ford's death in July 1853. The issue of the marriage was only one child, James Stuart Crawford. To meet these provisions to his wife and children no investment was ever made by Mr Crawford, and Mrs Crawford's whole means and estate were managed entirely by him up to the year 1870, when, at his request, the trustees accepted and assumed the management of the trust. They thereupon intimated the assignation of the policy on Mr Crawford's life to the insurance company, and obtained payment from him of £1765, 7s., as the funds in his hands which belonged to his wife. The first parties to the Special Case being desirous of having the trust closed, called upon the trustees to assign the policy to James Stuart Crawford, along with the obligation on his father in the marriage-contract to pay the annual premium thereon, and to transfer the other trust funds in their hands, after deduction of the trust expenses, to Robert Crawford in liferent and to James Stuart Crawford in fee. On that being done, the first parties to the case were prepared to grant a full discharge to the trustees. To this demand the trustees declined to accede, and in consequence a Special Case was submitted for the opinion and judgment of the Court on the two following questions:—(1) Whether the first parties were entitled to call on the trustees (the second parties) to denude of the trust-estate, and transfer the same, as requested and specified, on the first parties granting the trustees the discharge specified; and (2) whether the trustees are bound and in safety so to denude and transfer the trust estates on receiving such discharge and obligation.

After hearing argument for the second parties, the Court unanimously answered both questions in the affirmative.

Counsel for the First Parties—Henderson. Agent—James Somerville, S.S.C.

Counsel for the Second Parties—Buntine. Agents—Leburn, Henderson, & Wilson, S.S.C.

Tuesday, October 21.

SECOND DIVISION.

WYLIE & LOCHEAD *v.* M'ELROY & SONS.

Contract—Offer—Acceptance—Mora—Condition.

A having made an offer to B for a certain contract when the price of material was rapidly rising, *held* that A was not bound by the mere acceptance of his offer a month subsequently, because (1) there was undue delay on B's part, and (2) a most important condition had been annexed to the acceptance, which would have required A's express assent in order to bind him.

This case came up on appeal from the Glasgow Sheriff-Court. The pursuers and respondents, Messrs Wylie & Lochead, are cabinetmakers and carriage hirers in Glasgow, and the defenders and appellants, Messrs M'Elroy & Sons, are engineers there.

The summons concluded as follows:—"Therefore the defenders ought to be decerned to pay to the pursuers the sum of £1000 sterling, being damages sustained by the pursuers in consequence of the defenders having contracted with the pursuers, by offer and acceptance dated 23d and 24th April and 27th May 1872, to supply the pursuers with the iron work for certain stables which they were then about to erect in Kent Road, Glasgow, all, as therein specified, and at the prices and on the terms therein specified; and having thereafter, when called upon to implement the said contract, refused to do so, whereby the pursuers sustained loss and damage to the extent foresaid," &c.

The circumstances out of which the action arose may be shortly stated thus:—On 16th April 1872 Wylie & Lochead invited tenders for a contract to supply iron work for certain stables they were about to erect. In reply, on April 23d, Messrs M'Elroy wrote as follows:—

"We hereby offer to execute the iron founder work of the carriage show rooms and stables, &c., you propose to erect in Berkeley and Elderslie Streets and Kent Road, agreeably to plans thereof by Mr A. J. Smith, architect, and to the extent and as described in the annexed schedule, for the sum of one thousand two hundred and fifty-three pounds, thirteen shillings and fourpence sterling."

On the following day, the 24th, they wrote further:—"We beg to intimate that our offer to you of this date is not open for acceptance after to-morrow."

Again, on the same day, Messrs M'Elroy wrote to Messrs Wylie & Lochead amending their offer, in consequence, as was shown, of a more careful scrutiny, induced by their having learned that a lower offer had been made. The letter was as follows:—"Referring to our offer to you of yesterday's date, we are very sorry to observe it contains two clerical errors—namely, in the second item, £1, 7s. 0d. too much in the extension; and the last item, being cast iron, should have been priced at 14s., whereas it has been cast out at the rate of the precediug item, which is wrought iron. This makes the sum of £4, 4s. 0d. too much, together £5, 11s. 0d., which, being deducted from the amount of our offer, will make the correct amount, £1248, 2s. 4d., and we hope it is not too late to make this correction."

A day or two after this, one of the defenders called at Messrs Wylie & Lochead's to inquire if the offer had been accepted, and, being told that another party was still lower in price, concluded that he was not to get the contract. On May 27, or nearly a month subsequently, the pursuers wrote thus:—"Your offer of 23d April, with amendment of same as per your letter of 24th April, is hereby accepted, and we request you will have the work proceeded with at once. The calculated weights for each item to be ascertained and wrought out in accordance with the schedule, as no allowance can be made for any deviation from the prescribed weights. You are to finish the whole in a reasonable time, and, failing this, we shall have the option of employing other contractors, and completing the work at your expense. Should the building be stopped from any cause whatever, you shall be paid for the amount of work then done, but will have no claim on us beyond what is hereby agreed to be admitted."

This letter the M'Elroy's received, but did not in any way take notice of, because they averred they had concluded the offer to have fallen by non-acceptance within due time. In September 1872 Wylie & Lochead ordered some iron lintels, and the defenders replied, saying they were ready to make them at the lowest price current at date. The pursuers replied

on 6th September:—"We are at a loss to know what you mean by your letter of 4th. Your offer for the iron work of our new stable was accepted by us on 27th May last, and we therefore have a right to have said iron work supplied to us in terms of your contract. We request an explanation." The defenders replied, denying that they were under any obligation. The Sheriff-Substitute (MURRAY) allowed a conjunct proof, whereupon the defenders appealed to the Court of Session. The pursuers pleaded that, having sustained damage to the amount concluded for by the defenders' breach of contract, they were entitled to decree as libelled. The defenders pleaded—"(1) The pursuers having failed to accept the defenders' offer on the 24th April, their offer was thereafter not binding on the defenders. (2) The pursuers' pretended acceptance of the 27th May was not a pure or proper acceptance of the defenders' offer, as the letter of the 27th May contained various new stipulations not contained or referred to in the defenders' offer or relative schedule, and requiring the written consent of the defenders thereto, and to which the defenders never assented, and in respect thereof there was not a completed contract. (3) The pursuers' said letter of 27th May was not a timeous acceptance of the defenders' offer, and did not bind the defenders. (4) Assuming, but not admitting, that the defenders were in the first instance to be held as committed by the pursuers' letter of the 27th May, the defenders were entitled to resile from the pretended contract, on the ground of the pursuer's *mora* in proceeding with the contract for about four months, and in respect of the pursuer's failure during that period to furnish the defenders with working drawings or other necessary information to enable them to execute the contract, after which lapse of time the price of iron had advanced to a very high figure, and when the execution of the contract would have been to the defenders' serious loss."

Authority—*Jacques, Serruys & Co.* v. *Watt*, Feb. 12, 1817, F.C.

At advising—

LORD BENHOLME—I cannot understand that it should have been the intention of the defenders in this action that a definite prorogation was given of the time allowed to the pursuers for acceptance of the offer, nor, on the other hand, can I understand that, at the outset, the pursuers can have had any such prorogation in view, all the more so as the price of iron was at that very time rising rapidly.

The time taken by Wylie & Lochead to reply and to accept of the offer was an utterly unreasonable delay. There is some evidence that there was an attempt on the part of the pursuers to play one offerer for the contract off against another, and so, if possible, beat the offers down to the lowest figure. The defenders were certainly led to believe that their tender was not the lowest, whereas in point of fact it was so. [*His Lordship here quoted the correspondence on this point.*]

In the fluctuating state of the iron market at the time at which the offer was made, a period rather to be counted by hours than months was fairly to be allowed for acceptance. But even when that acceptance did come, although a long period—far too long—had been suffered to elapse, it was not an unconditional acceptance, for there was adjected a most important condition, materially modifying the whole position of matters. By a condition such as this, apart from everything else, the general claim for non-implement of the original bargain would have been extinguished. The question then comes to be, whether Messrs Wylie & Lochead were entitled to consider that the M'Elroys were bound by their acceptance, and to act on such a view, as they aver they did, in the face of the long delay, of the fluctuations of the market, and of this newly-added and important condition.

There can be no doubt that it would have been more prudent in the defenders had they sent a reply to Messrs Wylie & Lochead's ultimate letter of acceptance, instead of taking no notice of it whatever. That, however, is not really the point, unless they stood in such relations with respect to the contract that mere silence alone placed them in the position of being bound by it. This I cannot regard as having been the case. That letter, at that distance of time, with that new element in it, required a positive, direct, and distinct acceptance by the M'Elroys. I am unable, in the subsequent conduct of the parties, or in the subsequent correspondence, to find anything to overturn this view. I think it just comes to this, that the original offer not being accepted in reasonable time, and the proposed acceptance, a month after, being clogged by such a condition, there was required, in order to make such a contract binding, an express assent to it on the part of the M'Elroys.

On these grounds, I am of opinion that the defences ought to be sustained, and the defenders assoilzied from the conclusions of the summons.

LORD COWAN—I am absolutely of the same opinion.

LORD JUSTICE-CLERK—I concur entirely in your Lordship's views, and would only add the following sentences. I am of opinion:—

1. That the condition of time was only so far departed from by the letter of the 24th as to give the parties the same time to consider the amendment as they had to consider the offer.

2. That by the alleged actings of the defenders, relied on as operating an extension of time, the extension of time could only have revived the offer if the pursuers had then accepted it.

3. That the letter of the 27th of May having been written after the former offer was at an end, and on the erroneous assumption that the offer was still binding, the silence of the defenders did not avail to make a new contract. And

4. That the condition annexed to that letter could not become binding by mere silence.

LORD NEAVES—I concur.

The Court pronounced the following interlocutor:—

> "Find that it has not been proved that the contract libelled was concluded between the pursuers and defenders: Therefore sustain the appeal, assoilzie the defenders from the conclusions of the action, and decern: Find the pursuers liable in expenses, and remit to the Auditor to tax and report."

Counsel for Pursuers and Respondents—Solicitor-General (Clark), Q.C., and Mackintosh. Agents—J. & R. D. Ross, W.S.

Counsel for Defenders and Appellants—Pattison & Balfour. Agent—R. P. Stevenson, S.S.C.

S., Clerk.