to the effect of entitling the wadsetter to the feu-duty of fifty merks payable to Mackintosh the granter, so long as the wadset should not be redeemed. He does not think it can be held to have been intended to constitute the wadsetter in any proper sense the superior of MacGillivray, so as to entitle him to the casualties of superiority, or enable him to enter the heirs of MacGillivray as his vassals.

But it appears to the Lord Ordinary that the wadset right affords a complete defence to Colonel Fraser Tytler against the action, in so far as it concludes for reduction of the titles of MacGillivray and the defender, and for non-entry duties. By that onerous deed, containing absolute warrandice on which exclusive possession has followed since 1768, the granter did in the most express manner recognise the base right held by Fraser; and upon the least extensive construction that can be given to it, he made over to him, so long as the wadset should be unredeemed, the right to the feu-duty of fifty merks, payable by his immediate superior MacGillivray, and disponed the lands, with precept on which infeftment has been taken, to the effect of making that a real right. It seems out of the question that, in that state of matters, he can be heard to contend that he is entitled, in respect of his superiority rights, to carry off the property by a reduction of his immediate vassal's title, or to defeat his grant of the feu-duty to Fraser. This would just be to bring the wadset, to which no objection can be taken, and on which there has been exclusive possession for a century, to an end without repayment of the sum for which it was granted.

"In the view which the Lord Ordinary takes of the case, it does not appear to him that there is room, as there usually is in a declarator of non-entry, for Colonel Fraser Tytler offering to take an entry from the pursuer, or that he is called upon to do so in this action. The pursuer maintains that the defender is not his vassal, and is not entitled to an entry, and that the fee held by him is absolutely sopite, and brought to an end by the effect of the decree against MacGillivray. The conclusion for non-entry is directed against MacGillivray alone, and the other defender is only involved in it with reference to the demand for bypast retoured duties, and for the rents of the land from the date of citation, as being due to the pursuer in consequence of MacGillivray's failure to enter. That is not, indeed, the case now persisted in by the pursuer, who claims the lands absolutely in respect of his own superiority titles, and the reduction of the titles of the MacGillivrays. But if it were so, there is still no call on the present defender to enter, and no conclusion against him in respect of his lying out unentered. The Lord Ordinary is therefore of opinion, upon the whole matter, that the present defenders are entitled to absolvitor from the whole conclusions of the summons, without further procedure in regard to any claim which Colonel Fraser Tytler may have to an entry from the pursuer, or the terms on which, if he is entitled to an entry, it must be given."

The pursuer reclaimed.

SOLICITOR-GENERAL and J. MARSHALL for him.

WATSON and KINNEAR in answer.

The argument in the Inner House was confined to the second question. To-day the Court adhered, adopting the reasoning of the Lord Ordinary. The Court held (1) that it was probably enough for the decision that the pursuer's summons was so framed as to be exhausted by the decree of reduction following upon the failure of MacGillivray to produce his titles; (2) that, supposing that difficulty overcome, the pursuer's right of superiority, on which his action was based, was, at the time the action was brought, substantially vested in the defender Colonel Tytler in virtue of the wadset right founded on; (3) that although it was stated that that wadset was in course of being redeemed, and had in fact been redeemed at the recent term of Whitsunday, the rights of parties under this action could not be affected by anything which took place *pendente percessu.*

Agents for Pursuer—Tods, Murray & Jamieson, W.S.

Agent for Defenders—James Tytler, W.S.

Saturday, May 21.

FIRST DIVISION.

SIMLA BANKING CORPORATION *v.* HOME.

Mandatory—Defender leaving Country—Service of the Queen—Discretion of Court. An officer in Her Majesty's service having become bound to an Indian Bank by a bond executed in India, eighteen months after the bond has become payable, obtains leave of absence. During his temporary residence in Scotland the bank raise an action on the bond. His leave having expired, he proceeds to India. Motion by the pursuer that the defender should be ordained to sist a mandatory *refused,* in respect that it was a matter for the discretion of the Court, and the circumstances were such as to justify the Court in exercising that discretion in favour of the defender.

On 30th June 1863 the defender Home became bound, jointly and severally with two others, in a bond and disposition to the Simla Bank Corporation for the sum of 3000 rupees, which they thereby bound themselves to repay with interest of 12 per cent. on 30th June 1866. Home was the cautioner for the others, who, as well as himself were English officers serving in India. The principals failed to repay the borrowed money when due, and in the end of the year 1867 Home left India for Scotland on leave of absence. He remained in Scotland until December 1869, and in June of that year the present action was raised against him by the Bank, for repayment of the sum borrowed, with interest. In March 1870, three months after the defender had left for India, his leave having expired, the pursuers moved the Lord Ordinary to ordain him to sist a mandatory.

The Lord Ordinary granted the motion.

The defender reclaimed.

J. M. GIBSON for him, argued that the rule which required a party leaving the country during the progress of a suit to sist a mandatory, was not peremptory, but that the Court had a discretion to make or refuse such order. In the present case the defender had left the country on Her Majesty's service, and on the authority of *Steel* v. *Steel,* 4 S., 527, and Shand's Practice, p. 156, it was not necessary for him to sist a mandatory.

MARSHALL in answer.

At advising—

LORD DEAS—I understand the general rule of law upon these cases to be, that the pursuer of an action, if he leaves the country must sist a mandatory if it be required by the defender, unless he

can show good cause to the contrary. In the case of the defender leaving the country, he may be compelled to sist a mandatory if the pursuer can show good cause for that proceeding. The positions of the pursuer and defender are thus very different, and that difference has been recognised in the House of Lords as well as in this Court. There is a discretion in the Court in both cases, but that discretion is much larger in the case of the defender's absence than in that of the pursuer. It is therefore a question of circumstances, and nothing special has been stated to us in this case by the pursuer, who rests upon what he calls the general rule that when a party to an action goes abroad, whether voluntarily or under compulsitor, he must sist a mandatory.

Now in my opinion there is a great distinction to be drawn between a party who goes abroad voluntarily or on his private business, and a party like this gentleman, who is ordered abroad on Her Majesty's service.

This debt was contracted in India by two individuals, and although the defender is bound jointly and severally with them, he appears to have been merely a cautioner.

The action is brought against him alone, while no reason is given why the others are not sued, and neither does it appear why proceedings were not taken against all the parties in India.

In the whole circumstances, I do not think that we have been shown any good reason why we should ordain him to sist a mandatory, at least at this stage, while I must not be held to decide that at no future stage will this motion be granted.

LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the defender is bound to sist a mandatory.

In considering this question, we must assume that the action has been properly brought, and the defender properly made a party to it. Thereafter, the defender leaves the country for an indefinite period; it does not appear when he may return, or if ever at all. Now, what is the law of this Court in such a case? I think it is, that the party so going abroad, whether he be defender or pursuer, is bound to sist a mandatory. The principle upon which this rule is based is twofold. First, that there may be some one within the country answerable to the other party for expenses; and secondly, that there may be some one answerable to the Court for the proper management of the case. The second of these objects is held to be of importance equally with the other.

There are cases in which a distinction has been drawn, and most properly, between a pursuer and defender. I refer to the cases in which one of the parties is bankrupt, and the question is whether he is entitled to proceed with the litigation without finding caution for expenses. I understand and admit the distinction drawn between the case of a bankrupt being the pursuer in an action, and therefore fairly liable to be stopped proceeding with it unless he find caution for expenses, and the case of a bankrupt being the defender in the action, whom it is most unreasonable that the pursuer, who called him into the field, should, after doing so, be allowed to hinder stating his defence till he find caution. But these are cases having no reference to parties going abroad, and as to these I think the rule is the same, in the case both of a pursuer and of a defender. I consider the rule to be, that the defender, equally with the pursuer, is bound to sist a mandatory. I can find no authority for holding that, merely because the party has gone abroad on duty, as, for instance, is a soldier who has been ordered abroad on service for an indefinite period, he is exempted from the operation of the rule. Nor do I think there is any authority for saying that the Court can, in such a question, look to the circumstances of each case, or give weight to an argument resting on alleged hardship. I think the Court is possessed of no discretion to discriminate on this ground between one individual and another.

I am unable on the whole to arrive at any conclusion other than that the defender should be appointed to sist a mandatory, ample time of course being allowed to him for doing so.

LORD PRESIDENT—If I thought that our judgment was adverse to any settled rule or practice, I would not concur with your Lordships, but I am of opinion that there is no such settled rule in the case of a defender going abroad, and I have a distinct impression that the practice is variable. We must keep in view the substance as well as the form of the motion. The form is that the defender shall have some one holding a mandate to represent him in the action, while the substance is that he shall find caution. That is plain from the fact that the pursuer will accept any one as mandatory without a mandate, if he be good for the expenses. That being so, there is no difference between this case and the case of a bankrupt. Both are questions for the discretion of the Court, and we must look to the special circumstances here. The pursuer had the option of suing the defender in India, where he would not have been obliged to sist a mandatory, and it is hard that, by being brought here, he should be subjected to that disadvantage. It was an Indian debt, and an Indian creditor, and all the parties were resident in India when the debt became payable. But the cautioner in the bond gets leave of absence and returns to Scotland, and during his temporary residence there the Bank brings this action instead of having sued it before he left India, or waiting till he should return. I think this is a case where, in the fair exercise of their discretion, the Court are entitled to refuse this motion *in hoc statu.*

Agents for Pursuer—Campbell & Lamond, W.S.
Agent for Defender—John Howe, W.S.

Tuesday, May 24.

SECOND DIVISION.

ANDREW OLIVER *v.* COSENS WEIR'S TRUSTEES.

Suspension—Action for Caution or of Removing under Agricultural Lease—A. S., Dec. 14, 1756, ¿ 5—*A. S., July* 10, 1839, ¿ 34—*Caution for Violent Profits—Desertion—Leaving land unlaboured—Remit to Sheriff.* Where a suspension had been brought of a threatened charge in an action for caution or of removing under an agricultural lease with some years to run, under the A. S. Dec. 14, 1756, *held* that the tenant could not be ordained to find caution for violent profits in terms of the A. S., July 10, 1839, before verifying his defence denying desertion and failure to labour; and remit made to the Lord Ordinary to remit to the