cutors, and, as such, represent the debtor. But there is no right of discussion known to the law as between heir and executor, or heir and gratuitous disponee, which can be pleaded against the creditor demanding payment of his debt from an heir who is undoubtedly liable for it; and, therefore, there is no principle in law for such a limitation of the statutory passive title as the defender contends for. It cannot be determined in this action, or between the present parties, whether the defender has any, or what, claim of relief against the trustees."

Beveridge reclaimed.

Clark (Black with him) for reclaimer.

Gifford (Watson with him) in reply.

Lord President—We have had an able and ingenious argument; but I confess I do not doubt that the Lord Ordinary is right. The only reasonable doubt arises from the manner in which Mr Erskine and Mr Bell have expressed themselves in the passages cited in stating the import of the case of *Vint*. But, apart from these two authorities, the whole matter is plain. I do not know any benefit of discussion in the law of Scotland, but either in proper cautionary obligations, or in discussion among heirs. And if this were to be adopted into the law now, as a third category of cases, in which discussion is to be allowed to a party rendering himself liable under the statute 1695, it is very curious that it has not been thought of in the two centuries which have almost elapsed since the Act was passed. The statute itself gives no countenance to such a plea. I think the true meaning of the statute is that, as in a question with creditors of the deceased, the heir passing him by and serving to a remoter heir, is to be liable as if he had served, except that he is not to be liable beyond the value of the estate. The case of *Vint* supports that view of the statute; for what was there decided was, that if an heir who had passed by and taken the estate from a remoter ancestor would, in his character of heir, have been entitled to the benefit of discussion if he had served, the circumstance of his being made liable under the statute in consequence of passing over the deceased was not to deprive him of the benefit of discussion. Mr Erskine and Mr Bell are not quite so clear as usual in their statement; but, so far as relates to Bell's Commentaries, there is no support to the contention of the reclaimer. I am satisfied by a consideration of the whole of that section that what Erskine means is this, that the heir who, by thus passing by is subjected to a passive title, has the benefit of discussion, *i.e.*, he has the benefit of the discussion which the law recognises among different classes of heirs, which is the only benefit of discussion Erskine could have had in view. I am clear for adhering.

Lord Curriehill—I am clearly of the same opinion. This is a liability imposed by statute, and not existing at common law. The statute imposes that liability without any qualification, and if we are to annex the condition that the heir is to be liable only *subsidiare* in a question with executors of the deceased, we would be making an innovation on the statute. If we are to do that on general principle, it would be a great stretch to take such liberty with the statute. But if we were at liberty to do so, all principle would lead to the opposite conclusion. What was the hardship for which this statutory remedy was provided? It was, that the estate, truly belonging to the debtor, became by operation of the common law exempt from liability for performance by the rule that the estate not vested in him by regular title is not to be liable. This remedy was not intended to do more than to put a creditor in the same position as if his debtor had been vested with the estate; and it provided that, if the person who would have served heir would have been liable, he must be equally liable if he pass over ,the debtor and serve to his ancestor. There is no ground for holding the defender entitled to the benefit of discussion.

Lord Deas concurred.

Lord Ardmillan—I concur. Under this Act of Parliament there is a statutory liability upon an heir passing over an interjected heir. That is qualified by the measure being the measure of the value of the estate; and, further, the statutory liability does not impair the proper liability *suo ordine* in which he would otherwise be subject. The true meaning of Mr Erskine and Mr Bell is, that the right of discussion which would be competent to an heir passing over if he had served shall not be impaired by the statutory liability laid on him when he passes over without serving. It is clear here, that if Beveridge, who is nephew both of William and James Morris, had served to James, he would have had no right of discussion, as in a question between him and the executors. There is no such known in our law. Therefore, I think that here, where the question is between Beveridge and the trustees of the deceased, the defence is not good, and the Lord Ordinary is right.

Adhere.

Agents for Pursuer—Watt & Marwick, S.S.C.

Agent for Defender—David Curror, S.S.C.

Friday, November 29.

SELBY *v.* BALDRY.

Master and Servant—Dismissal—Disobedience to Orders.—Circumstances in which *held* that a "general cutter" in a tailoring establishment, being dismissed during the currency of his contract of service, had no claim to wages for the period of the contract yet to run, or to damages,

Sheriff—Interlocutor—Findings—A. S., 15th February 1851.—Observations by the Court as to the non-observance in Sheriff-courts of the provisions of the A. S. 1851 as to the form of interlocutors in certain cases.

This was an advocation from the Sheriff-court of Forfarshire.

John Baldry was engaged as general cutter to James Selby, tailor and clothier in Montrose, for a year from 3d April 1865, at fifty shillings a-week, undertaking "to make myself generally useful, so far as you require me in your establishment." On 1st February thereafter the parties disagreed about an order given to the cutter by the master. In his evidence the pursuer stated, "When I returned at three P.M. the defender took the tunic and told me to take it inside (to the workshop) and make it, *i.e.*, sew it together. I refused, and said I had not come as a journeyman tailor."

The defender stated, "I requested the pursuer to make up a boy's tunic, which he had already so far prepared. He said 'No, I shan't do it.' He had

been doing similar work previously. That work was of the nature of sewing. I did not desire him to go to the workshop. I gave him no further orders during that day."

The cutter was dismissed, and now sued the master for wages, including wages from the period of dismissal up to 3d April 1866, the proper termination of his contract, on the ground of wrongous dismissal.

The master contended that Baldry, having refused to comply with a reasonable order, had no claim for wages except for the time during which he had worked, which proportion, accordingly, he offered to pay. After a proof, the Sheriff-substitute (Robertson) pronounced this interlocutor:—"The Sheriff-substitute having heard parties' procurators, and having made avizandum with the productions, proof, and whole process—For the reasons given in the annexed note, Finds that the pursuer is not justified in claiming wages after the 3d day of February last: Finds that there is no sum due the pursuer by the defender in name of damages: Therefore assoilzies the defender from the conclusions of the summons in so far as it relates to these claims: Finds that the pursuer is entitled to wages up to the 3d day of February last: Therefore decerns against the defender for the unpaid balance of wages up to that date; but in respect the defender has always been ready to pay this balance, finds the pursuer liable in expenses," &c.

The Sheriff (Maitland Heriot) pronounced this interlocutor:—"The Sheriff having considered the appeal for the pursuer against the interlocutor of 31st May last, along with the respective reclaiming petitions and answers, and having also considered the closed record, notes of evidence, and whole process—Sustains the said appeal, recals the interlocutor appealed against, and, for the reasons stated in the annexed note, decerns against the defender in terms of the conclusions of the libel: Finds the pursuer entitled to expenses," &c.

Selby advocated.

Hall (with him Clark) for advocator.

Gifford (with him Shand) in reply.

Lord President—This is a rather troublesome question of fact, and it is somewhat narrow. The question is, Who was to blame in this quarrel. It must be kept in view that the master and his cutter were not on good terms. There had been a growing want of satisfaction in the relation between the parties for some time, and it had been so far spoken out that the cutter was looking out for another place, and the master for another cutter. And if they could have suited themselves, and ended the relation between them before the termination of the contract, they might not have had this quarrel. It was necessary, in these circumstances, that both parties should be cautious, for the one who committed a mistake must suffer; and the question is, Who is in that unfortunate position? The Sheriff puts the case on this ground entirely, that the position of the pursuer being that of a cutter, but, at the same time, he being obliged to make himself generally useful in the establishment, he was asked to do a thing quite out of his agreement—*i.e.*, to go into the workshop. I am humbly of opinion that that is the question, and that the pursuer puts that as the question, as well as the Sheriff. The Sheriff was right in treating it as the pursuer's case. But I come to a different conclusion on the case from the Sheriff. I shall first show how that is the pursuer's case. He says in his evidence, "When I returned at three P.M. the defender took the tunic, and told me to take it inside (to the workshop) and make it—*i.e.*, sew it together. I refused, and said I had not come as a journeyman tailor. He said unless I did this I should work no more in the establishment."

"I never had been asked before to go into the journeymen's room to do work until that order about the tunic, about which I demurred. In my opinion I was asked to do this to degrade me, and as a pretext of dismissal. There were plenty men to do the work at the time—journeymen. It was the slack season. Defender had kept back the cutting from me, and given it to Logan when he came. I never had sewed garments for defender before, either in the workshop or cutting-room. There were twelve journeymen and four apprentices then. William Lunan was 'captain,' *i.e.*, foreman. Had I gone in among the journeymen I should have been put under him, and on a level with the other journeymen. Their wages are 18s. per week. Some less, some more. The captain gets 26s. I have obliged defender by doing a little job in sewing, but always in my own cutting-room. I frequently have done so. I never had been asked to do such a job, and never had done such a job as I was asked to do, when I refused, as above related."

Taking that statement of his grievance, it appears to me that the thing complained of at the time, and felt to be a grievance, was his being desired to go into the workshop and work with journeymen tailors.

Now the question is, Is that the fact? When this conversation took place between the pursuer and defender originally, there was no one else there, and they differ as to what took place. What the defender says is, that he "requested the pursuer to make up a boy's tunic which he had already so far prepared. He said, 'No, I shan't do it.'" Now, if the matter stood there, there would just be one against the other, and it would be very difficult to balance the evidence. But there is an interview between them that morning when another person is present, when reference is made to the previous conversation. The pursuer says:—"Defender called me into the front shop in presence of M'Kay and Burnes—a shop-boy. Defender wished me take my £5 and go. I refused, and took them witnesses. He said, 'Yesterday you refused to do what I asked you to do.' I admitted this, and would do so again. He did not explain what this order had been that I refused to do, but I explained."

The defender, on the other hand, says, in the first place, "I did not desire him to go to the workshop. I gave him no further orders during that day. Next day I had a conversation with him. I reminded him that he had refused to obey my orders the previous day. He admitted this. The clerk M'Kie was present. He said he refused because I had asked him to go to the workshop. I told him I never had asked him to go there." Here is another discrepancy, and which is the true state of matters? Is it the fact that the defender gave no explanation, or did he distinctly explain that he never asked the pursuer to go into the workshop? That must be answered in favour of the defender, for an independent witness, M'Kie, says:—"I remember a conversation in the front shop between them. Defender said pursuer had refused to do his work. Pursuer replied

'Yes, I refused.' He said defender wanted him to go to the workshop. Defender denied this; he said, 'I did not do so.' I distinctly heard this."

When we are balancing the evidence of two parties in a cause on a matter of fact which is vital to the dispute, if we find that in reference to this matter there is one material point on which the pursuer is contradicted and the defender supported, that is greatly decisive of the matter. My opinion therefore is—(1), That the pursuer was not on Thursday afternoon asked to go into the workshop; and (2), That if he misunderstood the defender's order, and really believed that he did receive such an order, he was disabused of that belief that morning, and was told that no such order had been given. Is then the complaint of the pursuer proved? on the contrary, it is disproved.

A different case is tried to be set up, that the thing he was asked to do, viz., sewing a tunic, was of itself degrading, and not within his contract. I do not think that is the pursuer's case; but, taking it as his case now, I think it is a very imperfect justification of disobedience to orders. Besides, if the objection which the pursuer had to the order given him was as to the work he was asked to do —sew an entire garment—he should have made that objection intelligible to the defender; but he evidently, according to his own statement, did not do that, for what was in his mind was only resistance to going into the workshop. But what is this objectionable order? It may or may not be different in kind from sewing repairs as he was in the habit of doing, but it is one of these fine distinctions difficult to follow. There is a piece of uncontradicted testimony which is material, particularly as the pursuer was allowed a proof in replication, and did not contradict it. The pursuer says;—"Tunic sewing is of the simplest class. It requires very little exertion, and can be done on a cutting-board; no ironing or heavy work, which would require pursuer to go to the workshop." I cannot say therefore that the order has been proved to be beyond the terms of the agreement. It would have been if he had been ordered to go into the workshop, but not unless. On the Friday morning, when the pursuer is given distinctly to understand what was the order, it was his part to say "I was under a mistake;" but he stands on his disobedience and justifies it. It is only after that the letter of dismissal was given. The time of the letter is material, for if it had been written before the matter of the order was cleared up, it was the duty of the master to withdraw it, and offer to take him back. Coming when it did, it was justifiable, and forms a good defence to this action.

The other Judges concurred. Lord Ardmillan inclining to dissent on the proof.

When the case was being heard, the Court animadverted strongly upon the framing of the interlocutors pronounced in the inferior Court, which did not contain findings in terms of the Act of Sederunt, 15th Feb. 1851. The provision in that Act of Sederunt was a highly useful one, but there appeared to be an increasing disregard to it in Sheriff-courts, as neither in this advocation, nor in the advocation before the Court on the previous day (*M'Ewan*) had the provisions of the Act of Sederunt been complied with. Such cases might be sent back to the Sheriff-court to be corrected, as had been done in a recent case (*Glasgow Gas Light Co.*, 11th July 1866, 4 Macph, 1041), but that was a hardship to the parties; but there must be some means for enforcing the provisions of the Act of Sederunt.

Agent for Baldry—Henry Buchan, S.S.C.
Agent for Selby—Wm. Burness, S.S.C.

Saturday, November 30.

MACFARLANE OR MACPARLANE *v.* THE CALEDONIAN RAILWAY COY.

Master and Servant—Inspector—Collaborateur—Reparation—Relevancy—Issue. A labourer in the employment of a Railway Company was ordered by the Company's inspector to watch on the line the effect of trains passing over a certain portion of the rails, and when so employed was knocked down and injured by a train; he alleged that this accident was caused through the failure of the inspector to give him notice of the train. *Held* that the inspector was a fellow-servant, and that the pursuer had not stated a relevant case of damage to entitle him to an issue against the Railway Company.

This was an action of damages at the instance of Michael Macfarlane or Macparlane against the Caledonian Railway Company. A new bridge was being constructed on the line near Trinity, in October 1866. The pursuer alleged that he was ordered by Mr King, the Railway Company's inspector, to watch this bridge and to report if the trains which passed over the line affected the temporary supports. He was directed to stop all the trains if he saw that the supports were becoming insecure. On the 18th October, between ten and eleven o'clock at night, after he had watched for some time, he observed that the weight of the trains which had passed during the day was causing the uprights to give way, and rendering the surface insecure. The pursuer stopped the next train which came up, and went to tell the inspector. He was after this ordered by the inspector to watch as before until the contractor's men arrived in the morning. It was in consequence of obedience to these orders that he met with the accident for which he now asks damages from the Railway Company. When he was standing on the down line in order to observe what effect an up-train had on the supports, another train came up, threw him down, and dragged him some distance, and so injured him as to make him unfit to earn his own livelihood. He alleged that it was necessary for him to stand on the down line in order to observe the effect of a train passing over the supports.

The pursuer proposed the following issue:—

"Whether on or about the 19th October 1866 the pursuer was injured by an engine on that part of the defender's line which runs from Coltbridge to Leith, and at or near that part of the said line, near Trinity, where the Edinburgh and Granton branch of the North British Railway crosses it, through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The defenders pleaded that they were not liable to the pursuer for any injury caused through his own fault or negligence, or through the fault and negligence of his fellow-servant.

The Lord Ordinary (Barcaple) reported the case on the failure of the parties to adjust the issue, and