In this interlocutor the pursuer acquiesced.

Counsel for the Pursuer—Solicitor-General and Marshall. Agent—William Kennedy, W.S.

Counsel for the Defender—Watson and Rutherfurd. Agent—William Milne, S.S.C.

Wednesday, February 28.

FIRST DIVISION.

JAMES LEITCH LANG *v.* JULIA DOWNIE AND OTHERS.

Process—Multiplepoinding—Consignation.

Where an action of multiplepoinding of executry funds was raised in name of the executrix as holder, while the funds were actually in the hands of her agent, who had undertaken a certain obligation to the cautioner of the executrix and also to parties having a claim against the funds:

Held that, the actual holder having been sisted as a party to the action, it was competent to ordain him to make consignation in the hands of the Clerk of Court, reserving to him all claims of lien which he might have in respect of his obligation or otherwise.

Counsel for the Appellant—Macdonald. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for the Respondents—R. Johnstone. Agent—J. B. M'Intosh, S.S.C.

Saturday, February 24.

SECOND DIVISION.

LORD ADVOCATE *v.* JAMES DRYSDALE.

Teinds—Inhibition—Tacit Relocation—Bona Fide *Perception.*

A lease was granted by the Crown to certain proprietors, for themselves and in trust for the whole other vassals of the Lordship of Dunfermline, of the teinds and feu-duties of their lands, in consideration of a *cumulo* tack-duty of £100. This lease expired on 23d March 1780; but it was admittedly continued by tacit relocation till 1838. In May and June of that year the Crown raised and executed an inhibition of teinds, and also obtained decree in an action of removing, putting an end to the lease as at 23d March 1839, so far as it related to subjects other than teinds. Thereafter the beneficiaries under the lease paid the feu-duties due from their lands to the Crown; but no teind duties were paid or claimed till 1868.

In an action at the instance of the Crown as titular, against one of the vassals of the Lordship of Dunfermline, for payment of arrears of surplus teinds since the date of the inhibition, *held* that the defender had at least a colourable title, sufficient to sustain the plea of *bona fide* perception. *Opinion*, that the inhibition of 1838 was inept on account of its having been too late to affect the crop of the current year; that in any case it had been derelinquished, and that the lease had thus been continued, *quoad* teinds, by tacit relocation down to the date of the action.

In this action the Lord Advocate, on behalf of the Crown, claimed various sums, amounting, exclusive of interest, to £1136, 3s. 0d., being arrears of the surplus teinds of the defender's lands of Easter and Wester Pitteuchar, due to the Crown as titular of the teinds of the Lordship of Dunfermline.

On 2d October 1783 a lease was granted by the Crown in favour of the Earl of Elgin and others, "for themselves and for behoof of the haill other vassals of the said Lordship of Dunfermline, and heritors of lands, the teinds of which, or feu-duties payable out of the same, belong to the said Lordship, and to the survivor or survivors of them and their assignees, and the heir or assignees of the last survivor," of "All and whole the foresaid Lordship of Dunfermline, and all lands, mills, woods, fishings, towns, burrows, annuairents, tenements, customs great and small, kirk's teinds, great and small, tenants' tenandries, as well of burgh as of land, teinds, farms, duties, feu-farms, teind-duties, interests of price of teinds, profits, emoluments, casualties, and others whatsoever pertaining or annexed thereto, or to the patrimony thereof." The tack-duty was fixed at £100 sterling, payable at Whitsunday yearly, and the duration of the lease was to be for nineteen years from and after the 23d day of March 1780. After the expiration of this tack, in 1799, it was admittedly continued by tacit relocation till at least 1811; but the defender averred that it continued till 1838, and the case was argued in the Inner House on that assumption. On 20th and 27th May and 10 June 1838, an inhibition of teinds, at the instance of Her Majesty's Solicitor of Teinds, was executed against the Earl of Elgin (the sole survivor of the lessees named in the tack) and the other heritors and possessors of the lands out of which the teinds were due, "that they, nor none of them, presume nor take upon them, under any colour or pretext, to lead, intromit with, take away, or dispose upon any of the teinds of the foresaid lands, liable in payment of teinds to the said commissioners as having right in manner foresaid this instant crop and year 1838, without tack, license, or tolerance of the said commissioners first had and obtained thereto."

In order to put an end to the tack in so far as it included other subjects than teinds, the Commissioners of Her Majesty's Woods and Forests raised an action of removing in the Sheriff-court of Fife against the Earl of Elgin; and in this action a judgment was pronounced deciding in effect that an end was put to the tack as at 23d March 1839, so far as it related to subjects other than teinds.

In the year 1839 a correspondence took place between the Commissioners of Woods and Forests and the agents of Lord Elgin as to a settlement of arrears of tack-duty. The negotiations were conducted on the footing that the tack was at an end at Whitsunday 1839; and in 1851 the trustees of the Earl paid the whole arrears of tack-duty due at that term, with interest thereon till 1851.

Mr Drysdale, the defender in this action, was one of the vassals of the Lordship of Dunfermline, being proprietor of the lands of Easter and Wester Pitteuchar, the teinds and feu-duties of which were included in the lease above mentioned. Since Whitsunday 1839 the defender and his father had paid the feu-duties for their lands to the Crown; but they paid no proportion of tack or teind-duties for the period subsequent to 1839, either to the Earl of Elgin or to any other person as in right of the lease.

The Crown now claimed as titular the arrears of surplus teinds since the date of the inhibition. It was admitted that no claim was made therefor till 9th October 1868, and that the defender and his predecessors uplifted and consumed the whole rents and produce of the lands, including teinds, without being aware that any such claim existed against them. In consequence of doubts as to the effect of the inhibition of teinds of 1839, a new inhibition was executed in March and April 1871; and the defender thereafter purchased the teinds of his lands.

The pursuer pleaded:—"(1) The said tack, in so far as it related to teinds, having been brought to an end by the said inhibition in 1838, and there having been no subsequent derelinquishment of the said inhibition, the Crown is entitled to decree, &c. (2) As the tack was one of feu-duties as well as of teinds, with a *cumulo* tack-duty for both, the putting an end to it in respect of the feu-duties imported the putting an end to it altogether, especially in the circumstances, or, at all events, prevented the operation of the principle of tacit relocation as to teinds. (3) Or otherwise, it having been expressly agreed or understood by the said Earl of Elgin during his life, as sole surviving lessee under the said tack, and subsequently by his trustees, on the one hand, and the Commissioners to Woods and Forests on the other hand, that the said tack as a whole should be held and dealt with as having come to an end as at Whitsunday 1839, and a final account having been adjusted and settled on that footing between the trustees of the said Earl of Elgin and the said Commissioners of Woods and Forests in 1851, the Crown is entitled to decree for the sums referred to in the first plea in law. (4) The said tack was at all events brought to an end by the death of Lord Elgin in 1841; and the said tack having been thereafter incapable of renewal by tacit relocation, and no new tack of the subjects therein contained having been subsequently granted, the Crown is entitled to decree for the surplus teinds for all crops and years subsequent to Lord Elgin's death."

The defender pleaded—"(1) The said tack having subsisted by the tacit relocation up to the present year, the defender is not liable for the surplus teinds of his said lands of Easter and Wester Pitteuchar. (2) The inhibition executed in May 1838 was disrelinquished or put an end to by the exaction of the tack-duty payable at Whitsunday 1839, and the acquiescence on the part of the Crown in the continued possession by the defender and his predecessors without making any claim for surplus teind. (3) *Separatim*, the claim now brought forward is excluded by the defender and his predecessors having received and consumed the rents and produce of the lands *bona fide*, in the belief that no such claim existed."

The Lord Ordinary in Exchequer (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh*, 21*st November* 1871.—The Lord Ordinary having heard counsel for the parties, and considered the record and proceedings, including the proof and joint note of admissions—Finds, as matter of fact, (1) That the teinds and feu-duties of the lands of Easter and Wester Pitteuchar belong to the Lordship of Dunfermline, and that the Crown is titular of these teinds; (2) That the Crown lease of the lands and feu-duties of the Lordship of Dunfermline, founded on and referred to in the record, was put an end to prior to the free or surplus teinds now sued for becoming due; and (3) That the said free or surplus teinds are resting-owing by the defender to the pursuer: With these findings, Appoints the case to be enrolled, that parties may be heard as to the sum for which decree is to be pronounced, and on the question of expenses of process.

"*Note.*—The primary and substantial question in dispute between the parties in this case is, Whether the Crown lease referred to was, or was not, put an end to prior to 1839. The pursuer contends that it was, and, consequently, that the defender is now resting-owing to the Crown the free or surplus teinds of his lands accruing for the years and crops 1839 and 1869, and intervening years. On the other hand, the contention of the defender is, that the lease referred to did not come to an end, as maintained by the pursuer, but continued to subsist by tacit relocation till the present year, and, therefore, that he is not liable to the pursuer for the free or surplus teinds concluded for.

"The lease referred to having been granted in 1783, for nineteen years from and after 23d March 1780, expired in 1799, but was admittedly continued, by tacit relocation, until 1811. Whether it was also continued until 1839, although matter of dispute, does not require to be now determined. And neither party indeed has any interest, so far as the Lord Ordinary can see, to raise a discussion on the point, seeing that a settlement, on the footing of the lease, was come to sometime ago for the period prior to Whitsunday 1839, and that the claim in the present case applies only to the subsequent period.

"In regard to this subsequent period, there are various important circumstances to be kept in view:—(1) The lease referred to embraces, not only the teinds, but also the feu-duties of the Lordship of Dunfermline; and for both there was payable a *cumulo* rent of £100, without any distinction being made as to how much of that sum was to be held as for the teinds, and how much for the feu-duties. (2) This being so, it is not easy to understand how tacit relocation could have been interrupted, and the lease effectually brought to an end in March 1839, as it admittedly was *quoad* the feu-duties, and not as regards the teinds. And, at any rate, (3) The inhibition, which was admittedly used in 1838, must, the Lord Ordinary thinks, be held in the circumstances to have effectually interrupted tacit relocation as regards the teinds, even supposing that the lease could have been thereafter continued till March 1839 *quoad* the feu-duties.

"Nor does the Lord Ordinary think that the defender was sound in his contention that the inhibition, not having been followed up by any steps for the purpose of ousting the tenants from possessing under the lease, must be held to have had no effect.

"The truth is, that the proper tenants had not possessed, or, at any rate, there is no evidence that they had possessed, under the lease after 1811; for, although the settlement above mentioned included all arrears of tack-duty down to Whitsunday 1839, it is obvious from the correspondence, Nos. 15 and 16 of process, and the account No. 14 of process, that it was made by way of compromise, and not in respect of the tack being continued by tacit relocation till Whitsunday 1839. No proceedings, therefore, were necessary after the inhibition was used to oust the tenants from possession. And, most certainly there is no evidence whatever that after Whitsunday 1839 they have drawn or at-

tempted to draw from the defender or any other vassal in the Lordship of Dunfermline, in virtue of the lease, a single farthing either of feu-duty or teinds; and, admittedly, the Crown has not drawn or received any rent whatever under the lease. Neither does the defender say that he has paid, or been asked to pay, since Whitsunday 1839, anything to the proper tenant or tenants under the lease. There neither was, nor could therefore have been, any possession under the lease during the period in respect of which the teinds in question are now sued for. And, indeed, the defender, as the Lord Ordinary understood his argument, did not contend that there was, except in the sense that he has remained since 1839 in possession of his free or surplus teinds: but clearly, such possession cannot be held to be possession under the lease, any more than it would have been before the lease was granted, or would be now in 1871, when it is not pretended that there is any lease. Besides, the defender is not the tenant, or one of the tenants, under the lease; and the circumstance of the lease having been granted to other persons, partly for his behoof and that of many others, cannot make him so. There never was any privity of contract under the lease in question, as between the Crown and the defender.

"In the circumstances, and for the reasons now adverted to, the Lord Ordinary can arrive at no other conclusion than that the defender is liable to the Crown in the free or surplus teinds sued for, and he cannot give any effect to the defender's third and fourth pleas in law. In regard to the latter plea, it is sufficient to say that no evidence has been adduced in support of it, and, indeed, it was not maintained at the debate. And in regard to the defender's third plea in law, the Lord Ordinary does not see how, in the circumstances, it could be entertained. The last surviving tenant under the lease was Lord Elgin, and his agent Mr Rolland has given evidence to the effect that the settlement, which has been more than once referred to, for all arrears prior to Whitsunday 1839, was made on the footing that the lease had by that time come to an end, and that thereafter there was no possession under the lease. There cannot therefore be any good foundation for the defender's plea of *bona fide* consumpt, for not only has he had no title or colourable title of possession of the surplus or free teinds in question, but the correspondence which took place between the agents for the Crown and the agents of Lord Elgin, the last surviving tenant under the lease, must be held to have given very distinct notice to all concerned that these teinds required to be accounted for, and paid to the Crown. Whether the defender is liable in interest is a different matter, which the Lord Ordinary is not to be understood as prejudging in any way by the remarks he has now made. He rather understood, from what passed at the debate, that interest was not to be insisted for.

"It is presumed the parties will have no difficulty in arranging as to the sum for which decree is to be pronounced. But, as the question of expenses has also to be spoken to, it is hoped the case will be again moved in without delay, and while the discussion which has already taken place is fresh in the recollection of the Lord Ordinary."

"12*th December* 1871.—The Lord Ordinary having heard parties' procurators, and considered the joint minute for the parties, No. 36 of process, decerns against the defender to make payment to the Lord Advocate, on behalf of Her Majesty, of the sum of £1006, 0s. 4d. sterling, as the amount of surplus teinds for the lands of Easter Pitteuchar, and of the sum of £130, 2s. 8d. sterling, as the amount of surplus teinds for the lands of Wester Pitteuchar, with interest on the said sums from the 4th day of April 1871, being the date of service of the subpœna until payment; finds the defender liable in expenses, subject to modification, and remits the account thereof to the auditor to tax the same and to report."

The defender reclaimed.

MILLAR, Q.C., G. WEBSTER, and GIBSON, for him.

Solicitor-General (CLARK) and T. IVORY for respondent.

The following authorities were referred to:—*Balfour* v. *L. Balmerinock*, July 15, 1615, M. 6433; *Blantyre*, March 18, 1628, M. 6434; *Lord Advocate* v. *Skene*, March 15, 1860, Erskine ii, 10, 35; *Stirling* v. *Easton*, Feb. 27, 1733, 1 Paton's Appeal Cases, p. 90; Stair ii, 1, 24; *Anderson* v. *Forbes*, Jan. 17, 1796, M. 15,344; *Crs. of Dunfermline* v. *Officers of State*, Feb. 1. 1705. M. 15,320; *Strathnaver* v. *Renton*, June 10, 1675, M. 15,342; *Sinclair* v. *Sinclair*, July 31, 1773, 5 Brown's Sup. 483; *Douglas* v. *Wedderburn*, July 19, 1664, M. 7748; *Urquhart* v. *Moray*, Dec. 10, 1823, 2 S. 567.

At advising—

LORD JUSTICE-CLERK—This is a claim by the Crown for arrears of teinds of lands belonging to the defender for a period of thirty years. The defence is twofold—first, that these teinds were held under a tack which had been renewed by tacit relocation until the raising of the present action; and secondly, that at least the claim of the Crown is excluded by the plea of *bona fide* perception and consumption. We have to deal with these two pleas. As to the first, it is necessary to attend to the nature of the tack founded on. It was a right of a peculiar character. It was granted by the Crown to certain proprietors within the lordship of Dunfermline, for themselves, and in trust for all the other heritors and vassals of the Crown. It was truly a trust, I cannot doubt, for the benefit of the Crown vassals. It comprised, *inter alia*, the teinds and feu-duties exigible by the Crown from the vassals and heritors. These were let for nineteen years and crops from 1780 (although the date of the tack is 1783), at a rent of £100 a-year,—the first year's rent being payable at Whitsunday 1781. The tenants were taken bound to relieve the landlord (the Crown) of minister's stipend, schoolmaster's salary, and other public burdens; and the lease was taken in the names of certain parties, and the survivor of them, and the heir of the last survivor; but it was, in fact, a trust for all the Crown vassals of the lordship who paid their proper share of the rent and burdens, and it must be assumed, I think, that in this case they did so. The provision that they should only be entitled to the benefit of the tack upon making that payment is a matter with which the landlord had no concern, and was entirely for the benefit of the tenants in trust. They were entitled to draw the full teind if the amount or proportion of their payment was equal to the sum provided under the tack. Now, it is admitted that this lease was continued by tacit relocation until 1838; but in July of that year—I believe May and July are the two dates—the Crown used an inhibition in ordinary form as regarded the teinds of the crop and year 1838; and, as regarded the feu-duties and other subjects, the Crown raised an action before the Sheriff for

the purpose of determining the lease, in which action a decree was obtained in 1839 in regard to the subjects other than the teinds. It is admitted that the defender has paid to the Crown year by year the feu-duties of his lands since 1838, and that he has paid no part of the teinds since that date, and that no demand upon this account has been made upon him. The teinds are valued; and I assume (although our information is scanty upon this head) that the defender has paid his proportion of stipend direct to the minister. There is no allegation upon that subject; but, as there is no statement that that was paid by the Crown, I assume that he continued to pay his proportion of stipend. There is thus no question that, as regards the feu-duties, the lease was at an end in 1839; and the question is, Did it also terminate as regarded the teinds? With regard to the inhibition which was used in 1838, it is said that that was inept on three grounds—first, because it was used too late; second, because it was not followed out for thirty years; and third, because it was of no use, by payment of the rent for that year having been accepted. As to these pleas, I may say that, if the inhibition was otherwise effectual, I do not think the settlement with the trustees of Lord Elgin thirteen years afterwards would affect it; but I am of opinion that, on the other two grounds, the inhibition was ineffectual. In the first place, I cannot doubt that, in a composite tack of this kind, tacit relocation took place unless there was notice before the term of entry to the tack; and as that was from the 23d of March in each year, I have no doubt that on the 23d of March 1838 this tack was renewed by tacit relocation for a year, and that it is impossible in that respect to make a separation between the teinds and the rest of the subjects. But, even if that were not so, I think the delay of thirty years in following up the inhibition is fatal to it. An inhibition of teinds, although it puts a tacksman in bad faith to intermeddle with the teinds, and exposes him to an action for spuilzie, is only a warning—an introduction, which requires to be acted on in order to preserve its effect. It does not of itself terminate the tenant's possession, or give the lessor a right to possess; and if it is not followed out with reasonable despatch, and the tacksman is left in possession, it is held to be passed from, and the action for spuilzie is excluded. I may say that I think the clearest definition of the nature of an inhibition of teinds is to be found in Lord Stair, where he explains that that form was derived from the canon law, and he seems to think that an inhibition of teinds was the origin of an ordinary inhibition in cases of debt. I quite distinguish this case from the case of the *Magistrates of Forfar*, quoted by the defender, in which the point seems to have been directly decided. It is true that in this case no part of the tack-duty was paid by the Crown under the inhibition, but the minister's stipend, which the tacksman was bound to pay out of his lease, continued, I presume, to be paid by him. It would therefore seem that the tack, as regarded the teinds, had not been terminated by common judicial proceeding until this action was raised. It does not, however, follow that it subsisted; and this raises the most difficult question in the case—namely, Whether the lease, as a whole, has not been conclusively surrendered. I think Lord Elgin in 1839, as the survivor of the trustees, had a right to renounce possession under the lease; and, if the Crown had assumed possession, the defender probably could have had no right to resist. But then the Crown did not assume possession, and the act of the trustee was never followed out. The defender did acquiesce in the surrender of the tack, as regarded the feu-duties, because he paid them; and it is contended with great force that, as the rent was *in cumulo*, the termination of part of the lease must be held to stop tacit relocation entirely. I do not disguise that this argument is a very strong one, but I am not satisfied that it is necessarily conclusive. The tack did admit of division, and the proceedings in 1838 and 1839 assumed that it did so—that it might be terminated as regarded the teinds, and not terminated as regarded the feu-duties. The procedure adopted necessarily implied that, and indeed, from the nature of the subjects let this must have been so, for the teinds of some of the lands might be purchased by the heritors that were entitled to purchase, notwithstanding the tack, and, in point of fact, this was largely done during the currency of the tack, the rent payable to the Crown suffering a corresponding abatement. The same thing might have happened with regard to the other subjects which were included in this lease, and in the course of the currency of a tack of this kind part of the subjects might have been shifted from one cause or other, by which the amount payable by the tacksman was diminished. The necessary result of that was, not to bring the tack to an end, but to make a proportional abatement in the rent which was exigible; and there was no difficulty manifestly in telling the proportion which should be so abated, because the proportion was exactly that which the heritor and vassal was bound to pay to the tacksman and his trustee. But I have great difficulty upon this part of the case. The inclination of my opinion would be that the tack was not terminated as regarded the teinds, but what I have said is almost conclusive with regard to the second point, because, with the difficulty that arises upon the question whether the title subsisted, there seems little doubt that there was colourable ground for believing that it did subsist. I think therefore that the defender is released on the ground of tacit relocation from this claim for repetition of bygone teinds, which is a very unfavourable claim, as any colourable title with possession will be sufficient to put the heritor in good faith, and to exclude the claim for byegones. I have not found any case in which that doctrine was not applied where there was any colourable title at all for the possession. The two elements that arise here are, first, that the possession commenced upon a sufficient title, and secondly, that the title was one which admitted of being continued by tacit consent; and if to these two pleas are added the fact that there is no act on the part of the titular to put the heritor in bad faith, I think that of itself would have been enough. Here, however, there is not only that, but a very reasonable ground for maintaining that the title itself subsisted. But it is clear that, although the possession and good faith may not protect the tenant against the destruction of his title, as I think was said in the case of *Anderson*, it may be quite sufficient to protect him from a claim for repetition. I shall only upon this matter say that the report of the case of *Scott of Ancrum* v. *The Heritors of Ancrum*, in Bell's Folio Cases, seems to me to contain the clearest statement of the principles of law applicable to this subject that I know, and, in particular, the opinions of Lord President Campbell and Lord Justice-Clerk Braxfield as given by Mr Bell. The Lord President says—"It is a very

serious question whether an heritor is to be made liable for byegone teinds. I am one of those who think such claims most unfavourable. It is extremely hard that an heritor, ignorant who has the true right to the teinds, and paying *bona fide* and without challenge to the minister, should be exposed to such a claim; and little favour is due, on the other hand, to a titular who lies by all the time, careless of his own rights, and then comes forward with a claim for the teind of forty years." Lord Braxfield's observations are still more to the point. He says—"There was complete *bona fides*, and I hold that every colourable title saves from byegones; it was so decided in the *Earl of Haddington* and *Earl of Hume*. There the byegone teinds of thirty-nine years were claimed, but they were not allowed. I was counsel in the case, and I remember the opinion of the Court was that a titular who allows heritors to possess is not entitled to complain of their intromission, but is held to waive and to intend to waive his claim for teinds." I think that is a true statement of the law, and I think it is entirely applicable to the facts of this case. There is a dictum of Lord Justice-Clerk Hope in the case of *Trinity Hospital* to the same effect, where he says that a delay of five years in following out an inhibition will raise a plea of *bona fide* perception. I have now shortly stated the principles upon which I come to that conclusion; but Lord Benholme has been good enough to prepare an opinion going fully into the facts and principles applicable to this case, and I entirely concur in the views which he has communicated to us, and which will be laid before the Court.

Lord Benholme—The question to be determined in this case regards the footing upon which the defender is bound to account for the teinds of his lands within the Lordship of Dunfermline, to the Crown as titular, from the year 1839, to which date the last settlement was brought down, till 1869, the year when he purchased those teinds. During this period of thirty years the pursuer contends that the defender is bound to account for the full surplus teinds, as not being embraced in any tack; whilst the defender maintains that he is entitled to have the account taken upon the footing of a tack originally granted by the Crown in 1783, for nineteen years, and subsequently prorogated by tacit relocation till the last of the said dates. The defence embraced this alternative form—that if the subsistence of the tack during the period in question cannot be affirmed as a strictly legal position, yet he is entitled to plead it as a colourable title upon which is to rest his plea of *bona fide* perception and consumption of his teinds.

In order fully to understand the object and the effect of the tack of 1783, it is proper to refer to the well known practice of the Crown in former times, and indeed until a comparatively recent period, of dealing with teinds of which the Crown held the titularity. This practice was to grant tacks of their teinds to each of the heritors at an easy and sometimes almost a nominal tack-duty which tacks they were used to renew from time to time as occasion required.

The great number of persons liable as heritors and vassals within the Lordship of Dunfermline rendered it troublesome, if not impracticable, to follow this course in regard to the revenues of this Lordship, consisting of feu-duties, teinds, and others; and the plan was adopted of giving the same substantial benefit to the heritors and vassals by granting a tack of the whole Lordship and its revenues to certain individuals among them, in trust; the beneficiaries being the whole parties liable for these revenues within the Lordship—an aggregate sum, £100 per annum, being the tack-duty to be paid for the whole. That this lease was no other than a pure trust is ascertained by the express terms of the tack; the lessees, as trustees, having no individual benefit from the tack beyond that which they shared with the other beneficiaries as vassals or heritors. As to the persons of the trustees besides the original lessees, they were declared to be the survivors or survivor, and the heir or assignees of the survivor.

The original tack necessarily would expire in 1802. But it seems to be admitted on all hands that it was prorogated till 1839 by tacit relocation. What took place in 1838 and 1839 requires to be carefully attended to.

The tack was for so many years and crops from the 23d March 1783. The effect of prorogation, therefore, was to prolong the tack, on the arrival of the 23d March of each year to the 23d of March of next year. Thus, after the arrival of the 23d March 1838 without warning or interruption, the tack was prorogated till March 1839, and of course included not only the feu-duties, but also the teinds of 1838.

In 1838 an action of removing was raised by the Crown against Lord Elgin, which was terminated by decree of removing as at Whitsunday 1839 from all the other subjects of the tack except the teinds. As to the teinds, an inhibition was used in May and June 1838, the prohibitions of which, however, extended only to the crop of that year. Now, it has been argued, and apparently with some reason, that this diligence was totally inoperative, in respect the teinds of 1838 fell under the terms of the original tack as prorogated for a year from 23d March 1838; that as to the teinds of subsequent years it was equally inoperative, since the efficacy of an inhibition upon future crops depends upon its efficacy upon the crop specially and exclusively mentioned in its prohibitions. The *ratio* of this doctrine was illustrated by the analogy of a claim which is effectually severed by the destruction of any one of its links by which its continuity is absolutely dissolved, whereas if the link against which the force is employed stand the shock and remain unimpaired, the whole chain is as entire as it was before.

The contention that the crop of 1838 fell under the tack seems to have been admitted by the Crown in the settlement of arrears effected in 1851, by which the teinds of 1838 and the other revenues of the Lordship were estimated, as under the tack, at £100.

The defender's doctrine, regarding the necessity of the inhibition being effectual as to the crop to which it relates, in order to have any effect on subsequent crops, seems to quadrate with the dictum of Forbes (p. 437), who observes, "Inhibition of teinds is the legal and habile way of interrupting tacit relocation and use of payment, which *being once duly raised and execute* hath the like effect as a warning against the tenants and possessors of lands for that and all subsequent years."

The necessary inference seems to be that its efficacy as to subsequent years depends upon its efficacy as to the year specially embraced in its prohibitions.

But perhaps the most weighty argument against the efficacy, or at least the subsistence of the in-

hibition of 1838, is the fact that for thirty years thereafter the advisers of the Crown took no single step to follow it up by demanding from the defenders that which, on the supposition that the inhibition put an end to the lease, they were entitled to demand, the surplus teinds of the defender's lands. In the case of *Lady Christian Graham* v. *Pate*, Feb. 20, 1790 (M. 11,063) an inhibition was held to be lost by *mora*, an interval of thirty-four years having elapsed from the date of the inhibition to the raising of the action. The judgment of Court, following upon an action raised in 1796, proceeded expressly on this ratio; "In respect the pursuers did not follow out their inhibition of teinds executed in 1762."

A similar judgment was pronounced in the case of the *Magistrates of Forfar* v. *Carnegy*, 1775 (Brown's Sup. 5, p. 483) in which it was found that "an inhibition of teinds may be passed from, and by not being insisted in for a tract of years, and the acquiescence of both parties in a state of possession contrary to what was intended by the inhibition."

I arrive at the conclusion that the first plea in law stated by the pursuer, which is founded exclusively upon the inhibition, ought to be repelled.

The pursuer's second plea seems to me to savour of metaphysics rather than of equity. It is to the effect that the tack, being one of feuduties, as well as teinds with a *cumulo* feu-duty, the putting an end to it as to the former must be held to extinguish it also as to the latter. Perhaps the only practical embarrassment the defender has to encounter in meeting this plea is the apparent difficulty of apportioning the *cumulo* tack duty between the one of these sources of revenue and the other. Yet, that such an apportionment is practicable, and is in fact contemplated by the tack itself, seems undeniable. The tack provides that the whole heritors and feuars are to be entitled to the benefit of the tack on their "paying to the lessees a rateable proportion of the said tack-duty of £100 per annum," &c. This provision contemplates an apportionment of the tack-duty, not only as between the feu-duties and the teinds, but also the farther apportionment of each of those portions of the tack-duty among the individual beneficiaries *inter se*. Such a detailed accounting was absolutely necessary in operating the relief of the last surviving lessee, whose trustees, on his account, had to settle the claims of the Crown, founded upon the lease, for arrears as between the years 1812 and 1839.

Further, it may be observed that such an apportionment of the tack-duty, in so far as regards the teinds, was to a certain extent made the basis of that long accounting, and regulated the diminution of the tack-duty, rendered necessary by the intermediate purchase of their teinds by certain of the heritors previous to 23d March 1839.

By these purchases the teinds of the several purchasers were, from the date of the purchase, excluded from the subjects of the tack. The *cumulo* tack-duty required therefore to be diminished, or, in other words, a deduction to be given from the £100 as from the date of the respective purchases. This was clearly stated by Mr Horne in his letter of 9th December 1850, as follows — "The commissioners will also deduct from the tack-duty the proportion which the subjects (teinds), purchased and paid for by certain of the vassals, bears to the whole subjects of the tack."

This principle of apportionment was accordingly followed out in the accounting. The proportion of the whole tack-duty effeiring to the teinds of each heritor who had purchased his teinds was held to be the interest of the purchase money, which of course had been struck at nine years' purchase.

In effect, this interest was in the accounting deducted from the whole tack-duty as at the date of the purchase, and interest charged only on the remainder. Had the account been made to assume a single continuous form—as in the interest account of a bank credit or deposit account—this would have clearly appeared to be the principle of the accounting. But exactly the same result was arrived at by the mode of stating the account actually adopted, viz., the whole tack-duty, with interest, was set out as the debit of each year in an account of charge, and then, in a separate account of deductions, the interest of the prices of the teinds was stated as a capital sum as at the date of the purchase; and interest accumulated on that capital sum at the same rate as was charged in the charge account,—the sum total of the one being deducted from the other to bring out the true balance as in 1839.

It would be premature to determine what annual sum the Crown may be entitled to in place of the full surplus teind-duties, since upon that subject there has hitherto been no discussion. But of this I am satisfied, that the difficulty, whether of mere form or of actual practice, is insufficient to prevent the application of the pleas stated in defence.

The pursuer's third plea proceeds upon an assumption, both of fact and of law, which seems utterly inadmissible. The alleged understanding or agreement of the late Earl of Elgin, that the lease terminated in 1839, or that of his trustees after his death, is supported by no proper evidence. And even if it were, the beneficiaries, who are not alleged to have been cognizant of either, cannot be affected thereby.

The pursuer's fourth plea in law, founded on the death of the late Lord Elgin, is manifestly ill-founded, since the tack expressly was conceived in favour of his heirs or assignees. And besides, the subsistence of a trust, by which important benefits are constituted in others than the trustees, does not come to an end by the failure of the trustees, who are merely the hand by which these benefits are to be drawn and administered.

Of the pleas maintained for the defender, it is perhaps necessary only to notice separately the third, which is this—"*Separatim*, the claim now brought forward is excluded by the defender and his predecessors having received and consumed the rents and produce of the lands *bona fide* in the belief that no such claim existed."

This plea assumes its alternative form from the circumstance that it is relevant, and indeed is only properly applicable, upon the supposition that the defender is unable to establish an absolute exclusion of the pursuer's pleas considered above. For if he were successful in absolutely overthrowing the pursuer's pleas, then this alternative plea on his own part would be superfluous and unnecessary.

To sustain the plea of *bona fide* perception, it is notorious that a mere colourable title is sufficient. Nay, it has been held that an expired tack, even when tacit relocation is out of the question, is a colourable title, in respect of its ambiguity in regard to its duration—such as to defend from a

claim for repetition of the real rent of lands during the period of litigation as to its true meaning between the landlord and tenant. I refer to the case of *Carnegy* v. *Scott*, Dec. 4, 1827, which was affirmed in the House of Lords.

In this case, immediately on the death of Patrick Scott, the original tenant, the landlord Mr Carnegy brought his action of removing against his daughter and heiress. In defence it was stated that the lease did not expire on her father's death, but continued during her own life. A litigation ensued, which lasted for eight years, in the course of which conflicting decisions were pronounced. By the ultimate judgment in the House of Lords it was determined that the lease expired on the death of Patrick Scott.

A subsequent litigation then ensued, in which the landlord insisted that, if not entitled to violent profits, he was at least entitled to the actual rents of the lands (which had been sub-let at a large surplus) from the date of his action of removing. But the defence of *bona fide* perception was sustained, both in this Court and in the House of Lords, relieving the tenant from any other demand during those years than payment of the principal tack-duty stipulated in the expired tack.

This case seems to be a stronger one than the present in favour of the defender, in respect, *first*, that the colourable title was truly in law a nullity; *secondly*, that there was no want of diligence—no laches on the part of the landlord—nor any conduct or attitude on his part that could mislead the defender; and *thirdly*, that the question related to the rent of lands, and not to teinds.

This last difference is of considerable importance, since the claim for bygone teinds is looked upon with peculiar disfavour by the law. In the case of *Scott* v. *Heritors of Ancrum* this bias of our practice is announced authoritatively from the Bench as follows:—"Claims for arrears of teinds are extremely unfavourable. If the demand had been made in proper time, the heritors would in all probability have purchased their teinds. Any title of possession, therefore, sufficient to put them in *bona fide* to suppose that they were not liable to a claim of this nature, is always sustained as a valid defence against it."

The application of this doctrine to the present case is strikingly obvious. The long continued silence or laches of the pursuer has unquestionably operated as a snare to the defender, in as much as the defender is pursued for thirty years' purchase of his surplus teinds, whereas, had the pursuers brought their demand in 1839, the teinds would undoubtedly have been bought at nine years' purchase. The defender's position is aggravated by the necessity he has lately been under of paying nine years' purchase of his surplus teinds, independently of the severe fine of thirty years' more with which he is threatened by the present action.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, and the third plea in law for the defender sustained.

Lord Cowan—The opinion which Lord Benholme has just given was, as your Lordship has stated, submitted to us in consultation, and the grounds of the conclusion at which he has arrived were fully discussed and considered. These grounds of judgment have my entire acquiescence. The difficulty which I have had throughout the argument has arisen from the apparent want of a proper divisible title on which the plea of *bona fides* could be maintained; but I think the grounds which have been stated by my brother, and also by your Lordship, conclusively show that this was not an indivisible title, but was truly a divisible title, and was recognised as such in the settlement which took place between the Crown and the heritor in 1851. Therefore the difficulty which pressed upon me with regard to a title upon which the plea of *bona fides* could have been maintained has been removed, because, although as regards the feu-duties that tack had certainly come to a close, there was the means of having separated from it the money to be paid for the teinds under the tack, had the Crown thought fit to have insisted upon their right; and as that matter was at least attended with great difficulty, that difficulty which I have felt is sufficient of itself to support the plea upon which the defender rests. It is at all events a colourable title to support the plea of a *bona fide* perception of the subject. I have only to add that, as regards any additional matter to which your Lordship referred in your opinion delivered to-day, that also has my entire acquiescence in any respect in which it may differ or enlarge upon the points that are not already discussed by the opinion of Lord Benholme.

Lord Neaves—I also concur in the opinions which have been delivered. This is a very important case, as we are now deciding it, as a protection for the parties against what are certainly extremely hard and severe claims at the instance of the titular. One great reason why these are more unfavourably viewed is perhaps the peculiar nature of the right. If you were to have an accounting for teinds going back for forty years, without any warning or intimation to the heritor that he was to be so sued, you might in the general case—and the law will take its colour from the general case—be involved in litigation of the most vexatious and embarrassing kind, because, whenever you come to an arrear of teinds—unless in the single case of a valuation, which may or may not exist—you get into an inquiry as to every crop that has been grown upon the lands from the time of the commencement of the accounting, in order to know what was teindable and what was not, and what the teinds consisted of. You are not to take a certain aliquot part of the rental; that, I understand is not the law or the practice in a bygone accounting; but you are to inquire into the actual teinds; and, in fact, it proposes that you should deal with the party as having in each of the years committed a spuilzie upon these teinds. That being the case, the law is very unwilling to institute such an oppressive inquiry where there has been *bona fides* with any colourable title—perhaps with a weaker title than might protect a party in another case. The difficulty here, however, is, as Lord Cowan has observed, upon the divisibility of this title; but, upon full consideration, I am convinced that in its own nature it was a divisible title. It contained subjects that were to some extent aborigines, and these subjects were such that tacit relocation with regard to each of them required to be used in a different manner. There is no way of stopping tacit relocation in a tack of teinds except by positive renunciation—except by inhibition; whereas in the case of lands or other subjects you can determine the tacit relocation by a sufficient warning, although that warning, of course, may be passed from again. But the nature of the subjects also showed that this was a divisible

title, because the teinds were terminable by purchase; and when the Crown ceased to be the landlord of the actual teinds, these teinds of course ceased to be the subject of a tack. The Crown could not receive a rent for teinds of which they were not to continue to be the titulars. They must have abated, as they did abate, from the tack-duty what effeired to the purchased teinds, because then the party became owner of them in his own right, and nothing had to be paid for them. That might obviously separate the tack into parts. Besides, on the other grounds, I agree with your Lordship that, without fully determining whether this would be available in feudal law, it is at least such a colourable title as in the circumstances fully justifies the defender in escaping from an accounting for bygone teinds. He has already paid his nine years' purchase, I understand; and if he were to pay thirty years' more, that would make him pay forty years' purchase for his teinds.

Lord Justice-Clerk read proposed judgment of the Court.

Mr Millar—I do not mean to reclaim against your Lordship's judgment; but even supposing it were an open question as to whether there should be any inquiry with regard to the amount of tack-duty payable by the defender, I would submit, with some confidence, that it is not raised in the present action. The only things concluded for in the information are, in the first place, surplus or free teind duties; and, in the next place, interest upon those sums which are due in that character. There is no averment made by the pursuer for the purpose of ascertaining what can be repaid, or what is the sum to which the Crown is entitled, supposing that it is not the surplus or free teind to which it is entitled, but what proportion of the £100 rent would be left.

Lord Justice-Clerk—Do not you think that in the claim for the teinds is necessarily embraced the amount of the tack-duty?

Mr Millar—I should think not.

Lord Neaves—You could not resist our finding that you were to be held as due a fair proportion of the duty.

Mr Millar—No. The defence proceeds upon that assumption. We have admitted our liability all through, and could not but admit our liability, because we say we possessed under the tack, and we could not have a higher right than these titles show.

Lord Justice-Clerk—Then the judgment may run that we sustain your third plea in law, but find you liable in the proportion of the tack-duty applicable to the teindable lands.

Mr Millar—I have nothing to say against that. That is quite a different matter.

Lord Justice-Clerk—It will be for the Crown to consider whether, when they have failed in their general plea, the proportion of the tack-duty which would have effeired with respect to the teinds of these lands is worth while to proceed further about. It would be infinitesimal, I suspect. I do not think it is of much practical moment.

Lord Benholme—I would like to say that I have looked into some of the documents which are not printed, and especially the detailed charge made up by the Crown, by which they bring out a demand of £1000 for one of the lands, and £130 for the other. There is in that charge a distinct statement of each year's overplus teind; and I find that, with regard to the larger estate, the surplus teind for these thirty years is somewhere about £33, and with interest it brings out nearly £1000. Now, how this proportion of tack-duty is to be ascertained may, no doubt, be a somewhat difficult matter, but if the plan is adopted which I presume has taken place in the accounting of 1851, I rather think the claim of the Crown would not be infinitesimal, because the interest of the nine years' purchase of £33 for thirty years would be nearly two-thirds of the claim which is now made. Therefore it is a matter for grave consideration whether we can enter into this inquiry in the present action. I have grave doubts whether it would be expedient to have a new process, or rather to have the substance of a new process, without the commencement of it, in regular form. I rather think our safe course would be to avoid that, and make the finding which is necessary in justice to the pursuer, that the defender is liable in his proportion, but that we require them to inform us what that proportion would be.

Lord Justice-Clerk—I do not quite concur in the observation of Lord Benholme, because, if the whole tack-duty was only £100 a-year in respect of the lordship of Dunfermline and the whole teinds, I think the proportion payable from these lands of Mr Drysdale's can hardly amount to anything appreciable. It may be, but I cannot see it.

Lord Benholme—Your Lordship is quite right in one view. I only ventured to say that, if the same rule was followed as was adopted in the accounting, the result would be very different. In that case the purchase money was held to be the amount of the tack-duty that should be deducted as at the date of the purchase. There are two very different modes of striking the proportion, and I rather think your Lordship is quite right—that it must be the proportion of the tack-duty effeiring to the subjects; but that is a matter on which I do not wish to give any opinion.

The Court accordingly assoilzied the defender, with expenses.

Agent for Pursuer—D. Beith, W.S.
Agents for Defender—Mitchell & Baxter, W.S.

Friday, March 1.

COOK *v.* NORTH BRITISH RAILWAY CO.

Reparation—Accident—Mora—*Abandonment—Acquiescence—Delay.*

A person in the employment of a Railway Company sustained severe injuries from an accident, for which the Railway Company were responsible, in the year 1846. He made no application for *solatium*, but was employed by the Company at easy work until the year 1870. *Held*, in an action at his instance for damages for the accident in 1846, that his claim was barred by *mora*,—their Lordships being of opinion that a delay of twenty-five years in constituting a claim which required constitution was sufficient to justify the plea of *mora*, although it was not alleged that there had been either abandonment or acquiescence.

This action, as originally laid, concluded for implement of an obligation alleged to have been undertaken by the North British Railway Company to employ the pursuer James Cook in light em-