that they will look at such an offer with reference to the conduct of the party, in considering whether his conduct has been reasonable or not. And I think that the utmost length the Court can go in a case where the extra-judicial offer has been repeated on record is to find no expenses due to or by either party. In no case has an extra-judicial offer received further effect.

On the other hand, a judicial tender, in order to be looked at, must be accompanied by an offer of expenses. There was no such tender here. The offer though repeated, was not accompanied by an offer of expenses, and if the defenders are well founded in saying that that repeated offer was sufficient to entitle them to expenses, I do not see why the argument should stop there. I think that the same legal consequence would follow if the defenders offered the same sum, less the expenses which they have incurred owing to the pursuers' conduct. The argument for the defenders would be as strong in this case as in the other.

That, I think, would introduce extreme looseness in practice, and in my opinion it would be better to adhere to the established rule. Therefore, though the Court may look at an extra-judicial offer as bearing on the conduct of the parties, I think that a tender must be irrespective of what has been done before, and must be accompanied by an offer of expenses.

I think that we should follow the course taken in *Critchley* v. *Campbell*, and that we should adhere to the interlocutor of the Lord Ordinary.

Lord Adam—As I understand this matter, the sum of £50 was offered by the defenders to the pursuers before the case came into Court, and this tender, which was renewed in the defences to the action, was eventually accepted by the pursuers, and the case thus brought to a close.

One thing is quite clear, that the pursuers by bringing and insisting in this action have gained nothing; they have got just what they would have got if there had been no proceedings at all, and so the pursuers are the parties who have caused all the expense. I should have thought it unfortunate if in such circumstances there had been a rigid rule of practice to prevent our taking that fact into consideration.

This case is certainly to be distinguished from one in which an extra-judicial offer has not been renewed, and for this obvious reason, that if the defender does not renew his offer, he then goes into Court and takes his chance of getting off altogether, or of being found liable for a less sum than that which he offered. But here the offer which was made was renewed on record, and was before the pursuer for acceptance throughout. That I think is quite distinguishable from a case where there has been an extra-judicial offer not renewed.

Lord President—I omitted to notice one peculiarity in this case, viz., that the offer of £50 was ultimately accepted by the pursuers, and that decree was pronounced upon the minute lodged by them accepting the offer. The ground of judgment which I think is applicable to that *species facti* is, that the pursuers should, instead of accepting the £50 at that late date, have accepted the offer before.

Lord Shand—I cannot see that it makes any difference that the £50 was accepted by minute. I think it would just have been the same if it had been decerned for.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found no expenses due to or by other party, and found the defenders entitled to expenses.

Counsel for Pursuers—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders—Dickson. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, February 18.

SECOND DIVISION.

ROWAT *v.* BROWN.

Process—Proof—Remit to the Lord Ordinary—Evidence (Scotland) Act 1866 (29 *and* 30 *Vict. cap.* 112)—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 62.

A Lord Ordinary having sustained a preliminary plea of no title to sue, and dismissed an action, the Inner House on a reclaiming-note recalled that interlocutor, repelled the plea, and before further answer allowed the parties a proof of their respective averments, and remitted to the Lord Ordinary to proceed. *Held* that section 62 of the Court of Session Act 1868, providing that when proof shall be ordered by one of the Divisions of the Court it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before one of the Judges of the said Division, did not apply to such a case, and that the proof could competently proceed before the Lord Ordinary.

The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112) provides by section 3—"Where proof shall be ordered by one of the Divisions of the Court, such proof shall be taken before any one of the Judges of the said Division or of the Lords Ordinary to whom the Court may think fit to remit, in one or other of the modes above provided in section 1 hereof, and his rulings upon the admissibility of evidence in the course of taking proof shall be subject to review by the Division of the Court in the discussion of the report of the proof."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 62, provided—"The 3d section of the Act 29 and 30 Vict. cap. 112, is hereby amended to the effect of providing that, notwithstanding the terms of said section, 'where proof shall be ordered by one of the Divisions of the Court,' it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion."

This case was reported by Lord Fraser to the Second Division under the following circumstances:—The action was brought before Lord Fraser (Ordinary) in the Outer House. The defender pleaded—"The pursuers have no title

to sue this action." On 30th October 1885 his Lordship found that the pursuers had no title to sue, and dismissed the action as incompetent. The defender reclaimed, and on 10th December 1885 the Second Division pronounced this interlocutor—"Recal the said interlocutor, repel the first plea-in-law stated for the defender, and before further answer allow the parties a proof of their respective averments: Find the pursuers entitled to expenses from the date of said interlocutor . . . and remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the expenses now found due when taxed, and decern." The Lord Ordinary appointed the proof allowed by that interlocutor to take place upon Wednesday 17th February. On that day objection was taken, under the 62d section of the Court of Session Act 1868, to the competency of the Lord Ordinary taking the proof. The ground of objection was that under the 62d section of the Court of Session Act 1868, as amending the Evidence (Scotland) Act 1866, the Court could no longer remit the case to a Lord Ordinary to take the proof. In the case of *Main* v. *Galbraith and Others* (*Fleming's Trustees*), June 30, 1883, 8 R. 880, the interlocutor was in the following terms—"Recal the interlocutor, and remit to the Lord Ordinary to allow the parties a proof before answer." In that case the Court was of opinion that the 62d section of the Act of 1868 did not apply. But the interlocutor here was different. Two reasons had been suggested by counsel to the Lord Ordinary why this case fell under the 62d section of the Act of 1868—(1) That that Act had been passed so as to lessen the expenses of litigation. (2) That if the Court thought that any proof was necessary they might have the advantage of at least one of the Judges who were to decide the cause having seen the witnesses.

Lord Justice-Clerk—My impression is that the clause in the Act of Parliament was only intended to apply to cases where the case having been brought into the Division on the merits, the Court thought it necessary that proof should be taken before judgment could be pronounced. But the clause does not apply to this case, where an action having been begun in the Outer House in the usual way, and the Lord Ordinary having pronounced a judgment on a preliminary plea, the case is brought before the Inner House on a reclaiming-note, and the Inner House has altered the judgment of the Lord Ordinary.

Lord Young—That is also my opinion. The case is simple enough. The case was begun in the Outer House, and the parties sought a judgment from the Lord Ordinary as they were entitled to do. But the Lord Ordinary was of opinion that the action was incompetent—that the pursuer had no title to sue. The case was not argued or decided on its merits in the Outer House. Well, the case came here on a reclaiming-note, on the question whether the action is a competent one. We were of opinion that the action was a competent action—that the pursuer had title to sue. The proper course was then to send the case back to the Outer House to be tried there. We were of opinion that the pursuer had a title to sue his action, and therefore we remitted back to the Lord Ordinary to take the proof. I agree with your Lordship that the form of the interlocutor had better be changed, but even as it stands it is not impossible to be worked out. This is quite a different case from that to which the Act of Parliament is meant to apply. A case has passed through the Outer House; it has been heard and decided there. Well, if it comes here on a reclaiming-note, and we think that a proof of the facts is necessary before we can give a proper judgment upon it, we may order it, and we order that it should be taken before one of the Judges of the Division, and do not remit the case back to the Lord Ordinary who has already disposed of it. But that is not the case here. The only thing before us on the reclaiming-note was the question whether the case was a competent one or not. I believe, although I do not remember the case, that that was the only question before us. We remitted the case back to the Outer House to be dealt with by the Lord Ordinary as a competent case. I agree with your Lordship that that was the substance of an interlocutor, and that the case ought to go on in the Outer House.

Lord Craighill—I am of the same opinion. I have always understood that this section in the Court of Session Act was to provide against that which might have been an inconvenient arrangement. The words of the clause in the former statute were so wide that the Lord Ordinary might have been employed as a mere commissioner, and it was to provide against that that the section in the Act was so framed. But I never understood that in a case which fell to be decided by the Lord Ordinary, but which had been reclaimed on a preliminary point to the Inner House, the Division could not pronounce an interlocutor ordering the proof in the cause to be taken by the Lord Ordinary.

Lord Rutherfurd Clark concurred.

Counsel for Pursuers—Gloag—Lang. Agent—Thomas White, S.S.C.

Counsel for Defender—Comrie Thomson—Alison. Agents—Welsh & Forbes, S.S.C.

Thursday, February, 18.

SECOND DIVISION.

M'LAREN AND OTHERS (TRUSTEES FOR BARONY PARISH OF GLASGOW) *v.* BURNS.

Superior and Vassal—Casualty—Redemption of Casualty — One Year's Rent — Special Value of Subject to Vassal — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

A parochial board who were proprietors of the *dominium utile* of lands (feued prior to 1874) on which they had erected at great expense an asylum for pauper lunatics, desired to redeem the casualties incident thereto on payment, under section 15 of the Conveyancing (Scotland) Act 1874, of the amount