was right to grant such a diligence as he had granted, the document not being in itself sufficient. Such a diligence was granted in the case of *Menzies* v. *Duff*, June 5, 1851, 13 D. 1044; Bell's Comm. ii. 314 of M'Laren's Ed., 5th ed. 347. Besides, the diligence here might be a very limited one. He was prepared to give in a specification of the documents required, and of the persons in whose hands they were.

At advising—

Lord President—There are three points determined by the Sheriff here. The first is in regard to the want of a stamp on a document founded on by the claimant Murray. The second is in regard to the allowance by the Sheriff to Mrs M'Culloch of an amendment of her claim by the addition of some words to her designation. The third is in regard to the diligence granted for the recovery of additional documents and books to support the claims of both of these parties.

As regards the first point, the document in question is expressed in these terms—[*reads as above*]. If that is a promissory-note, the Sheriff is wrong, for the document should at once have been rejected: but I am of opinion that it is a document in the nature of a bond, not of a promissory-note, for it is impossible to ascertain from the document itself what the precise sum payable is, as no one can tell what the bank interest will amount to. That fact is conclusive upon the nature of the document under *Morgan's* case, which is in harmony with the leading cases of *Pirie's Trustees* and *Martin*. But the Sheriff did not take the right way of admitting it; he should have proceeded under the 16th section of the Stamp Act of 33 and 34 Vic. c. 97, and upon payment of the duty and the penalty he should then have admitted it without a stamp. We should therefore, I think, recall that finding and allowance, and remit to the Sheriff to admit the document after the duty has been duly paid.

With regard to the diligence allowed, I cannot approve of the terms in which it is granted, for it is a roving diligence, under which the party might have gone all over the world to recover documents. Now, all that this party required, and all he was entitled to get, was a diligence to recover certain specific documents which he can say are in the hands of certain third parties and will instruct his claim. The counsel for Mr Crawford, who supports this claim, says that he can specify the documents that will do so, and I think he should be allowed such a limited diligence.

Lord Deas concurred, observing—upon the question as to the granting of a diligence—The statute contemplates very summary procedure, and it is the duty of the Sheriff to keep the diligence within reasonable bounds, and not allow this privilege to be abused. If any thing of that kind were brought under our notice, we should not of course allow the statute to be so transgressed, but I entirely concur in the allowance of diligence proposed.

Lord Mure concurred.

Lord Shand concurred on the question of the stamping of the documents. On the other question he said—With reference to the other point, the universal rule I understand to be that where parties come to vote at an election of a trustee they shall have their affidavits in proper form, and shall produce the documents to instruct their claims which are in their possession or under their control; if any party does not do so he must lose his vote. Here the writings asked for are beyond the parties' control, and are, as it appears, sufficient to make out their claims plainly. I think that the Sheriff should allow a diligence to recover any special documents on the one side as well as on the other.

The Court substantially adhered to the interlocutor of the Sheriff, but allowed expenses to neither party.

Counsel for Tennent (Appellant)—Trayner—C. S. Dickson. Agent—Thomas Carmichael, S.S.C.

Counsel for Crawford (Respondent)—J. P. B. Robertson. Agents—Bruce & Kerr, W.S.

Tuesday, January 15.

SECOND DIVISION.

[Sheriff of Forfarshire.

SIMPSON *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Obligation on Railway Company to maintain Fences along a Disused Line.

A portion of a line of railway was relinquished and disused in terms of a Special Act of Parliament. The railway company left the fences in good condition when they ceased using the line, but after that they were suffered to get into disrepair. In an action of damages against the railway company on account of injury caused to stock through the insufficient state of the fences—*held* that the railway company was liable, in respect (1) that their obligation in the original Act under which the railway was constructed was to put up and maintain in all time coming a sufficient fence, which obligation was part of the price paid for the ground, and (2) that the relinquishment of use in no respect liberated the company from any obligations which they had undertaken to those with whom they had originally contracted.

Charles Simpson, the pursuer in this case, was tenant of the farm of Hatton, near Newtyle. Part of the line of the Dundee and Newtyle Railway, now owned by the defenders the Caledonian Railway Company, ran through the pursuer's farm. By Act of Parliament (27 and 28 Vict. cap. 214, the defenders had obtained authority to disuse as a public railway a portion of the line, including the part passing through pursuer's farm. The terms of the 18th section of the Act were as follows:—"On the completion and opening for public traffic of the railway, and of the joint station at Newtyle hereinafter provided for, so much of the Dundee and Newtyle Railway as lies between Pitnappie Junction and the foot of the Hatton incline at Newtyle Station shall be relinquished and disused as a public railway; and the *solum* thereof, subject to all claims affecting the same at the instance of other parties than the

Dundee and Newtyle Railway Company, and all works thereon, shall vest in and may be sold and disposed of by the Company."

During the time that the line was in use, the part of it which ran through the pursuer's farm was kept well enclosed and fenced by the defenders, and the fences were left in good repair when they ceased to use it. After that, however, they had fallen into disrepair, in consequence of which, and also of the overflow of certain water-tanks and the neglected state of a bridge over the line, all due to the fault of the defenders, the pursuer alleged that he had suffered serious damage to his farm and farm stock, for which he sought to make the defenders liable in this action, and the question arose as to whether the defenders were bound to maintain the fences, &c., in good repair, and having failed to do so, were liable for the damage caused to the pursuer.

The Act of Parliament sanctioning the construction of the said line was 7 Geo. IV. c. 101. Section 71 of that Act enacted that the railway company were to put up and maintain at their own cost gates and bridges on the line "for the use of the owners and occupiers of the lands and grounds through which such railway shall be made." In the event of the railway company not complying with that provision, the owners and occupiers of the contiguous lands were themselves to do what was necessary, with recourse against the company for the cost.

Section 73 provided that the company, after taking land for the use of the railway, should divide and separate it from the lands adjoining "with good and sufficient posts, rails, hedges, &c., or other fences so to be made as aforesaid, in case the owner or owners of such land and grounds . . . shall at any time desire the same to be fenced off . . . and the said company shall also make and maintain all necessary gates in all such fences to be made as aforesaid, all such gates being made to open towards such lands and grounds; then, and in every such case, the powers, provisions, directions, and regulations hereinbefore contained with respect to the gates and other works as aforesaid, shall extend and apply and be applicable to the making and maintaining of said fences as fully and effectually to all intents and purposes as if the said powers, provisions, directions, and regulations were now repeated and re-enacted with respect to such fences."

The defenders founded upon the Act 27 and 28 Vict. cap. 214, which authorised the Scottish Central Railway Company to make a new line to be substituted for the portion of the Dundee and Newtyle Railway which they were to relinquish. The 18th section of that Act provided—"On the completion and opening for public traffic of the railway, and of the joint station at Newtyle hereinafter provided for, so much of the Dundee and Newtyle Railway . . . shall be relinquished and disused as a public railway, and the *solum* thereof, subject to all claims affecting the same at the instance of other parties than the Dundee and Newtyle Railway Company, and all works thereon, shall vest in and may be sold and disposed of by the company." The defenders stated that they were not bound to maintain fences on the *solum* on the disused line, nor on adjacent owners' lands. In any event, they pleaded that the pursuer not having availed himself of the remedy provided by sections 71 and 73 of the Act 7 Geo. IV. cap. 101, was barred from pursuing the present action.

After various procedure the Sheriff-Substitute (CHEYNE), on 11th December 1876, issued an interlocutor allowing both parties a proof. He appended the following note:—

"*Note.*—While I have thought it better to leave all the defenders' pleas open in the meantime, I may say, with regard to the two points argued before me at the recent debate, that I have formed a pretty clear opinion that the defenders are under a statutory obligation to maintain fences along the disused piece of railway, and also that their plea, founded on sections 71 and 73 of the Act 7 Geo. IV. c. 101, is untenable. With regard to the former point, I am not prepared to rule that the pursuer's claim is not one affecting the *solum* of the disused piece of line in the sense in which that expression is employed in section 18 of the Act 27 and 28 Vict. c. 214, but at the same time I think that I do not require to decide the point here, and I shall therefore leave it to be determined when, if ever, it arises in a question with a purchaser from the defenders. Dealing with the defenders themselves, it is, in my opinion, sufficient to observe that as lessees of the undertaking of the Dundee and Newtyle Railway Company they took over all the liabilities of that Company, including the obligation constantly to maintain these fences, and that I cannot read the clause of the Act of 1867 upon which they found, as relieving or intended to relieve them of that obligation. Its effect is, I think, simply to give them power to sell the *solum* of the disused piece of railway."

On 3d March 1877 the Sheriff-Substitute pronounced an interlocutor in which he assoilzied the defenders from the first and fourth conclusions of the summons (relating to the tanks and the bridge), in respect the pursuer no longer insisted in them. After stating various findings in fact as above narrated, he went on to find—"(4) That the parties have agreed that the damage sustained by the pursuer during said period in consequence of the insufficient state of the said fences, shall be held to amount to (£65) sixty-five pounds sterling; and (5) that the undertaking of the Dundee and Newtyle Railway Company is now, and was during the period in question, vested in the defenders; and having regard to the foregoing findings and to the provisions of 7 Geo. IV. c. 101 (being the original Act under which the Dundee and Newtyle Railway was constructed), and under reference also to the accompanying note and to the note appended to the interlocutor of 11th December last, Finds in law that the defenders were bound during the period in question to have kept the disused piece of line separated from the pursuer's farm by a sufficient fence, and that they are liable to make good the damages sustained by the pursuer in consequence of their failure so to do: Therefore decerns against the defenders for payment to the pursuer of the sum of £65 sterling, with interest thereon at the rate of five per centum per annum from the date of citation hereon till paid." He appended the following note:—

"*Note*—Upon the only question now left for my decision, so far at least as the merits of the case are concerned, viz., whether the defenders were bound to maintain a sufficient fence along the disused piece of railway, I have formed a clear and decided opinion in the pursuer's

favour. At the discussion which preceded the allowance of proof, it was, as I understood, conceded that the defenders were liable, unless sect. 18 of the Act of 1864 relieved them; but at the recent discussion the defenders' counsel, besides relying upon the provision in the Act of 1864 (as to the effect of which I retain the opinion expressed in my previous note, and have nothing to add to what I there said), maintained that there was not enough in the case to warrant the conclusion that any obligation in regard to the particular fences with which we are here dealing ever attached either to the Dundee and Newtyle Railway Company or to the defenders as in their room. With regard, however, to this new contention, I think it sufficient to remark that while it is undoubtedly true that, under sect. 73 of the Special Act under which the railway was made, the obligation on the Company to erect and maintain fences only arises 'in case the owner or owners of such lands and grounds adjoining to such railway, or any of them respectively, shall at any time desire the same to be fenced off, or in case the said Company of proprietors shall think proper to fence off the same, instead of the gates being erected as aforesaid;' and while it is also true that we have no information (which, considering that it is fifty years since the railway was made, is not to be wondered at) as to how these particular fences came to be put up, still as there is no allegation that they were put up by the owner of the adjoining land under the powers given him in sect. 75 of the statute, and as it is admitted that they were in use to be kept in order by the railway company's servants, it seems to me a fair and reasonable presumption that they were originally erected by the Company either at the desire of the owner of the adjoining land, or voluntarily as a substitute for the gates, which must otherwise have been put across the line in order to fill up the gaps in the fences caused by the formation of the railway, and which it is not alleged ever existed.

"From the pursuer's agent making no allusion to sect. 10 of the Regulation of Railways Act 1842 (5 and 6 Vict. c. 55), I presume that he is satisfied, as I own I am, that he cannot avail himself of that provision, but must rest his case entirely upon the Special Act."

On appeal the Sheriff (MAITLAND HERIOT) adhered, adding the following note:—

"*Note.*— . . . The question for decision arises whether the Caledonian Railway Company, who now come in place of the Dundee and Newtyle Railway Company, are still bound to keep the disused portion of railway fenced and enclosed as before.

"The obligation to do so, as contained in the 73d of the original Act, is very explicit—[*quotes as above narrated*].

"That being so, the Sheriff fails to discover any clause anywhere that liberates the railway company from that clear and distinct obligation. The company contend that the 18th section of the Act of 1864 does liberate them. After substituting the new for the old line of railway, it provides, 'and the *solum* thereof, subject to all claims affecting the same at the instance of other parties than the Dundee and Newtyle Railway Company, and all works thereon, shall vest in and may be sold by the Company.' It may or may not be that the burden of fencing the *solum* is a 'claim affecting the same.' If it be, it is expressly kept up by this clause. If it be not, the clause has no reference to fencing, and that matter is just left as it was previously.

"This question arises in an action of damages for injury to the pursuer's stock owing to the want of proper fences for the period from 8th July 1875 to 15th April 1876. The defenders contend that, even assuming they are still bound to fence, the pursuer was not entitled to stand aside and see his stock pass through the fence without doing something to prevent them. It is said that he ought to have adopted one of two courses—first, he ought himself to have repaired the fence temporarily—to have mended up the hole or gap —and then applied to the defenders for the cost of the repairs. Had this been the case of an unexpected gap occurring in an ordinary fence, there might have been much force in the contention. But on looking at the evidence of Alexander Simpson, we find that the whole fence was in bad order. . . . .

"It seems therefore to the Sheriff that it was not a fence which the pursuer could have repaired in a temporary way by filling up gaps or holes. The whole fence was bad, and either 'gone' or 'rotten.'

"Then it is said, second, that the pursuer's statutory remedy was to give the defenders notice under the 71st and 73d sections of the Act, and at the end of thirty days to do the work himself. The pursuer might probably have followed that course had he seen fit to do so. But the Sheriff cannot hold that he was restricted to that remedy. The Company were well aware of the state of these fences." . . . .

The defenders appealed.

Argued for them—The railway company were not bound to maintain in all time coming the fences of disused lines. The obligation to fence was only meant to apply to a time when locomotives were actually passing up and down the line, the fences being meant as a protection against them. The land was taken for the use of the railway; it was no longer used by the railway, for it was abandoned and the lands were to be sold. The only obligation now upon them was the ordinary one under common law to be at half the expense of keeping up the march-fence.

Authorities—*Matson* v. *Baird & Company*, November 9, 1877, *ante*, p. 73; 5 and 6 Vict. cap. 55, sec. 10; 13 and 14 Vict. c. 83, secs. 19 and 21.

At advising—

LORD JUSTICE-CLERK—I think the Judges in the Court below have taken the right view in this case. It seems to me to be a very clear and simple one.

At the original formation of the railway, which was one of the first of its kind, power was got to take land compulsorily for the purpose of constructing it. The Act of Parliament was passed in 1826. It sanctioned the use of locomotive power on the line, and locomotive power was, I believe, used within a year or two of its opening. But the right to take land and to interfere compulsorily with private property implied a right to full compensation on the part of those whose property was taken; and accordingly the Company came under certain specific obligations to the proprietor and his tenant, in particular they came under an obligation in respect

of injury done by the railway coming through and thereby destroying the communication between the two parts of the ground, to put up and maintain in all time coming a sufficient fence. That they were bound to do that whether they used their railway or not I think there can be no question whatever. Their right to relinquish or abandon the railway and sell the ground might no doubt be limited by their obligations to the public, but their obligation to the proprietor and the tenant of the land was to keep up that fence in all time coming.

It is said, however, by the railway company that they have been liberated from that obligation, and from all obligations of that kind, by being entitled under their new Act to relinquish and disuse that portion of the line as a public railway and to sell the *solum* thereof subject to all claims affecting the same at the instance of other parties. Now, unquestionably there are claims in relation to the portion of the railway on the part of the pursuer, who is the present tenant; and the claim is not so much with reference to the *solum* as against the Company itself, for the plain reason that the obligation was part of the price paid for the compulsory purchase, and that they are bound to pay the whole price which they undertook to give. The real result of the argument for the railway company just comes to this, that if they had undertaken to pay by feu-duty they would be liberated because they no longer intend to use this line as part of their railway. The argument, founded on a recent case (*Matson* v. *Baird & Company, supra*) that it is the safety of the public or of animals with regard to passing trains that is the sole object of the obligation to fence, is manifestly not tenable. So far as I recollect that case, it referred to a level-crossing, and the question was, how far the stringent obligation as to having gates and keeping people to shut these gates at the crossing were still to be enforced when the line was no longer used?

Looking therefore at the case simply in this view, first, that the keeping up of these fences was part of the price paid for powers under which alone the Company were permitted to make their railway, and second, that the relinquishment here in no respect liberates the Company from any obligations which they have undertaken to those with whom they contracted in 1826 in respect of their patrimonial interest, I entirely concur in the very clearly expressed opinions of both Sheriffs in the Court below.

LORDS ORMIDALE and GIFFORD concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—J. P. B. Robertson. Agents—Maclachlan & Rodger, W.S.

Counsel for Defenders (Appellants)—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, January 15.*

OUTER HOUSE.

[Lord Curriehill, Ordinary.

RUSSELL *v.* THE INLAND REVENUE.

Revenue—Inhabited House Duty—Business Premises.

Where a dwelling-house and business premises are under the same roof, but there is no internal communication between them, they are liable for inhabited house duty as one house if occupied by the same person.

This was a Case stated for the opinion of the Court of Exchequer under the following circumstances:—Mr William Russell, draper, Leslie, was assessed for Inhabited House Duties for the year ending 24th May 1877, at 6d. per £1 on £52, the annual value of premises occupied by him at Leslie.

Against that assessment he appealed at a meeting of the Commissioners at Kirkcaldy in January 1877. He stated that the amount on which the assessment was laid consisted of £35 rent of shop and £17 rent of dwelling-house, and there being no internal communication whatever, and the house being under £20, he contended that no duty was payable. The house was entered by a roofed staircase of 18 steps, built within the yard after referred to, but outside all the other premises. The dwelling-house had been let some years previously as such, separately from the other premises, and there had been no structural alteration since. The nearest shop door was nine feet in the open air from the foot of the covered staircase. None of Mr Russell's workers boarded or lodged on either of the premises.

The surveyor stated that he had viewed the premises, which consisted of a shop on the ground floor and house above, with yard and offices behind. The entrance to the house was from the yard, to which access was had by a "close" between this and the adjoining property, but the shop had two back doors entering upon same yard, so that the appellant went from shop to house without coming into the street or the "close." In support of the assessment the surveyor referred to Rule 3, Schedule B, 48 Geo. III. c. 55, which enacted that "all shops and warehouses which are attached to the dwelling-house or have any communication therewith shall in charging the said duties be valued together with the dwelling-house," and to the case decided by the English Judges, No. 2781 (not otherwise reported), and contended that as the house and shop were under one roof, and as the whole premises were in the occupation of the appellant, and there was communication throughout by the private yard, which was a portion of the premises, the appellant was liable to the assessment appealed against.

The Commissioners considering the question to be attended with difficulty, decided to relieve the appellant, with which decision the surveyor expressed himself dissatisfied, and requested that this case might be stated.

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor finding that the determination of

* Decided 6th March 1877.