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-

ployment for the rest of his life, or for damages in breach thereof, or, alternatively, for damage for injuries received by him while employed by the Railway Company in 1846, for which he alleged that they were responsible.

The pursuer alleged—"On Saturday, 28th November 1846, the pursuer, having finished his work at Saint Margaret's, paid his fare to travel thence to Edinburgh, and proceeded as a passenger, between the hours of two and three o'clock on the afternoon of that day, in one of the Company's trains, towards Edinburgh. On reaching the incline at Rose Lane, Abbeyhill, the train came to a standstill, and was run into by a passenger train also proceeding towards Edinburgh. The collision was occasioned by the fault or culpable negligence and carelessness, or want of skill, of the engineer or engine-driver of the train in which the pursuer was, by his allowing the pump which regulates the supply of water to the boiler of the engine to remain open, whereby an undue influx of water and consequent suppression of the steam took place, and the engine and train were thereby brought to a standstill; and also in consequence of the carelessness, fault, and negligence of the engineer or engine-driver of the other train, also belonging to the defenders, not being on the proper outlook when he approached the train in which the pursuer was. The injuries sustained by the pursuer in consequence of the collision proved nearly fatal. The pursuer was carried home in a state of insensibility, and, after having been entirely incapacitated from work of any kind for eighteen months, he at length partially recovered, but it was found that the internal injuries he had sustained were of such a serious and permanent character that he would never again be able to perform any work except of a very light and easy description. He has suffered from these injuries ever since, and they still entirely preclude him from attempting the work of a blacksmith, to which he was brought up, or any other heavy work.

"Whilst the pursuer was confined to bed, from the effects of said collision, the Railway Company directed every attention to be paid to him. In particular, they procured for him the medical attendance of Professor Alison and Doctors Hunter and George Hamilton Bell; they provided him with two nurses; they furnished him with an invalid's chair; they paid for his medicines, &c.; and they paid him his wages regularly during the whole period of his inability to work.

"During the pursuer's illness, occasioned by said collision, he was repeatedly visited by Mr Learmonth of Dean, then chairman of the Company, by Dr Hamilton Bell, the deputy-chairman, and Mr Davidson, the general manager, all of whom, acting on behalf of the North British Railway Company, undertook as a compensation to the pursuer for his said injuries, and assured him that if he was ever able to work he should be constantly employed by the defenders, as long as he lived, at such light work as he might be able to perform. As soon as the pursuer had so far recovered from the effects of said injuries as to be able to walk about, Professor Alison wrote to the Board of Directors, and also to Mr Thornton, superintendent of locomotives, to the effect that the pursuer would be incapacitated, not by temporary weakness, but by permanent internal injuries, from doing any work for the future except of a light and easy kind, and that in the open air. On 28th September 1848 the pursuer was accordingly, and in implement of the undertaking and assurance above referred to, appointed by the defenders inspector of waggons at Leith. His duties were of an important and responsible, but physically easy character. The pursuer performed these duties efficiently and faithfully for a period of nearly twenty years. In 1868 the pursuer was removed from his post at Leith and transferred to the Waverley Bridge Station, at Edinburgh, where he was employed in the same capacity as before; but the work was more laborious, and he was, moreover, required to do night work. While thus engaged at the Waverley Station, he was falsely accused of having been intoxicated, or having otherwise misconducted himself, in or about 12th June 1869. In consequence of this accusation, he was dismissed by the Company from their service at or about the beginning of July of the same year; but the Company, on investigation, discovered the accusation to be totally unfounded, and they accordingly received pursuer back into their service in or about the month of December 1869. Meanwhile, however, the pursuer's office as inspector of waggons had been filled up, and the Company, instead of assigning to him work of the kind to which he had been so long accustomed, or any other such light work as he was alone fit for (and as they undertook to provide him with), sent him to Cowlairs Station, near Glasgow, where they required him to perform work to which his strength was quite unequal. The pursuer repeatedly called upon the defenders to give him work of a light nature, such as he was able to perform,—but this they refused to do. Notwithstanding frequent attacks of acute pain, resulting from the internal injuries sustained in consequence of said collision, and the heavy work the defenders gave him to perform, the pursuer persevered in his new employment until February 1870, when he was at length compelled to succumb and abandon his employment. Since that date the pursuer has applied in every legitimate way to the Company for such light and suitable employment as they were bound to give him. The Company, however, took no notice of the pursuer's applications until February 1871, on the 24th of which month he received a letter from the secretary, informing him that "the directors, after full inquiry, declined to re-employ him."

"In consequence of the injuries sustained by the pursuer, in the manner above stated, he is now unable to earn his livelihood, and moreover he has a large family to support, and he estimates the damage, loss, and permanent injury he has sustained through the culpable negligence of the defenders, or those for whom they are responsible, at £1000 sterling. The present action has been rendered necessary in consequence of the failure on the part of the defenders to employ him during his lifetime at such light work as he might be able to perform. But for this undertaking on their part, or on the part of those for whom they are responsible, shortly after the pursuer received the injuries above condescended on, he would then have raised his action against the defenders for compensation for said injuries."

The Lord Ordinary pronounced this interlocutor and note:—

Edinburgh, 1st December 1871.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, finds that the allegations of the pursuer are not relevant or sufficient to support the action as laid, and therefore dismisses the same, and decerns: Finds the defenders entitled to expenses, allows an ac-

count thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—The summons as it came into Court, and as it was first brought under the consideration of the Lord Ordinary, contained two alternative conclusions—the first for implement of an alleged obligation, whereby it is said that the defenders undertook to employ the pursuer constantly in light work, and for payment of £250—and the second for payment of £1000 damages.

"It was explained on the part of the pursuer, and the record shows, that the first of these alternative conclusions was founded on the assumption that the defenders had undertaken and bound themselves, by way of compensation for injuries the pursuer had sustained through their fault in 1846, to employ him in light work so long as he lived and was able for it, and that the defenders had recently broken that contract, and refused to go on with it, and were, consequently, for that breach liable to him in the £250 concluded for; and that the second alternative conclusion was to meet the contingency of the pursuer failing to establish the first, and being obliged to resort to his remedy against the defenders in respect of the injury he sustained in 1846, just as if there had been no such agreement as that upon which the first alternative conclusion of the summons was founded.

"But, after discussion, and when it is presumed the pursuer became sensible that he could not succeed in supporting his first alternative conclusion, he amended his summons to the effect of deleting from it that conclusion altogether; so that there is now only one conclusion—viz., that which was formerly the second alternative one.

"It appears to the Lord Ordinary that the allegations of the pursuer are not relevant or sufficient to support the action as it is thus now laid.

"The agreement, whereby it is said that the defenders bound themselves to employ the pursuer in light work, is averred in Article 4 of the condescendence. It is not, however, there said that the defenders were parties to that agreement, but only that certain individuals, 'acting on behalf of the North British Railway Company, undertook, as a compensation to the pursuer for his said injuries, and assured him that if he was ever able to work, he should be constantly employed by the defenders as long as he lived.' It was accordingly maintained by the defenders at the debate that they, a statutory company, who could only enter into contracts in conformity with their statutes of incorporation, could not be bound by any such verbal undertaking and assurance of the individuals referred to: and further, that the allegations of the pursuer are insufficient to admit of such an undertaking and assurance being rendered operative and effectual against the defenders, on the principle of *rei interventus* or otherwise.

"These appeared to the Lord Ordinary to be very formidable objections to his sustaining the action *quoad* the first alternative conclusion of the summons, but it has become unnecessary to deal further specifically with that conclusion, as it has now been, on the motion of the pursuer himself, deleted, and the summons to that effect held as restricted or amended.

"Then, in regard to the other, and only conclusion of the summons as it now stands, viz., that which was formerly the second alternative one, it appears to the Lord Ordinary that it cannot be sustained. He can find no relevant or sufficient allegations in the record to entitle the pursuer to maintain such a claim against the defenders, after the lapse of more than twenty years, during which not only was it not brought forward, but, according to his own showing, he had been receiving other compensation in lieu of it. It must, the Lord Ordinary thinks, be held, on the showing of the pursuer himself, that such a mode of redress as that now attempted to be enforced under the summons as it now stands was long ago waived and abandoned by him, and not only so, but also that in lieu of it he had betaken himself to another and different mode of redress, the full benefit of which he has reaped for many years. In this view of the pursuer's action, as it is now laid, the Lord Ordinary has dismissed it, being of opinion that his allegations are irrelevant, and insufficient to support it."

The pursuer reclaimed.

MAIR and KIRKPATRICK for him.

SOLICITOR-GENERAL and MACLEAN in answer.

At advising—

LORD BENHOLME—Damages are claimed in this action upon two grounds, and the Lord Ordinary has dismissed the case as laid upon both grounds. As to the first of these, I agree in thinking that no relevant case has been stated upon record; but as to the second my opinion differs from that of the Lord Ordinary. I think that the claim for damages is cut off by *mora* on the part of the pursuer. The word *mora* suggests mere delay, but I am free to admit that in the ordinary case delay of itself is not sufficient to establish a plea of *mora*, and that abandonment must be implied in the delay. But when the claim is one which requires constitution, such as the claim in the present case, I think the plea of *mora* will be justified by delay for a certain length of time in constituting the claim. In such a case presumption of acquiescence or abandonment is not required. I do not think that this poor man ever acquiesced or abandoned his claim against the Railway Company; but his failure to constitute a claim for so many years was an injury to the defenders, which justifies the plea of *mora*. I am of opinion, therefore, that we should recall the Lord Ordinary's interlocutor, and assoilzie the defenders.

The other Judges concurred.

Agent for Pursuer—Thomas Lawson, S.S.C.

Agents for Defenders—Dalmahoy & Cowan, W.S.

Monday, March 4.

FIRST DIVISION.

(Before Seven Judges.)

HALDANE (SPEIRS' JUDICIAL FACTOR) *v.* SPEIRS.

Proof—Loan—Writ or Oath—Admissibility of Parole Evidence—Bank Cheque.

The judicial factor on the estate of a deceased brought an action against a brother of the deceased to recover payment of a sum of £750, which he alleged was advanced in loan to the defender by the deceased a short time before his death, and produced a bank cheque for the amount, payable to the defender or bearer, drawn by the deceased on his bank account, with the defender's signature on the back. The defender admitted that he had re-