to Mr Stewart Robertson for his report on the value of the ship, and preparation of inventory of stores, &c., and also with the agent's charges in connection with the sale and transfer, and Mr Melville's fee now to be noticed. I am anxious to have the Lord Ordinary's view as to the auctioneer's fee for guidance in other cases.

"2. As regards the fee stated for the Clerk of Court (£21), while I consider it a full fee, I am not prepared to say it is excessive. The entry in the account shows the nature and extent of his services, and it cannot be doubted that he had both trouble and responsibility."

The Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Having heard counsel for the pursuer on the Auditor's report on his account of expenses up to 7th November current, Disallows the sum of £63, 2s. as fee to Mr James Wishart Thomson, auctioneer, under date 7th November current, and in lieu thereof allows him a fee of £5, 5s.: *Quoad ultra* approves of said report on the account as now taxed at the sum of £261, 9s. 7d. sterling: Grants warrant to and authorises the British Linen Company Bank to make payment to the pursuer's agents, Messrs Boyd, Jameson, & Kelly, W.S., of the said sum of £261, 9s. 7d. out of the sum consigned in their hands, and to the Accountant of Court to exhibit the deposit-receipt for the consigned fund with a view to said payment, both on a certified copy of this interlocutor, and decerns.

"*Note.*—I entirely agree with the views expressed by the Auditor as to the charge made for the auctioneer. It appears to me that a half per cent. on the price realised is too extravagant to be allowed. It was stated at the bar that the usual fee charged by auctioneers at Leith for the sale of a ship ranges from a half to one per cent. on the sum realised by the sale. I cannot recognise that as a rule, especially as it appears that the charges in Edinburgh by auctioneers of the highest standing for the sale of heritable property is so very much less. I see no reason why the charge for selling a ship should be higher than for selling a house. In the present case it was stated that the auctioneer left the matter of his fee entirely in the hands of the Court. I have allowed him £5, 5s. As to the Clerk's fee I take also the Auditor's view, and allow it as charged."

Counsel for Pursuer—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, December 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MACRAE *v.* THE EDINBURGH STREET TRAMWAYS COMPANY.

Process—Tender—Judicial Reference—Acceptance of Tender.

In the course of proceedings to recover an account for professional services the defenders made a judicial tender of a sum in full of all claims Thereafter by joint-minute the case was referred to a judicial referee. After the referee's award was prepared, and handed to the clerk for delivery on payment of the fees, and when its terms had become known to the parties, but before it had been delivered to either, the pursuer, finding that he was to be allowed less than the tendered amount, put in a minute accepting the tender made by the defenders before the case was sent to the referee. *Held* that the offer to accept the sum tendered came too late.

Question, Whether after a report by a judicial referee has been prepared, and handed to the clerk for delivery on payment of the fees, and this fact has been intimated to the parties, it is beyond the referee's power to alter its terms?

John Macrae, civil engineer, Edinburgh, in December 1884 raised this action against the Edinburgh Street Tramways Company, concluding for payment of £1516, 5s. 1d., being the amount of two accounts of £1083, 6s. 8d. and £432, 18s. 5d. for professional work done by him on their behalf. He had been for a considerable time their engineer.

The defenders while admitting certain of the items claimed, averred that the claim made was overcharged, and not in conformity with an arrangement entered into with the pursuer. They offered in their defence £225, 18s. 2d. as the balance truly due.

On 22d May 1885 the defenders made a judicial tender to the pursuer of £565, with expenses, in full of the conclusions of the action.

On 3d June 1885 the Lord Ordinary found, after proof, that an arrangement as to the manner of the pursuer's payment which defenders alleged, was not proved, and that he was therefore entitled to make the usual professional charges, and *quoad ultra*, both the parties having lodged a joint-minute referring the whole cause, so far as not thereby disposed of, to G. Miller Cunningham, C.E., interponed authority thereto, and remitted to him as judicial referee, with power to take such further probation as might be required, reserving meantime all questions of expenses.

On 4th August Mr Cunningham's report was ready, and intimation of this was given to both parties by the clerk to the reference, who wrote that it would be delivered on payment of the referee's fee and his clerk's account.

Neither party borrowed the report, but from a copy it appeared that the effect of Mr Cunningham's findings was to give to the pursuer a sum of £467, 17s. 1d., or nearly £100 less than the defenders had tendered. He did not deal with expenses.

On 20th October 1885 the pursuer lodged a minute by which he accepted the defenders' tender of 22d May for £565 The Lord Ordinary by interlocutor of 28th October, in respect of the minute of acceptance of the tender of 22d May and of the said tender, decerned against the defenders for £565, being the amount tendered. He found pursuer entitled to expenses up to 22d May, but reserved to defenders to move for expenses subsequent to that date.

"*Opinion.*—The pursuer has raised an action for payment of two accounts for professional business done by him for the defenders. The record having been made up, I allowed a proof, which was in part taken on the 27th of May 1885.

The proof was not concluded, but parties requested me to pronounce judgment upon a single point in the case, and I accordingly did so upon 3d June 1885. Thereupon a joint-minute was lodged, whereby the parties 'concurred in stating, under reference to the Lord Ordinary's interlocutor of this date (June 3, 1885), that the parties agreed to refer, and hereby refer, the whole cause, so far as not disposed of by the said interlocutor, to George Miller Cunningham, Esquire, Civil Engineer, Edinburgh.' I remitted the case to Mr Cunningham as referee, and he proceeded to do his work as such; and upon 4th August 1885 the clerk to the reference, Mr Robert B. Blyth, wrote a letter to the defender's agents as follows:—'Mr Cunningham's report in this matter is now completed, and I have written Messrs Dundas & Wilson that it will be delivered upon payment of his fee and my account. I have returned the process to them, and I now hand you a bundle of papers—nine in number—which were laid before the referee by you. Please acknowledge receipt.' The letter that was sent to Messrs Dundas & Wilson, the pursuer's agents, has not been produced, but it may be taken to be of the import here stated. An intimation was thus given to the parties that the referee's report was ready to be given to them. It still however, lies in the hands of the clerk to the reference, neither party having taken it up; but the clerk has communicaied a copy of it to the defenders, which has been produced by them, and from which it appears that the whole sum found due by the referee to the pursuer is £467, 17s. 1d. Now, upon 22d of May 1885, before the proof was commenced, the defenders tendered to the pursuer £565, with expenses. The tender therefore largely exceeded the sum found due by the referee, and apparently the pursuer having surmised that this would be the result, tendered, on 20th October 1885, a minute to the judicial referee declaring his acceptance of the tender of 22d May 1885. The referee declined to receive this minute, on the grounds stated by the clerk to the reference in his letter of 21st October, as follows:—'I am now instructed by the judicial referee to return to you the accompanying minute of acceptance of tender by the pursuer; he is of opinion that the minute of reference by the parties submitting the matter to him had the full effect of a reference to him of the whole cause, and that it therefore superseded all proceedings in the action prior to its date. The tender made by the Tramways Company accordingly, in his view, thereby fell, and the minute of acceptance is therefore now incompetent. That is the matter which of course must be decided by the Court, but the judicial referee in the circumstances does not think it advisable that I should mark the minute of acceptance as a step in the proceedings before him.' The ground here taken up by the referee is erroneous. The judicial reference did not make the tender which was lodged invalid. But the question still remains, Whether it is competent, at the stage at which the case has arrived, for the pursuer now to accept it? In an ordinary submission it has been determined that until the award of the arbiter has been issued or put upon record the arbiter may cancel it; nay, even where it has been handed by the arbiter to the clerk to the submission, and a copy of it handed by the clerk to the parties, he has the same powers over it—(Bell on Arbitration, p. 210). But this must be taken with a qualification. In the case of *M'Quaker* v. *Phœnix Assurance Company* (19th March 1859, 21 D. 794) Lord Ivory made this remark in reference to a case where the award had been signed and given to the clerk to be delivered—'The only other position to be considered is where the award has been sent to the clerk, or come into his hands. The effect of that depends on the purpose for which it has come into his hands. If the arbiter has sent it within the time allowed for issuing the decree, and for the purpose of giving it to the parties, the clerk becomes the trustee or officer of the parties, and ceases to be the officer of the arbiter. That is issuing the decree to all intents and purposes.' Now, in the present case, if the referee directed the clerk to deliver the report, and, if the same law applied in this matter to a judicial reference as was thus applied to an ordinary award in an ordinary submission, then the report would be held to have been issued, and to be beyond the power of alteration by the referee, and after that there could be no acceptance of the tender. But I cannot apply the same rule. Until the report has been submitted to the Court the referee has power to change it. The judicial reference does not put an end to the process—which may fall asleep and be awakened while the reference is pending—and motions may be made in Court—as for diligences—and the report may be sent back to the reporter to be amended, as probably would have been the case here if it had not come to a close by the acceptance of the tender.

The referee has misconstrued the reservation as to expenses contained in the interlocutor of 3d June 1885. The expenses that were then reserved were the expenses incurred up to that date, but the referee had full power to dispose of all the other expenses that have been incurred. Now, in these circumstances there does not seem to have been any valid ground upon which there shall be refusal to recognise the acceptance of the tender made on 20th October 1885 by the pursuer. So long as the tender remains in process it stands there as a judicial offer which may be accepted at any time. It may be recalled no doubt by lodging another minute expressly recalling it or modifying it, but if there be no such recal or modification the pursuer may at any time he pleases accept it, of course subject to the rules as to expenses incurred after the date of the tender. Therefore I grant the motion of the pursuer for decree for the sum of £565, with expenses to the 22d May 1885."

The defenders reclaimed, and argued that the tender fell when the parties agreed to enter into a judicial reference which had the effect of taking the case out of the hands of the Court. The acceptance of the tender came too late, as it was not made until the findings of the arbiter had become known.

Authorities—*Shiel* v. *Shiel's Trustees*, Feb. 11, 1874, 1 R. 502; *M'Laren* v. *Shore*, July 3, 1883, 10 R. 1067; *Rogerson* v. *Rogerson*, Jan. 31, 1885, 12 R. 583; *M'Nair* v. *Gray*, May 31, 1827, 5 S. 686; *Colquhoun* v. *Haig*, Jan. 13, 1825, 3 S. 298.

Replied for pursuer—The circumstance of a cause being remitted to a judicial referee did

not in any way affect a tender, because a judicial reference is merely a step of procedure in a depending action. [See Bell on Arbitration, p. 269]. The matter was not affected by the mere intention of the referee to decide one way or other, and at the time when the letters were written by the clerk to the reference the referee would have been entitled to withdraw his award, as it had not been delivered to the parties.—*Mackenzie* v. *Girvan*, Dec. 19, 1840, 3 D. 318; *Taylor* v. *Burns*, May 17, 1839, 1 D. 743; *Gillon* v. *Simson*, Jan. 14, 1859, 21 D. 243.—A tender is an offer in the cause. While the one exists, the other holds good. The decree-arbitral is not a final decree; this award never became final.—*Paul* v. *Springfield*, 21 D. 206.

At advising—

LORD PRESIDENT—This is an action brought by a civil engineer in Edinburgh against the Edinburgh Street Tramways Company for professional work done by him, and the defences are several in number, one of which is the existence of an agreement by which it was arranged that the pursuer was only to charge for actual outlays.

On the 13th of January 1885 the defenders made a tender of £480, and again on 22d May of the same year the tender was raised to £565 with expenses up to the date of action. This was the state of matters when it was agreed by joint-minute to refer the whole cause to a judicial referee, neither of the tenders made by the defenders having been accepted by the pursuer.

Upon the 3d June the Lord Ordinary pronounced an interlocutor which bore the same date as the joint-minute, and was indeed *unico contextu* with it, in which he repelled the objections stated by the defenders to the pursuer's claim for professional charges, and then the interlocutor proceeds, "*Quoad ultra* interpones authority to the joint-minute of reference for the parties, No. of process, and, in terms thereof, remits the process to George Miller Cunningham, Esquire, civil engineer, Edinburgh, as judicial referee therein, with power to him to take such further probation as the justice of the case may require: Grants diligence for citing witnesses and havers to appear before the referee, and recommends him to report his opinion *quam primum*, reserving meantime all questions of expenses."

Now, this reservation as to expenses was a somewhat unusual course to follow, as a remit to a judicial referee as a general rule embraces the whole matters in dispute between the parties, including the question of expenses, but the parties here seem to have acquiesced in what was done, and the arrangement of course is binding upon them.

The case proceeded in usual form before the judicial referee, and in due course he prepared his report dated 4th August 1885, by which he found that the pursuer was entitled to a certain amount of his account amounting to £476. That report was put into the hands of the clerk to the reference, Mr Robert Blyth, who wrote to the parties telling them that the report was in his hands and ready for delivery. In his letter to the defender's agents Mr Blyth says—"Dear Sirs,—Mr Cunningham's report in this matter is now completed, and I have written Messrs Dundas & Wilson that it will be delivered upon payment of his fee and my account. I have returned the process to them, and I now hand you a bundle of papers—nine in number—which were laid before the referee by you. Please acknowledge receipt.—I am, &c." A letter in similar terms was sent to the agents for the pursuer.

The parties thus became aware that the referee had issued his final report, and as copies of it had been sent to the parties they had become aware of the result, and of the nature of the findings of the judicial referee.

A question was raised in the course of the discussion as to whether the referee's report having been put into the hands of the clerk to the reference with a view to its being delivered to the parties, was so far beyond the control of the referee as to exclude him from making any alteration on or modification of his findings.

Upon that question I do not give any opinion, as I do not think it is raised in the present case.

What the pursuer has done here is this. He lodged a minute on the 20th October 1885, more than two months after Mr Cunningham's report had been put into the hands of the clerk to the reference, in which he accepted the tender of 22d May, by which the defenders offered him £565, which was a good deal more than he was found to be entitled to by the judicial referee's award. What he now desires is, that his acceptance of this tender should be held as good and effectual, and the Lord Ordinary is of opinion that it is.

I cannot agree with the Lord Ordinary, and I do not think that the pursuer was entitled to accept the tender of May in the end of October, and more than two months after he had become aware of the findings of the judicial referee.

An offer made by a party without any limit of time being appended may became inoperative by a change of circumstances. The offer might be perfectly fair and reasonable at one time and not at another, and accordingly by the ordinary law of contract constituted by offer and acceptance if the circumstances change materially between the time the offer is made and its acceptance then the offer will not be binding.

Here the judicial referee has determined that the pursuer is not entitled to so large an amount as the sum tendered, and there can be no doubt of the fact that the pursuer was aware of the sum which he was to receive under this reference. That being so, it was a matter of small importance whether this report was delivered or not, but in these circumstances I do not think that the pursuer was in good faith to accept an offer made to him in a totally different state of circumstances.

LORD MURE concurred.

LORD SHAND—There were various points argued for the defenders and particularly this one, that as the whole matter in dispute had been referred to Mr Cunningham, so that the referee came in place of a Judge, it followed that any tender made in an earlier part of the case fell, but that the referee would consider the effect of any such tender in fixing the amount in his award.

This is no doubt a somewhat difficult and delicate point, but on the question now before us I am of the same opinion as your Lordship that the pursuer's acceptance of this tender has come too late.

Mr Cunningham had issued notes of his award,

and had shown in them the amount which he intended to allow the pursuer. Then two months after the referee has indicated his findings, the pursuer claims to be allowed to accept a tender made by the defenders some months prior and before the reference was entered into. In these circumstances I think the acceptance of the tender came too late. I am also of opinion that Mr Cunningham had power to alter his findings up to the time that the report was given up by the clerk to one or other of the parties.

LORD ADAM—I concur.

The Court recalled the interlocutor of the Lord Ordinary, found that the pursuer was not entitled by his minute of 20th October 1885 to accept the tender made by the defenders by their minute dated 22d May 1885, and remitted to the Lord Ordinary to proceed in the cause.

Counsel for Pursuer—Low—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders—D.-F. Balfour, Q.C.—Guthrie. Agents—Paterson, Cameron & Co., S.S.C.

Saturday, December 5.

FIRST DIVISION.

[Lord Lee, Ordinary.

DOWNIE *v.* BLACK.

Proof—Evidence—Innominate Contract—Proof prout de jure.

In an action of damages for verbal slander the defender averred that his agent and the pursuer's had, acting on special authority received from their respective clients, entered into an agreement by which the person who had informed the defender of the subject-matter of the slander was disclosed to the pursuer on condition that he should take no proceedings against the defender. *Held* that this agreement could be proved *prout de jure.*

In June 1885 the Rev. John Downie, B.D., raised an action of damages for slander against the Rev. Duncan Black, minister of Kilmory, Arran.

The Lord Ordinary (LEE) on 3d November 1885 approved of three issues for the trial of the case, the first of which sufficiently indicates the subject-matter of the alleged slander, which was said to have been uttered when the pursuer was a candidate for a vacant parish, and was in these terms—"Whether, in or about the month of May or June 1881, in or near the manse of Kilmory, Arran, or the house then inhabited by William Tod, farmer, Glenree, Arran, the defender falsely and calumniously stated to the said William Tod that the pursuer had on one occasion received some money by mistake from a shopkeeper in Kilmartin, and that after allowing a considerable time to elapse he had gone to the Rev. Mr Blair to ask his advice as to what he should do with the money, whether to keep it or return it to the shopkeeper, adding, 'that an honest man did not need to ask anybody's advice in a matter of that kind, but would return what did not belong to him without fee or reward,' or did falsely and calumniously make statements or use words to the like effect, meaning thereby that the pursuer knew from whom he had got the change by mistake, and that he had dishonestly intended to retain the money, to the loss, injury, and damage of the pursuer?"

The Lord Ordinary also repelled the defender's second plea-in-law, which was—"The pursuer having got the name of the defender's informant on the condition that no proceedings would be taken against the defender, is barred from insisting in the present action," holding that the defender's statements in support of it were not relevant and sufficient. The statement on which that plea was founded was—"Explained that prior to the raising of the present action the pursuer asked the defender to disclose the name of his informant, on the understanding and condition that if he did so no proceedings would be taken against the defender. The defender gave the name of his informant on that condition."

The defender proposed a counter issue in the following terms, which was disallowed by the Lord Ordinary—"Whether the pursuer agreed with the defender not to take proceedings against him if he disclosed the name of his informant? and Whether the defender did not prior to the raising of the present action disclose his informant?"

The defender reclaimed.

The following letters were founded on in the Inner House:—Pursuer's agent to defender, dated 31st December 1884:—"Sir,—I am instructed by the Rev. John Downie, Dalhousie Street, to write you about a *fama* which was raised against him in 1882, and which is being still circulated to his prejudice and annoyance. Mr Downie has already been in communication with you upon this subject, and he has handed me your letter, in which you acknowledge that you told the false and malicious story (which I do not care at present to repeat) to a gentleman in confidence. He has also handed me your letter to Mr Peter Downie, in which you make the same acknowledgment; and I have also got a letter from Mr William Todd, in which he states he got the same story from you. I have other evidence before me that the story was told by you, and I cannot trace the origin of it to any other person. I have therefore to request that you will either acknowledge that you originated the story, and now agree to withdraw it, or give your author; at least I think it right to give you the opportunity of clearing yourself if you can. Unless I hear from you within four days from this date, giving the name and address of your informant, if such there be, I am instructed to raise an action in the Court of Session against you, to compel a retractation and palinode, and make claim for *solatium.* At this distance of time I would not have advised Mr Downie to trouble himself about this matter, but as the *fama* has not died out, and is constantly cropping up to his great hurt and annoyance, he is, I think, fairly justified in putting the *fama* to silence by proceedings in Court." Defender's agent to pursuer's agent, dated 9th January 1885:—"Dear Sir,—In answer to your letter to the Rev. Mr Black, Kilmory, Arran, I beg to say that he got the story referred to in the Rev. Mr Blair's house in Glasgow." Pursuer's agent to defender's agent, dated 10th January 1885:—Dear Sir,—I am favoured with your letter of yesterday, which I