that he was only resident in the United Kingdom for a temporary purpose, and (2) that he was alleged to be in a state of impecuniosity.

With regard to the first of these grounds, the facts as explained at the bar are that he is residing in England without any present intention of leaving it. But if he is resident in the United Kingdom with no immediate intention of leaving, we cannot inquire as to the probable duration of his residence. If the defender finds reason to believe in the course of the proceedings that the pursuer has quitted the jurisdiction, then he may apply to have him ordained to sist a mandatory, but the mere fact that his residence is temporary and not permanent is not a sufficient reason for pronouncing such an order.

As to the pursuer's alleged impecuniosity, the letters read to us, which are not of very recent date, certainly do show him to be in an impecunious state, but I never understood that mere poverty was a sufficient ground for shutting the door of the Court to a litigant.

On the whole, I am of opinion that the pursuer is not bound *hoc statu* to sist a mandatory, and that the interlocutor of the Lord Ordinary should be recalled.

LORD M'LAREN—There is no doubt as to the rule of the common law on this subject. The practice was, that whenever a pursuer was extraneous—I had rather not use the word "foreigner" as applicable to our fellow subjects in England and the Colonies—to the jurisdiction of the Court, he was under the necessity of sisting a mandatory. There are other reasons suggested which may have accounted for the origin of the rule, but in its application in our time I think the matter of being responsible for expenses was the main and determining consideration in all such cases. It was not an absolute rule. The Court always maintained its right to exercise a discretion, and in some cases the necessity for finding a mandatory was dispensed with.

Some years after the passing of the Judgments Extension Act, the Court, recognising that the appointment of a mandatory was a matter of discretion, thought fit to alter its practice by laying down explicitly that persons resident in England and Ireland should be treated in all such questions substantially as if they were resident in Scotland—that is to say, that the party was not to find a mandatory unless under circumstances which would justify an application against a Scotsman to find security for expenses. That judgment has been understood to fix the practice, and has been constantly acted upon.

Now, it seems to me that in developing this equitable principle the Court did not proceed upon the view that a party resident in England or Ireland was to be favoured because of his nationality. If that had been the ground of judgment the principle would have been extended to India and the Colonies. The decision proceeded upon the purely practical consideration that under the Judgments Extension Act decree could be enforced for expenses, and therefore that as against the party resident in England or Ireland the other party was in as good a position with reference to his power of making a judgment effectual as if his opponent had been resident within the jurisdiction of the Court. That is the ground of judgment expressed in the Lord President's opinion. It is the logical and the only ground that the Court could proceed upon if they were extending the operation of the Judgments Extension Act, and that ground of judgment plainly covers the case of a foreigner domiciled abroad

but resident in London. It could not have been the intention of the Court in laying down this rule to make it necessary to try the question of domicile in order to the application of the rule.

Therefore I am of opinion that Mr Dessau, though neither naturalised nor said to be domiciled in England, is still in the position of a person resident in England, and therefore is not under ordinary circumstances to be required to sist a mandatory.

I agree also with what your Lordship in the chair has said on the second ground. The Lord Ordinary has not proceeded upon the ground of poverty, and I agree that poverty is no reason for compelling a person to sist a mandatory. While the Court may not have strictly defined a rule, the usual case of requiring a person to find security for expenses is where he is either bankrupt or has granted a trust-disposition for behoof of creditors so as to take the administration of his fortune—be it great or small—out of his own hands.

LORD KINNEAR—I am entirely of the same opinion. The defender's counsel says that it is the rule that a foreigner requires to sist a mandatory. I am not aware that the rule ever obtained that a foreigner, irrespective of his residence, could not sue without a mandatory. The rule was that a resident abroad required to sist a mandatory, but in applying that rule, which was always a matter for the discretion of the Court, it was never suggested that the Court should inquire into the place of the pursuer's birth, domicile, or allegiance. The only question was as to his residence, and, if it appeared that he was resident abroad, it did not matter whether he was a Scotsman or an Englishman, or a subject of some other country. The one condition which was indispensable to the operation of the rule was that he should not be resident in Scotland. The rule has been modified in consequence of the Judgments Extension Act, because the decrees of this Court may now be enforced in other parts of the United Kingdom; and for the purpose of this question residence in some other part of the United Kingdom is thus practically equivalent to residence in Scotland.

With regard to the pursuer's alleged impecuniosity, I confess I am not inclined to draw any inference from the letters. All that they show is that the pursuer was pressing the defender for money on the ground apparently that he had some claim against him. That may or may not be the case, but it appears to me that demands of that kind, and the urgency with which they are pressed, afford no safe ground for any conclusion as to the pecuniary condition of a letter writer who has not been examined as a witness or given an opportunity of explaining the circumstances in which his letters were written. If it were safe to draw any such conclusion, I agree that mere impecuniosity is no reason whatever for requiring a party to find security for expenses or to sist a mandatory.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor reclaimed against.

Counsel for the Pursuer—Clyde. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defender—J. C. Watt. Agent—James Gibson, S.S.C.

Tuesday, June 29.

FIRST DIVISION.

MACKINNON'S TRUSTEES *v.* MACNEILL AND OTHERS.

Succession — Vesting — Postponement of Date of Payment till Majority—Substitution of Issue to Predeceasers.

A truster directed his trustees "to make payment to my nephew, the said D, of another sum of £60,000, and that for his liferent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children, equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime available for their maintenance and education, the issue of any of the said children who have predeceased taking the parent's share." D having predeceased the testator, one of his children, who survived the testator, died before attaining majority.

Held that she had a vested right in her share of the legacy.

Observed by the Court (following the cases of *Waters' Trustees* v. *Waters*, December 6, 1884, 12 R. 253, and *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697) that the substitution of the issue of any children predeceasing to their parent's share was not a destination-over properly so-called, but merely an expression of what would be implied by law, viz., of the *conditio si sine liberis institutus decesserit.*

Process — Special Case — Questions Stated in Case but not Argued.

The Court will not, in a special case, answer questions which, while submitted in the case for the judgment and opinion of the Court, are not disputed, or have not been argued by the parties.

Sir William Mackinnon, of Loup and Balinakill, died on the 22nd June 1893, leaving a trust-disposition and settlement dated 21st April 1884, by which he disposed his whole estate to trustees.

The tenth purpose of the trust was as follows—"I direct and appoint my said trustees to make payment to my nephew, the said Duncan MacNeill, of another sum of £60,000, and that in liferent for his liferent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children, equally among them, share