ought to have issued a process caption, with all the accompaniments of that proceeding, and notice should have been first given to him to return the document within a certain number of hours, and failing its return, that a process caption would then issue. The process caption was a process applicable to the ordinary practice of borrowing documents from the Court and giving a receipt. In that case notice must be given before the document can be called back. But here the document had been taken wrongfully, and not borrowed or possessed rightfully. Such a proceeding, therefore, as the process caption was not appropriate to this case. What, then, could the Judge do, for clearly he must have had some remedy? In his (the Lord Chancellor's) opinion, the Judge might have treated it as a contempt of Court, and vindicated his dignity by at once committing the appellant. But there were two other courses open, both milder and gentler. He might have done what the Inner House said he ought to have done —namely, give notice to return the document, and failing its return, imprison him. Or thirdly, the Sheriff might have imprisoned the appellant, and kept him in prison until he returned the document. This last was the course actually followed. It is true the words process caption were put by some mistake at the head of the warrant, which was unnecessary. At the same time, the warrant to imprison was quite right, and the dignity of the Court could not have been properly vindicated without it. He (the Lord Chancellor) regretted that so long a litigation had followed, especially after the previous appeal to this House, and that so much money had been spent, or rather wasted, in such proceedings. But the judgment of the Inner House was in the main right, and the first appeal ought to be dismissed with costs. As to the cross appeal brought by Mr Ligertwood and Mr Daniel, the interlocutor of the Court of Session ought to be reversed so far as it found that the Sheriff had acted irregularly, and so far as it found no costs to be due to the respondents. He therefore proposed to reverse the interlocutor of the Court, and, in place of it, remit the case, with directions that the defenders (the respondents) should be assoilzied, with expenses.

Lord Chelmsford said he would have simply expressed his agreement with his noble and learned friend if it had not been that two learned Judges of the Second Division had held the Sheriff to have acted irregularly in not giving special notice before imprisoning the appellant. In his (Lord Chelmsford's) opinion no notice whatever was necessary. The case was regularly before the Sheriff when the document was taken away. Can there be a doubt that the Sheriff could issue a warrant of imprisonment against the appellant until he restored the document? It was said the Sheriff proceeded irregularly in issuing a process caption. But as to that, it rather appeared he was right enough. The position in which Watt stood was exactly the same as if he had borrowed the document, and as if the usual notice to return it had expired and yet he wrongfully detained it. The Lord Ordinary in this view very tersely and well described that a process caption was appropriate. It was quite plain a warrant could and should issue to imprison the appellant, as there was no excuse whatever for his conduct, and it was only astonishing that the Inner House could in such a case have made the defenders pay their own costs. As regards Mr Ligertwood, there was no pretence for making him a defender at all, for he was in no way answerable for his deputy. The worst that could happen was that the deputy should be responsible as if he was sheriff-clerk. Mr Ligertwood ought, therefore, to be wholly discharged from all liability. The judgment of the House, therefore, should be to alter the decision of the Inner House in favour of the respondents, and give them their costs.

Lord Selborne said he also concurred in the judgment proposed by the Lord Chancellor. The Lord Justice-Clerk differed from the other Judges, so that there were two Judges against two in the Court below. It would certainly be extraordinary in a case like the present, where the appellant had behaved so strangely, if the officers of the Court should be held liable for their own costs of this litigation, which had on various frivolous pretences been kept on foot no less than seven years. It would be hard that the respondents should be liable to this heavy expense, and the judgment of the House would correct that error in the decision of the Court below.

Affirmed with costs, and judgment varied.

Counsel for Appellant—J. Pearson, Q.C., and Robertson. Agent—William Officer, S.S.C.

Counsel for Respondent—Lord Advocate (Gordon) and Anderson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, April 24.

(Before Lord Chancellor Cairns, Lord Chelmsford, and Lord Selborne.)

LORD ADVOCATE *v.* JAMES DRYSDALE.

(*Ante*, vol. ix., p. 308.)

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* (affirming judgment) that the defender had a title sufficient to sustain the plea of *bona fide* perception.

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 assignee of the last survivor," of "All and whole the foresaid Lordship of Dunfermline, and all lands, mills, woods, fishings, towns, burrows, annualrents, tenements, customs great and small, kirk's teinds great and small, tenant's 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 10th 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 of 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 derelinquished 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) held that the lease was put an end to prior to the free or surplus teinds sued for becoming due, and that they were therefore resting-owing by the defender to the pursuer.

Upon a reclaiming note, the Second Division recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

The pursuer appealed to the House of Lords.

At giving judgment—

The LORD CHANCELLOR moved the judgment of the House. After stating the facts of the case in some detail, his Lordship held that the law was

clear, and almost beyond the possibility of doubt. It was unnecessary to go into the consideration of any of the other pleas, the third plea of *bona fide* perception and consumption being an effectual bar to the claim on the part of the Crown. It was clear from the whole tenor of the lease that it was conceived as much in favour of each individual heritor of the Lordship of Dunfermline as of those who were appointed trustees. Each heritor was therefore truly a tenant under the lease of his own teind and feu-duties, holding them from the Crown under the obligation of paying his quota of the rent. The term of the lease expired in March 1799, but the Crown took no step to interrupt the tacit relocation which undoubtedly followed until the year 1838, when they raised and executed an inhibition of teinds, which was admittedly null. In the same year an action of removing was raised in the Sheriff Court of Fife against Lord Elgin, the sole surviving trustee, and, after various procedure, a judgment was pronounced that an end was put to the tack as at March 1839, so far as it related to subjects other than teinds. Since the date of that judgment the Crown have received payment of the feu-duties from the respondent and other vassals of the Lordship of Dunfermline, but they have taken no steps whatever until the present action to enter into possession of the surplus teinds. They did not even make the respondent aware that there was such a claim against him until 1868. There being such perfect ignorance on the part of the respondent and his predecessors of the claim now made, and there having been perfectly *bona fide* perception and consumption of what in England they would style the mesne property, he had no hesitation in holding that the judgment of the Inner House of the Court of Session was a correct one, and ought to be affirmed, and the appeal dismissed, with costs.

Lord Chelmsford expressed his concurrence. He doubted the competency on the part of the respondents to plead tacit relocation, but, however that might be, the third plea of *bona fide* consumption was quite sufficient. During the whole period, from the commencement of the lease in 1780 down to the present time, no change took place, so far as the respondent or his authors were concerned, in the state of possession of the teinds in question. No one claimed or intromitted with them. Had the Crown proceeded to collect the feu-duties, the respondent would at once have put an end to all right or interest on the part of the Crown on the teinds of his lands by purchasing them, as he has now done, at nine years' purchase of their amount, after deducting stipend, while in the event of the Crown's claim in the present being sustained, he would be practically compelled to pay nearly forty years' purchase.

Lord Selborne also concurred.

Judgment affirmed.

Counsel for the Appellant — Lord Advocate (Gordon). Agent—D. Beith, W.S.

Counsel for the Respondents—J. Pearson, Q.C., and Gibson. Agents—Mitchell & Baxter, W.S.

Friday, April 24.

(Before Lord Chancellor Cairns, Lords Chelmsford, Hatherley, and Selborne.)

CALEDONIAN RAILWAY CO. *v.* WEMYSS BAY RAILWAY CO.

Railway—Assessment—Arbitration—Reference.

Circumstances in which *held* (aff. judgment) that a dispute between two Railway Companies, whether the working out of an agreement into which they had entered, as to the disposal of nett revenue, could be reconciled with the rights of mortgagees was a difference as to the mode of carrying out the agreement, and so fell under a clause of the incorporating Act of Parliament, referring all such cases to arbitration.

The defenders in this action, the Greenock and Wemyss Bay Railway Company, were incorporated by the Act 25 and 26 Vict., c. 160, 17th July 1862. The share capital of the company was fixed at £120,000, and the borrowing powers at £40,000. By an agreement, dated 1st and 2d April 1862, entered into by the pursuers, the Caledonian Railway Company, and the provisional directors of the Greenock and Wemyss Bay Railway Company, and afterwards confirmed by the latter company's Act (1862), it was agreed that the Caledonian Railway Company should contribute and hold in perpetuity £30,000, or one-fourth of the capital stock of the Wemyss Bay Company, but that only under the conditions, stipulations, and provisions thereinafter written. It was also provided that the Greenock and Wemyss Bay Company should make and maintain the line, and that when completed the Caledonian Company should supply the necessary rolling stock and work it on the terms set forth in Article 8th of the said agreement, which is as follows:—"That the cost of working the traffic upon the said railway and pier, and of the stock and plant to be provided by the said Caledonian Railway Company as aforesaid, shall be borne and defrayed by the said Caledonian Railway Company, in respect whereof the said Caledonian Railway Company shall be entitled, from time to time, to receive and retain for their own use £50 out of every £100 of the gross amount of money earned, realised, and levied on the said railway and pier, until, from time to time, the said gross receipts shall so far exceed £8000 in the year, as at £45 per cent thereof to yield for the said working a sum not less than £4000, in which case £45 out of every £100 of the said gross receipts shall be received and retained by the Caledonian Railway Company for the said working, instead of £50 per cent. as aforesaid, and the remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company.

The charges upon the balance of the gross receipts, after paying the working expenses in terms of Article 8th, and the manner in which the residue is to be divided, are thus settled by Article 9th of the said agreement:—"That out of the said Greenock and Wemyss Bay Railway Company's share of the gross receipts there shall be paid by them—*First,* The whole charges and expenses of maintaining the said railway, pier, and other works, and also all public and parish burdens, including poors-rates, county rates, prison assess-