'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

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