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

must say is very unsatisfactory; more especially as I told you verbally that before Mr Downie could relieve Mr Black of the responsibility which he has incurred by circulating the false calumny, he would not only require to tell where he heard the story but from whom he heard it. To say that he heard it in Mr Blair's house is a mere evasion, and unless I hear from you on Monday, giving the name of Mr Black's informant, I shall parley no longer with the matter, but forward the papers to Edinburgh, and hold Mr Black the acknowledged author of the *fama*. Defender's agent to pursuer's agent, dated 12th January 1885:—"Dear Sir,—I have your letter of Saturday. Mr Black had, of course, the story from Mr Blair. Your client knows all about the matter, and my last letter to you, instead of being an evasion, was ample information for him."

After argument upon the relevancy of the defender's statements he proposed by minute to amend his defences by stating—"Explained that on or about 31st December 1884 the pursuer's agent, Mr Fraser, writer, Glasgow, wrote and forwarded, on behalf of the pursuer, a letter to the defender, in which, after referring to the circulation by the defender of the statements complained of, he requested that the defender should either acknowledge that he originated the story, and should agree to withdraw it, or give his author, and also stated that unless the defender within four days gave the name and address of his informant an action would be raised against him. The defender thereupon instructed Mr Douglas, writer, Glasgow, his agent, to state to the pursuer's agent that he had got the whole of the statements complained of from the Rev Robert Blair, minister of the parish of Cambuslang. Thereafter the said agents for the parties met together in Glasgow on or about the 9th January 1885, when it was agreed between them, as acting for and authorised by their respective clients, that the pursuer would not raise any action or take any proceedings against the defender provided he gave the name of his informant. In terms of that agreement the defender's agent gave the pursuer's agent the name of the defender's informant, viz., the said Reverend Robert Blair. The letters relative to the said agreement are produced and founded on. The pursuer's agent was specially authorised by the pursuer to make the said agreement, and the pursuer approved of it after it had been made. The story told by Mr Blair to the defender, and which was told by him to the defender in Mr Blair's house in Glasgow, in or about the year 1878, was, that the pursuer had on one occasion received a £5 note by mistake from a shopkeeper in Kilmartin, and that he had come to Mr Blair for advice as to what he should do with the money, and that Mr Blair had replied to him that he ought to have returned the money at once. At the same time, Mr Blair added to the defender, that an honest man should have known what to do with the money. Mr Blair also stated to the defender that in consequence of the pursuer's conduct with reference to that money he could not recommend him to a parish."

The pursuer argued that the agreement set forth in the minute must be proved by writ or oath, being an innominate contract. It was one which did not fall under the general mandate to an agent, and was of so unusual a nature that a proof *prout de jure* ought not to be allowed.—*White* v. *Arthur*, June 4, 1864, 2 Macph. 1154; *Forbes* v. *Caird*, July 20, 1877, 4 R. 1141; Ersk. Inst. iv. 2, 20.

At advising—

Lord President—It does not appear to me that there is anything uncommon or unusual about the arrangement here entered into. It may not be a nominate contract in the ordinary sense of that term, though perhaps it might be held to fall under the head of compromise, but so far as I can see it is a contract which can be proved by parole evidence in the ordinary way, and if it is incompetent so to prove it, it cannot be proved at all, for the parties to the action are not the people who actually made it. I think, however, that it is quite competent to prove the agreement by proof *prout de jure*. As for the instructions upon which the agents acted, that is simply mandate, and can certainly be proved by parole evidence.

I agree with the parties in thinking that as parole evidence is to be allowed, a separate proof on this matter should be allowed, and that there is no need of sending this part of the case to a jury.

Lord Mure concurred.

Lord Shand—I think the rule applicable to the question before us is well stated by Lord Deas in the case of *Forbes* v. *Cain*, July 20, 1877, 4 R. 1141, where he says—"There is no such rule as that no innominate contract can be proved except by writ or oath. But it may be stated to be a rule that a contract of an unusual or anomalous nature can be proved only by writ or oath." I think the rubric of that case states precisely what I consider to be the law on the point—"The proof of an innominate contract is not restricted to writ or oath unless the stipulations are of an unusual and extraordinary character." If we were to hold otherwise it would lead to this result, that unless the bargain could be classed under the head of sale, barter, loan, or some such well-known contract, parole evidence on the subject would be inadmissible, and looking to the various contracts which are daily entered into in the way of business, that would be a very anomalous state of matters. If the contract is of a very unusual kind, then no doubt the proof must be by writ or oath of the parties, but that is not the state of the case here. The mandate under which the agents acted can certainly be proved by parole, and I cannot see that the agreement into which they are alleged to have entered for their principals is in any sense an "unusual or anomalous" one.

Lord Adam concurred.

The Court allowed the defender's minute and the pursuer's answer to it to be added to the record, and allowed the parties a proof of their averments thus added to the record.

Counsel for Pursuer—Comrie Thomson—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—D.-F. Balfour, Q.C.—M'Kechnie. Agents—Gill & Pringle, W.S.