the cases we have had cited to us go to support that proposition.

It was argued that if the house of the medical superintendent was part of the hospital, so is that of the chaplain. I do not think that follows at all. The duties of the two may be equally important, but they are not equally connected with the establishment, for the duties of the chaplain relate to the next world while those of the medical superintendent relate to this; the duties of the one are more immediate than those of the other. Therefore there is no use in arguing that if the one is part of the hospital the other must be also. It is of no consequence whether the necessity arises from a statutory condition or not; the question is one of fact, and on the facts I hold that this house is not only a part but a necessary part of the hospital. Even if there had been no authority, I should be of opinion that on a mere statement of the case this house was part of it. The managers have so found, but I do not go upon that, for it is not necessary. Apart from the conclusion of the managers, I am clearly of the same opinion as your Lordship.

Lord Mure—I have no difficulty in concurring, for it is clear that it was just as necessary that this gentleman should live in the precincts of the Infirmary as it was in the English cases cited, where there was a statutory provision to that effect.

Lord Shand concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Inland Revenue—Solicitor-General (Asher, Q.C.)—Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Fasson—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Saturday, May 19.

SECOND DIVISION.

[Lord Lee, Ordinary.

WAUGH *v.* THE CITY OF GLASGOW UNION RAILWAY COMPANY.

INGLIS *v.* THE SAME.

Reparation—Railway—Obligation to Fence—Relevancy.

A person having charge of a locomotive in the employment of a trading company whose works communicated by a siding with the main line of a railway company, raised an action of damages against the railway company setting forth that while upon the siding on a dark night in the discharge of his duty, and when about to move certain points thereon, he fell over an embankment on to the main line and received severe injuries. He further averred that it was the duty of the railway company to fence the siding at the place in question, and that the accident was due to the absence of such fencing. *Held* that the obligation to fence was a question of circumstances, and that the pursuer was entitled to an issue for the trial of the cause.

Hugh Waugh, brakesman, and James Inglis, weigher, both in the employment of the Steel Company of Scotland (Limited), at their works at Blochairn, near Glasgow, raised the present actions against the City of Glasgow Union Railway Company for damages for personal injuries by falling in the darkness of a winter morning over an embankment on to the defenders' railway.

The pursuer Waugh set forth that he was the fireman or stoker of an engine connected with the Steel Company of Scotland at Blochairn. The pursuer Inglis set forth that he was "weigher" in connection with the same engine. Both pursuers averred that the engine with which they were connected carried a crane for lifting ingots, and a weighing machine for weighing them. They further averred—"The defenders have a line of railway or siding which leads into the works of the said Steel Company at Blochairn, which is called or known as the Blochairn siding of their system of railway lines. This siding or railway is the property of the defenders, and is formed on an incline by archways of brick, leading off their main line of railway up to the Steel Company's works at Blochairn, and it is by this siding or railway that the said Steel Company, by arrangement with the defenders, take in and put out the material for their works. The said Steel Company have also, by arrangement as aforesaid, the use of the defenders' ground and railway to the south-west of their works for laying down ingots and blooms, as also ores and other materials, before they are taken into their works." The pursuer Waugh averred—"Upon the morning of Wednesday the 1st day of November 1882, at about three or half-past three o'clock, being then very dark, the pursuer was, with his engine, No. 4 'crane pug' aforesaid, engaged at the outside of the Steel Company's works, and upon the defenders' said railway siding, when, having to get down to examine the points, which are situated near to the corner of a wooden bridge at the west end of the Steel Company's works, he, in the dark, fell over the defenders' embakment there, which is perpendicular, aud at least 15 feet in height, and is not protected by any fence, paling, or protection whatever." The pursuer Inglis averred that on the same morning he was with the engine engaged at the outside of the Steel Company's works, and upon the defenders' railway siding, "when, having been engaged at his ordinary employment as a weigher on said engine, and having occasion to alight therefrom to assist in examining the points, or do some other business along with the said Hugh Waugh near to the corner of a wooden bridge at the west end of the Steel Company's works, they in the dark fell over," &c. Each pursuer averred that in consequence of the fall he had sustained severe injuries, and each averred—"The place where the pursuer fell and sustained his injuries is totally unfenced and unprotected. There was a railing or fence at the same place about twelve months previously, but it was removed by the defenders, and nothing was put up in its stead. The place is a very dangerous one, and should have been kept properly fenced and protected by the defenders, as it was their duty to the Steel Company and their servants, and all others having right to use and being lawfully on the said railway or siding, to

have done for the safety and security of those using the said railway or siding, but this the defenders, although aware of its dangerous character, culpably neglected to have done. The pursuer fell over the embankment and sustained his injuries in consequence of the unfenced condition of the embankment."

The defenders denied liability, and averred that the points were protected by a brick wall, and that had the engine been stopped, and had the pursuer (Waugh) got off it at the proper place, and taken a hand-lamp of the engine with him, which should have been there for that purpose, the accident would not have occurred. They also denied that they were bound to fence the place at all. In the case of Inglis they denied that the pursuer had any occasion to leave the siding or touch the points, that being the fireman's business and not the weigher's. They averred that opposite the points there was a brick wall, by the erection of which they had more than fulfilled any legal obligation.

They pleaded that the pursuers' averments were not relevant.

The Lord Ordinary (LEE) after hearing counsel on this plea in the Procedure Roll, allowed the pursuer in each case to lodge an issue.

"*Opinion.*—[*Waugh's case*] The pursuer sues the City of Glasgow Union Railway Company for damages on account of personal injuries, which he says were suffered through the defenders' fault. It appears the defenders have a siding—called the Blochairn siding—which connects the works of the Steel Company of Scotland with their lines of railway. This siding ascends from the main line until it reaches a level sufficient to cross over the line by a bridge. The incline between the point where the siding joins the main line and the bridge over the railway is said to be constructed upon archways of brick, forming what is called by the pursuer an embankment running along the side of the railway, and the side of which next the railway is said to be perpendicular.

"The fault alleged against the defenders is that this embankment is unfenced, at least in one part where it formerly was fenced, and the pursuer's injuries are said to have been received in consequence of his having fallen over in the dark while going from his engine to the points connecting the siding with the line into the works. It is not denied in this case (as in Inglis' case) that the pursuer may have had legitimate occasion to get off his engine and attend to the points. These private points are said to be attended to by someone on the engine, and not by a separate pointsman. But it is alleged by the defenders that opposite the points the siding is protected by a brick wall, and that if the engine had stopped at the right place such an accident could not have happened.

"The only question at present, however, is, whether the pursuer's allegations are relevant and sufficient to support the statement in the condescendence of a failure of duty on the part of the defenders in regard to the fencing of that part of the embankment over which the pursuer fell.

"In deciding this question I cannot assume that the engine was not stopped at the right place. I must assume that the pursuer may be able to prove his allegations, which, fairly read, seem to me to import that he got off the engine at a place where it was legitimate and intelligible that the engine should stop before advancing to the points.

"It was decided in the case of *Clark* v. *The Caledonian Railway Company*, 5 R. 273, and also in the case of *Robertson* v. *Adamson*, 24 D. 1231, that the proprietors of railways or other works are under no such general obligation to fence bridges as to make them liable in all cases where an injury is caused by the want of fencing.

"I take it to be also decided that in such cases it is not sufficient to allege in general terms that it was the duty of the defenders to fence. The allegations must set forth circumstances from which an obligation to fence may be inferred or may arise.

"But while this is so, it by no means follows that failure to fence may not be sufficient to give rise to liability. The question whether there was fault in not fencing such a place is a question of circumstances, and one which, in my opinion, cannot be decided in the negative in this case without inquiry. The obligation upon the proprietors of such a siding, which is to be used by others not merely for passing along with engines and trucks but also to some extent for walking upon in order to get from the engines to the points, is to use reasonable precautions for the safety of those lawfully using it and who have not themselves undertaken the risk attending such use.

"Now, in the present case, the pursuer was not a servant in the employment of the defenders. He was, according to the allegations, using the siding as a servant of the Steel Company, who were entitled to the use of it. I see no reason to doubt that the pursuer, being lawfully there, was entitled to assume that no reasonable precaution had been omitted, and that the siding was in proper condition. Had a part of this embankment been removed or allowed to fall down, and had an accident occurred to him through the fault of the defenders in not using proper precautions, I think he would have had an action against the defenders, and that it would have been no answer to say that they had not contracted with him and were under no common law obligation to the public. By allowing the siding to be used by the servants of the Steel Company they incurred an obligation to use reasonable care in seeing to its condition and in guarding against its being left in a dangerous state.

"My opinion, therefore, in this case is, that the question whether there was fault on the part of the defenders is one of circumstances. I think that the question of fencing bridges was so dealt with by the Lord President in the case of *Clark* v. *The Caledonian Railway Company*, and the question of fencing the place in question here seems to be much of the same kind. A good deal may turn upon the length of this incline; the distance of the place where the engine stopped from the points, the mode in which these points were managed, and the condition of the way upon both sides of the rails. It is said to have been a dark night. This may suggest carelessness on the pursuer's part in not taking a lamp. But I cannot infer contributory negligence. The want of a lamp may admit of explanation, and the darkness may account for the engine having been drawn up at a greater distance than necessary from the points. I have no

information as to the distances at present; and on the whole I think that the proper course is to adjust issues for the trial of the cause.

"[*Inglis' case*] In Inglis' case I have some difficulty in holding that there is a sufficient allegation that the pursuer had any occasion to get off the engine at that place. He describes himself as a weigher, and I do not see that in that capacity he had anything to do with the points. But as he says that he went to assist the stoker, and that it was a dark night, I think that he also should be allowed an issue. If he was one of those who had a right to be there, the question whether the place was such as should have been fenced by the defenders, is a question which he is entitled to raise. For the obligation to fence, where it arises, seems to arise for the protection of all persons having a right to be at the place—*M'Martin* v. *Hannay*, 10 Macph. 411, p. Lord Neaves; *Ferguson* v. *Laidlaw*, February 1, 1871, 8 Scot. Law Rep. 33, p. Lord Justice-Clerk."

Thereafter the Lord Ordinary approved of the following issue in each action:—"Whether, on the morning of the 1st day of November 1882, the pursuer fell over an embankment on the defenders' line of railway, at a place at or near the Blochairn Steel Works, near Glasgow, and was thereby injured in his person, through the fault of the defenders, to the loss, injury, and damage of the pursuer."

The defenders reclaimed.

Additional authorities — *Ireland* v. *North British Railway Company*, November 1, 1882, 10 R. 53; *Greer* v. *Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069; *Woodley* v. *Metropolitan District Railway Company*, 2 L.R., Exch. Div. 384; *M'Monagle* v. *Baird*, December 17, 1881, 9 R. 364.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuers (Respondents)—Campbell Smith—Nevay. Agent—Robert Broatch, L.A.

Counsel for Defenders (Reclaimers)—Jameson—Lockhart. Agents—Murray, Beith, & Murray, W.S.

Saturday, May 19.

OUTER HOUSE.

[Lord M'Laren.

NIVEN, PETITIONER.

Husband and Wife—Desertion—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 5—*Dispensing with Husband's Consent—Adultery.*

A woman whose husband had deserted her without making any provision for her maintenance, presented a petition under sec. 5 of the Married Women's Property Act 1881, craving the Court to dispense with her husband's consent to conveyances of certain heritable subjects belonging to her. At the date of the petition she was living in adultery. *Held* that the adultery did not operate as a bar to the granting of the petition.

Section 5 of the Married Women's Property (Scotland) Act 1881 provides—"Where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

The petitioner Agnes Niven was married to James Niven on the 21st September 1877, and thereafter resided for some time in Wallacetown. A few months after the marriage the husband left his wife without making any provision for her maintenance. Thereafter she lived with a married couple related to him for some time, but afterwards left them and cohabited with a miner in Whifflet.

This was a petition at her instance to dispense with her husband's consent to a disposition of certain heritable property belonging to her which she had sold, and also to a disposition of certain other heritable property which, as heir-at-law to her grandfather and grandmother, and in implement of a disposition and settlement by them, she proposed to convey in favour of a cousin. She set forth that she had made efforts to trace her husband, and that the last time he was heard of was about a year before the presenting of the petition, since which time she believed he had gone abroad. In order to enable her to grant the dispositions above-mentioned, she prayed the Court, in terms of the fifth clause of the Married Women's Property (Scotland) Act, to dispense with the consent of her husband to them.

No appearance was made for him.

The petition was intimated on the walls and in the minute book, and served edictally on Niven.

The Lord Ordinary (M'Laren), after a proof of the averments, the import of which is fully stated in his Lordship's opinion, issued this interlocutor:—"Finds that the petitioner has been deserted by her husband, and that since such desertion he has not contributed to her support. Therefore dispenses with the consent of James Niven, the petitioner's said husband, to the necessary dispositions or conveyances to be granted by the petitioner of the subjects and others described in the prayer of the petition to the parties therein named, and which prayer to that effect is here held as repeated *brevitatis causa*, and decerns."

"*Opinion.*—I had some doubt in the course of the proof whether this case would come under the 5th clause of the statute under which the petition is presented. No doubt the husband left his wife unprovided for, but it is not a case of voluntary separation, and the wife is living in adultery with another man.

"The conditions governing the 5th clause of the statute are not exhaustive. There are just two specified cases in which it is competent to give the authority here asked—desertion and voluntary separation. The case raised here is one of desertion. According to the pursuer's statement, she was deserted by her husband after he had given her a beating. It appears that the husband did return to his house for a short time, and she remained for some time after he left her under the protection of a married couple. After a short interval the wife leaves that protection and goes off with another man, and when the husband is told of that he says he almost thought this would happen. If the husband himself was here he might say that there was no desertion, as he had good cause to