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.

the Commissioners was wrong. He added this note:—

"*Note.*—The business premises are under the same roof as the dwelling-house, and are undoubtedly attached thereto, although there is no internal communication between them, and as both are occupied by the same person they must be valued *in cumulo* under the statute."

The case of *Robert Salmond jun.* v. *The Inland Revenue*, the circumstances of which were analogous to the above, was similarly decided on the same day.

The interlocutors were acquiesced in.

Tuesday, January 15.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

PHILIP AND OTHERS (RHIND'S TRUSTEES) *v.* RHIND AND OTHERS.

Presumption—Circumstances where the Court fixed a Date at which Death must be presumed.

A sailor, born in 1805, was last heard of in Jamaica in 1843. He had written immediately before that to his sister, communicating an intention to return to England "if I live." In an action brought for the distribution of his estate, the Court *held* that, in these and the other circumstances of the case as proved, the presumption was that he had died, and fixed 1st January 1850 as the date prior to which the death must presumably be held to have taken place, and directed division of his estate upon caution.

The question involved here was—Whether a certain Thomas Rhind was to be presumed to be dead, and if so, at what date the presumption was to be held to have operated? It arose in a multiplepoinding at the instance of the executors of the late Alexander Rhind, merchant in Dundee. Mr Rhind died in 1841, leaving a last will and codicils thereto of different dates in 1840 and 1841. By the said will Mr Rhind left the whole residue of his estate to be divided among his nephews and nieces (of whom Thomas Rhind was one) in liferent and their children in fee, and in the event of any of them dying without issue, his or her share was to be divided among the others then alive. Most of the residue of the testator's estate had been distributed by the executors, and the only sum about which there was any dispute was the share effeiring to Thomas Rhind. The present action was raised by one of the surviving nieces of the testator for the purpose of having his share divided, and for various other purposes, which need not be referred to.

The following facts regarding Rhind, as brought out in evidence, are taken from the note of the Lord Ordinary (CURRIEHILL):—"Thomas Rhind was born in 1805. He was a sailor, and was for many years in the merchant service. He appears to have been of short stature, and naturally robust; but although he was a good sailor, he was unquestionably addicted to drink. During his employment in the merchant service he made, between his voyages, frequent visits to his relatives in this country, amongst others to his uncle the truster, and to his sisters Mrs Bell and Mrs Peddie, his last visit having been in 1839. He also corresponded with several of his relations, but particularly with his sister Mrs Bell, to whom he appears to have been much attached. After his visit to Scotland in 1839 he left the merchant service and entered the Royal Navy. He was second master of H.M.S. 'Griffon,' then commanded by Captain Jenkins, who says in his evidence that Thomas Rhind was addicted to drink all the time he was in the service, which led to his being tried by court-martial for three separate acts of drunkenness and insubordination, and being dismissed the service by the sentence of the Court on 3d March 1843, when the vessel was on the West India station, near Jamaica.

"While in the Royal Navy Thomas Rhind was in the Naval Hospital, Haslar, on the sick list, from November 1841 till June 1842, under treatment for *fistula lacrymalis;* and immediately on his discharge from the 'Griffon,' in 1843, he was admitted as a patient into the hospital at Kingston, Jamaica, and remained there under treatment for stricture till he was discharged on 31st March.

"During Thomas Rhind's residence at Haslar his uncle, the truster, died, and the late Mr David Mitchell, writer, Dundee, the agent of the trustees, had a good deal of correspondence with him as to payment of a special legacy of £50 bequeathed to him by his uncle. The letters of Thomas Rhind to Mr Mitchell cannot be found; but from the letters to him in Mr Mitchell's letter-books, and from the legacy receipt and other documents in process, it is proved that the legacy of £50 was duly received by him in May 1842. It is also proved that a copy of the truster's will was sent to him when in Haslar Hospital by his cousin James Bell, and that Rhind had been dissatisfied with the settlement, as conferring less benefit upon him than he had expected. He does not appear to have made any claim at the time for his liferent under his uncle's will, probably in consequence of the 'Griffon having sailed for Jamaica soon after June 1842. On 20th March 1843, shortly after his dismissal from the 'Griffon,' he writes from the hospital in Jamaica to his sister Mrs Bell a letter in the following terms:—'Dear Sister,—I am sorry to inform you of my ill-health, yet happy to say I am still alive, but God knows how long. I have been in the midst of all the dreadful earthquakes hear, and hurt nothing, but now obliged to come to hospital. I have left the service in consequence of a disturbance between me and the purser and gunner. I merely write you this to let you know I am alive, and not write to the 'Griffon' any more. If I live to come to England, I will try and get a ship when I am able to come out of this hole, for it's not like a hospital—rather a poorhouse. I was in Antigua when the earthquakes took place, which almost sunk the dock, and made our ship shake like the leave of a tree. There are great numbers of deaths hear from feaver, but I am recovering. My love to mother, Wm., and all the family.—I remain, with respect, your loving brother, THOMAS RHIND.'