to Martinmas 1865, and also for board wages up to that term. There is no doubt that from 24th April 1865 till Martinmas the pursuer was not serving the defender. The defender tenders wages up to 24th April, but denies liability otherwise, because he has received for the subsequent period no corresponding service from the pursuer. The Sheriff-substitute assoilzied the defender, proceeding on a ground which was not pleaded by him. The Sheriff recalled this interlocutor, and sustained the pursuer's claim. I cannot agree with his Lordship. I think the pursuer has no case, and in forming that opinion I proceed entirely on the pursuer's own evidence, beyond which I don't think it necessary to go. The pursuer was disabled in consequence of an injury. The manner in which he sustained it is thus described by himself. [*Reads as above.*] From this evidence I gather these facts: The horse was a dangerous horse—not unfit for use—but troublesome. Of the two horses under the pursuer's charge he selected that one to put into the cart. He used no reins. He had reins there which he might have used. And he sat in front of his cart without any rein in his hand. In these circumstances, I think the injury he sustained was imputable entirely to his own recklessness. The injury made him unable to fulfil his contract of service; and, having been so disabled by his own fault exclusively, he is not entitled to recover more than the wages tendered.

The other Judges concurred.

Agent for advocator—John Thomson, S.S.C.

Agent for respondent—Alexander Morison, S.S.C.

Thursday, November 28.

MORRIS *v.* MORRIS' TRUSTEES AND ANOTHER.

Heir—Ancestor—Apparency—Passive Title—1695, *c.* 24—*Discussion. Held* that an heir subjected to a passive title under 1695, c. 24, has not the benefit of discussion as in a question between him and the representatives of the debtor. Opinions as to the meaning of Erskine and Bell.

This was an action by the widow of the late James Morris, of Albany House, Dunfermline, against her husband's trustees and Andrew Beveridge, a nephew of her husband, conjunctly and severally, for payment of an annuity secured to her by marriage-contract. It appeared that James Morris and his brother William were joint *pro indiviso* proprietors of certain heritable subjects in virtue of a feu-disposition on which an infeftment followed in favour of neither of them. William Morris died in 1841, and James thereafter, until his own death in 1864, possessed his deceased brother's *pro indiviso* share of the property as heir-apparent of his brother, without making up any title. James Morris left a trust-disposition and settlement conveying his whole heritable and moveable estate to trustees for the purposes mentioned in the deed. Andrew Beveridge made up a title to the *pro indiviso* half of the property by serving as heir-of-line in general, and also of conquest, to William, his maternal uncle, passing by James, who had been more than three years in possession on apparency, and to whom Beveridge was apparent heir. The trustees made up a title to the other half. The trustees alleging that they were unable from the proceeds of James Morris' estate to pay the annuity provided to the widow, the widow brought this action against the trustees and Andrew Beveridge, to have a conjunct and several liability established against the defenders for payment of her annuity, founding, as against Beveridge, on the statute 1695, c. 24. The plea principally insisted in by Beveridge was that the pursuer was not entitled to decree against him until she had discussed her husband's trustees and representatives. He maintained that the heir who is by the statute subjected to a passive title has the benefit of discussion, so that the creditors of the interjected person must discuss all the debtor's representatives before the heir can be condemned, referring to the authority of Bell's Com., i., 666-7.

The Lord Ordinary repelled the plea, adding this note to his interlocutor:—

"*Note.*—The defender does not dispute that, to the extent of the value of the estate, to which he has made up a title passing over the pursuer's husband, he is liable under the Act 1695 for payment of her annuity. But he maintains that his liability is subsidiary to that of her husband's trustees and proper representatives, and that he is entitled to have them discussed before he can be called upon to pay. In support of this contention he refers to the *dictum* of Mr Erskine, iii., 8, 94, that the heir who is by the statute subjected to a passive title 'has the benefit of discussion, so that the creditors of the interjected person must discuss all the debtor's representatives before the heir can be condemned;' and to Mr Bell, i. Com., 666-7, and the case of *Vint* v. *Dalhousie*, M. 3562.

"The Lord Ordinary thinks that the defender misapprehends the import of these authorities. The case of *Vint*, which is referred to both by Mr Erskine and Mr Bell, was a discussion as between heirs—the heir-male and the heir of line—and if Mr Erskine's words, which are not unambiguous, are to be taken as importing that the privilege goes beyond the ordinary right of discussion as between heirs, his doctrine is not warranted by the authority on which he grounds it. Mr Bell says, that 'the personal responsibility of the entered heir, if not heir-at-law and representative of the deceased, is of the nature of a subsidiary obligation after the heirs of the deceased have been discussed,' and he also refers to the case of *Vint* as the authority for the rule. He could not mean that the entered heir would be liable at all, even as a subsidiary obligant, if he was not an heir of the interjected person. The statute only enacts that he shall be liable for the debts and deeds of the person interjected, 'to whom he was apparent heir.' The Lord Ordinary understands Mr Bell as merely expressing the doctrine fixed by the case of *Vint* to which he refers—that if the heir entering to a remoter ancestor is not heir-at-law, and, in that sense, representative of the interjected person, but only his heir-male, or other heir of a limited kind, he is entitled to the benefit of discussion common to all heirs. This seems to be the import of all the authorities; but any further limitation or postponement of the heir's liability would seem to be unwarranted by the terms of the statute, and contrary to its intention.

"The defender is not an heir of a more limited character asking to have the heir-general discussed. He is himself the heir-general of line and of conquest, though unentered, and only liable under the statute. He seeks to have the trustees discussed, on the ground that they are disponees and exe-

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