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

Sheriff to receive complainer's defences, allow proof, and proceed in the cause.

The complainer was tenant of the farm of Bogangreen and Muirside in Berwickshire under a nineteen years' lease from the deceased Thomas Weir, dated 3d December 1863 and 14th April 1864. The complainer's estates were sequestrated under the Bankrupt Acts on 14th April 1869, but he was thereafter discharged under the sequestration and reinvested in his estates on 3d December of the same year. On 12th January 1870 the complainer was served with a summons raised before the Sheriff of Haddington and Berwick, at the instance of the respondents, founding on the 5th section of the A.S. of 14th December 1756, and setting forth that the complainer had deserted his possession of the farm leased to him, and had left it unlaboured at the usual time of labouring. It then concluded that the complainer be ordained to find caution for the yearly rent of the said farm for the five crops from Whitsunday 1869 to Whitsunday 1874 inclusive; and, failing his finding caution, that he be decerned and ordained to flit and remove, &c. The complainer entered appearance to defend the action, and at the calling of the summons his procurator stated certain defences which he proposed to minute, and in particular he denied that the complainer had deserted his possession of the farm and left it unlaboured at the usual time of labouring. He stated further that the complainer resided on the farm as he had always done since his entry thereto, that he had already ploughed part of the lands, and was in the course of having the farm properly laboured for the crop of the current year. For the respondents it was objected to the said defence being minuted till the complainer had found caution for violent profits in terms of the A. S. of 10th July 1839, § 34. This objection the Sheriff-Substitute sustained, whereupon the complainer offered to verify forthwith his defence, and in particular to prove that he had not deserted and left the land unlaboured. This offer was refused, and an interlocutor pronounced by the Sheriff-Substitute (Dickson) ordaining the complainer,—in respect he had not found caution for violent profits, and had not instantly verified a defence excluding the action,—to find caution for the rents for the five following crops. To this interlocutor the Sheriff (Shand), on appeal, adhered. The complainer having failed to find caution for violent profits, was decerned against in the removing in terms of the conclusions of the summons. On this decree a charge was threatened, and the complainer accordingly brought the present note of suspension. The Lord Ordinary on the Bills (Lord Mure) refused the note. Against this judgment the complainer reclaimed.

Scott and Brand, for the complainer, pleaded that the Judges in the inferior court had totally misconstrued the nature of the case: that the process raised was not in its inception an action of removing at all, but an action for caution, and that it was only on the failure to find caution that an interlocutor of removing could be pronounced. This was the course followed in the analogous case of *Cossar* v. *Home*, Feb. 8, 1847, 9 D. 617. Further, that the complainer could not competently be asked to find caution till the respondents had proved their averments and the complainer allowed an opportunity of verifying his defence. There had been error in treating this case as if the lease had expired or was about to expire, for then, and then only, did the 34th section of the A.S. 1839 apply; *Mackenzie* v. *Mackenzie*, May 23, 1848, 10 D. 1009, was an authority in point as to this.

A. Moncrieff and Kinnear, for the respondents, maintained that *Cossar* was a direct authority for them, for the report of the case is not intelligible unless on the supposition that the respondent there had been ordained to find caution for violent profits before the interlocutor ordaining caution for the five following crops was pronounced; that the case of *Mackenzie* was so peculiar in its circumstances — from an action having first been raised by the tenant to compel the landlord to implement the terms of his lease, — that it could not be used as an authority against them, and that the present action was in all respects an action of removing to which the A. S. of 1839 directly applied. That therefore the interlocutors of the inferior court were well founded, and that the letters ought to be found orderly proceeded.

The Court unanimously held that the action was not, properly speaking, one of removing, but an action for caution, and could only become one of removing in the event of the complainer failing to find caution, but that he could not competently be ordained to find caution till the respondents had proved their averments of desertion and failure to labour at the usual time of labouring, and the complainer been allowed an opportunity of meeting that proof. They also held that the cases of *Cossar* and *Mackenzie* were both authorities for this view, and that the A. S. of 10th July 1829 had no application, in respect the lease had not expired nor was about to expire. The note was sought to be passed on juratory caution, but Lord Cowan was disposed to pass it without caution. The interlocutor pronounced did not however pass the note, but altered the interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary to remit to the Sheriff to allow the defences tendered for the complainer to be received, and thereafter to take proof and proceed in the cause as might be just; and found the complainer entitled to the expenses incurred in the Bill Chamber.

Agent for Complainer—David Milne, S.S.C.

Agents for Respondents—Hamilton, Kinnear & Beatson, W.S.

Wednesday, May 25.

FIRST DIVISION.

HARDIE *v.* AUSTIN & M'ASLAN.

Contract—Warrandice—First-class Stock—Mercantile Law Amendment Act—Turnip Seed. On construction of a contract to supply 50 bushels East Lothian Swede turnip seed of first-class stock, crop 1866, *held* (1) that this meant of not first-class quality but first-class pedigree; and (2) that under the Mercantile Law Amendment Act the seller was not liable in warrandice for deficient germination, as he did not know of any bad quality in the seed when he sold it, gave no express warranty, and did not supply them for any particular purpose, but only for the general purpose of growing crops.

Observed by Lord President—A sale of oats for grinding purposes, or oil for food, as distinguished from burning, would be a sale for a particular purpose and imply warranty.

The pursuer is a seed merchant in Haddington,