in his note indicated an opinion that the case should not be thrown out without further investigation; that the relative responsibilities of the parties could not be properly judged of until the whole facts should be ascertained. His Lordship did not think that it could be held in a question of relevancy, and without any investigation, to be clear that the pursuer, when employed to perform the special duty of watching from a particular spot on the line, the effect of a train passing was not entitled to rely that the defenders' arrangements were such as to make it possible for him to perform that duty without being run down by another train.

W. N. MACLAREN for pursuer.

YOUNG and JOHNSTONE, for defenders.

LORD PRESIDENT—The pursuer of this action says that he was a labourer in the employment of the Caledonian Railway Company at the time the accident which has given rise to the action happened, and that he was employed as a watchman at a place where a bridge was being constructed for the purpose of observing what effect the trains passing over the line had on the supports. He did so till ten or eleven o'clock, and he then observed that the supports were given way. He was then sent to Edinburgh by the inspector, and when he returned was ordered to watch as before. All these orders were given by Mr King, who in the condescendence is merely called "the inspector." Now, I think that this inspector was a fellow-servant—he had charge of the men on that part of the line. All that the pursuer did was under his orders. The pursuer alleges that the inspector King, when he gave these orders to him, ought to have accompanied them with directions as to the time the trains were likely to arrive. It is of no importance now to inquire whether such an allegation would be a good averment of negligence to subject King in damages, but I do not think it is sufficient to subject the Railway Company; for the pursuer and the inspector stood in the relation of fellow-servants in the same line of employment.

The other Judges concurred.

Agent for Pursuer—J. M. Macqueen, S.S.C.

Agents for Defenders—Hope & Mackay, W.S.

Saturday, November 30.

SUTHERLAND & MACKAY *v.* MACKAY.

(*Ante*, p. 40.)

Obligation — Principal Debtor — Cautioner—Sale—Debts Recovery (Scotland) Act 1867—*Mercantile Law Amendment Act.* Circumstances in which one defender in an action for price of goods furnished *held* to have acted as principal obligant and not as the agent of the other defender.

This was an action brought under the Debts Recovery (Scotland) Act 1867, in which Murdo Mackay sued the defenders, John Sutherland and Nathaniel Mackay, conjunctly and severally, for £26, 13s. 1½d. for goods, as per account produced. The summons was dated 2d October 1867.

The pursuer stated that the goods specified in the account sued for were forwarded by him to the defender Mackay on the order and credit of the other defender Sutherland, on whose account Mackay received the same, and he pleaded that the defender Mackay was liable in payment as having received the goods, and the defender Sutherland as being the person on whose order they were supplied. The defender Mackay admitted having received the goods, but pleaded that he was entitled by agreement to a deduction of 5 per cent., and tendered the balance. The defender Sutherland denied having ordered the goods on his own credit, or having undertaken to pay for them. He stated that, at the request of the other defender, Mackay, he asked the pursuer to forward the goods to the defender Mackay, and that in doing so he acted merely as Mackay's messenger; and that he did not guarantee payment. He pleaded that, not having ordered the goods on his own credit, he was not liable for the price; and that any alleged guarantee by him could be proved only by his writ.

On the 23d and 24th October last a proof was led before the Sheriff-substitute at Tain, who pronounced an interlocutor, in which he found, *inter alia*, that the defender Mackay was liable to the pursuer in the amount of the account sued for, in respect of his having purchased the goods through the agency of the defender John Sutherland, but under deduction of a sum of 10s. 6d., charged for a pack-sheet and bags, which had been returned: That the defender Sutherland was not liable to the pursuer for the price of the goods, on the ground of the orders having been given by him, in respect he informed the pursuer that the goods were ordered for the defender Mackay, and was not liable on the ground of the alleged promise of payment, in respect it was of the nature of a guarantee for the other defender, and was not in writing.

The pursuer and the defender Mackay appealed against this judgment of the Sheriff-substitute, and on the 7th of November the Sheriff (Cook) recalled the interlocutor of the Sheriff-substitute, and found as matter of fact, (1) that the goods included in the account sued for were furnished by the pursuer for the use of the defender Nathaniel Mackay, with the knowledge of the said defender, but on the sole order of the defender Sutherland, acting, not as the messenger or agent for the defender Mackay, but as a party interested on his own account in the conduct and management of Mackay's business; (2) that the prices agreed upon between the pursuer and Sutherland for the said furnishings were the prices charged in the account sued for, No. 2 of process, without abatement of any discount; (3) that although the defender Mackay now admits liability for the said furnishings, he not only failed to pay, or offered to pay, the account sued for when rendered to him, but denied his liability, and represented the defender Sutherland as the party truly liable to pay the said account to the pursuer; (4) that the pieces of pack-sheet and the bags, forming the last two items in the account sued for, were returned to, and have been retained by, the pursuer: Found in these circumstances, in point of law, that the defender Mackay is liable in payment of the said account in respect of his own admission of liability, and as the party who received and used the goods included in the account, but under deduction of the sums charged for the last two items in the account, which were returned as aforesaid; and that the defender Sutherland is also liable in payment of the account as in a question with the pursuer, not as guarantor or cautioner for the defender Mackay, but as the party on whose direct and immediate order the whole goods were furnished: Therefore

decerned against the defenders, conjunctly and severally, and in favour of the pursuer, for the sum of £26, 13s. 1½d., as concluded for in the summons, but under deduction of the sum of 10s. 6d., as the value of the pack-sheets and bags, forming the last two items of the said account, and returned as aforesaid: Found the pursuer entitled to expenses as against both defenders, and decerned against them, conjunctly and severally, and in favour of the pursuer, for the sum of £3, 9s. 6d. as the amount of the same.

Both defenders appealed to the Court of Session.

BLACK, for appellants. No argument was offered in support of the appeal of the defender Mackay.

M'LENNAN, for respondent, was not called on.

LORD PRESIDENT—If I thought there was any difficulty on the sixth section of the Mercantile Law Amendment Act, I would have heard more argument. I am satisfied that the obligation in this case was one of direct obligation for the price of the goods furnished, and not one of guarantee. The question is whether, in the circumstances, the defender Sutherland did undertake as a principal debtor? Now I am of opinion that the whole circumstances disclosed in the evidence lead to the conclusion that Sutherland, having become deeply interested in the affairs of the defender Mackay, interposed as a principal debtor. I think that the statements of the pursuer are true, and that the interlocutor of the Sheriff should be affirmed.

The other judges concurred.

Agent for Appellants—David Forsyth, S.S.C.

Agent for Respondent—Murray, Beith, & Murray, W.S.

Saturday, November 30.

SECOND DIVISION.

THOMSON (POLICE COMMISSIONERS OF WISHAW) *v.* BELL.

Property—Assessment—Boundaries of Burgh—Police and Improvement (Scotland) Act 1850—*Collector—Error in fact*—Condictio indebiti—Bona fide *consumption—Corporation—Commissioners.* A party returned his property as within the assessable limits under the Police and Improvement Act, and paid the assessment levied upon him for several years. He afterwards discovered that it was not so situated, and brought an action of repetition for the sums paid in error against the collector of the assessment as representing the Commissioners by whom it was imposed. *Held* that a *condictio indebiti* did not lie, in respect the sums having been in *bona fide* consumed, and the Commissioners not being a corporation, and the obligation of one set of ratepayers not transmitting to another, there was not that concurrence of a fund extant and a person to whom the debt had been paid and who improperly retained, that were involved in the nature of that equitable claim.

This was an advocation from the Sheriff-court of Lanarkshire of an action in which the question was, whether the pursuer was entitled to recover from the defenders, the Police Commissioners of the burgh of Wishaw, certain sums paid by him as assessments upon a brick-work belonging to him for the year from 1859 to 1863. The ground of the demand was, that the sums in question had been paid in error, viz., upon the erroneous assumption that the brick-work assessed was within the burgh; and the claim accordingly resolved itself into one of *condictio indebiti;* and the question was, whether such a claim could lie in the circumstances of this case, and against the present Police Commissioners. The action was brought as a set off to a claim by the Commissioners for arrears of assessment alleged to be due for different subjects within the burgh.

The defender made the following statements:—That Wishaw was some time ago created a burgh under the Police and Improvement (Scotland) Act 1850, and the provisions of that Act were afterwards adopted. That in carrying out the Act under section 69, there is annually made up a roll or book of assessment showing the yearly rent or value of the whole premises in the burgh liable to be assessed under the Act, and according to which the assessments under the Act are levied, if not appealed against. This roll or book of assessment is made up from the valuation roll of the burgh, compiled by the county assessor under the Valuation Acts. Under the Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict., c. 91, sec. 5) the assessor transmits yearly to each person included in his valuation, whether as proprietor, tenant or occupier, a copy of every entry in such valuation roll, wherein such person is set forth either as proprietor, tenant, or occupier. At the same time there is also sent a notice to such person that if he considers himself aggrieved by such valuation he may appeal, in the manner set forth in the Act, or he may obtain redress by satisfying the assessor that he has well founded ground of complaint. Should there be no ground of complaint, these notices are returned to the assessor signed by the party to whom they were sent. Immediately after the appeals against the valuation are disposed of, the valuation roll is authenticated under the Act, and is in force for the year from the Whitsunday preceding to the Whitsunday following. It is from the valuation roll so authenticated that the assessment roll of the burgh is made up. In pursuance of his duty, the assessor sent to the pursuer the returns necessary by the Act for the years 1859–60, 1860–61, 1861–62, 1862–63, 1863–64, in which the property of the Green Brick-work was entered as in the burgh of Wishaw. In due course he received these returns from the pursuer duly signed as correct. After having made up the assessment roll of the burgh, the collector, in pursuance of his duty, sent a notice each year to the pursuer, informing him of the amount assessed, and giving him notice that should he have any ground of complaint he must lodge an appeal within a certain time. As no appeal was lodged until the assessment for the year 1863–64 was imposed, the roll each preceding year was in terms of the Act authenticated, and the assessments levied. It was not till July 1863, after he had paid the assessment for the year 1862–63, that the pursuer discovered or pretended to discover his error in having returned the brick-work as being within the boundaries of the burgh of Wishaw, and he then demanded back the assessments that he had paid during that and the three previous years. That the pursuer was a Commissioner of Police of the said burgh during the years 1859–60, 1860–61, 1861–62, and laid on the assessment which he afterwards paid, and the effect of including the brick-work in the burgh was to relieve him from the police assessment of the county in respect of these premises. That the error of including the said brick-work in the valuation roll of the burgh