been entered into previous to a written lease —*Held*, a minute referring the matter to the defender's oath must definitely refer to the contract alleged; and a form approved which referred to certain articles of the condescendence.

Interlocutor—Expenses. As the interlocutor bore approval of a reference "proposed by the defender," the Court recalled the interlocutor, and declined to find the defender entitled to the expenses of the reclaiming note.

By lease, dated 31st March and 1st April 1870, the defender let to the pursuer certain premises at Silvermills and a specified amount of steam power. In December last the pursuer raised an action in which he claimed damages from the defender for breach of a verbal contract which he said had been entered into in or about February between the parties, for the supply of heating steam to him for his machinery. The defender denied that any such contract had been made, and pleaded that if made it could only be proved by writ or oath. The Lord Ordinary (JERVISWOODE) and the Second Division in March last adopted this contention. The pursuer accordingly gave in a minute referring the whole matters dealt with by the Lord Ordinary's interlocutor to the defender's oath. The defender objected to the indefiniteness of the reference, and the minute was refused. On the request of the pursuer a minute was adjusted by the parties, and given in by the pursuer, but was withdrawn by him from process before any interlocutor was pronounced by the Court upon it. He thereafter gave in the following minute:—"The pursuer hereby refers to the oath of the defender whether he contracted to supply the pursuer with steam for heating purposes to be used in his business as a comb manufacturer in the premises at Silvermills, let to pursuer by the defender in terms of a written lease, dated 31st March and 1st April 1870." The defender objected that the reference should be more specific, as the only contract alleged was anterior to the lease; and urged that the proper form for the reference would be in terms of the minute that had been adjusted, viz., "the pursuer hereby refers to the oath of the defender whether in or about the month of February 1870 the defender contracted to supply the pursuer with steam for heating purposes as set forth by the pursuer in the second and third articles of his condescendence."

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the minute of reference by the pursuer to the oath of the defender, No. 12 of process, refuses to sustain the same in the terms therein stated; approves of a reference proposed by the defender, whereby the pursuer refers to the oath of the defender—'Whether in or about the month of February 1870 the defender contracted to supply the pursuer with steam for heating purposes as set forth by the pursuer in the second and third articles of his condescendence;' appoints," &c.

The Court, considering the minute proposed by the pursuer too indefinite in the circumstances, directed him to amend his minute by incorporating a reference to his condescendence, and approved of the following minute:—"The pursuer hereby refers to the oath of the defender whether the defender contracted to supply the pursuer with steam for heating purposes as set forth by the pursuer in the second and third articles of his condescendence." As the Lord Ordinary's interlocutor bore that it approved of a "reference proposed by the defender," the Court recalled the interlocutor, and refused to make any finding on the matter of expenses of the reclaiming note.

Agents for Pursuer—J. B. Douglas & Smith, W.S.

Agents for Defender—Gillespie & Paterson, W.S.

Tuesday, May 30.

FIRST DIVISION.

NICHOLSON & WILSON *v.* BRUCE.

Agent and Principal—Railway—Engineer—Process —Defences—All Parties not called—Expenses. A, the engineer of a private railway belonging to B, being sued for the price of certain furnishings for the use of the line, averred that the pursuers were fully aware that in ordering the goods he had acted in his factorial capacity as engineer to the line, and that they had looked to the proprietor for payment. A plea of all parties not called was stated. The Lord Ordinary, without noticing this plea, allowed a proof, and on the proof, *held* that the pursuers had failed to establish that the goods were furnished on the personal credit of the defender, and assoilzied him accordingly. The pursuers reclaimed, and the Court, after hearing argument on the merits, sisted the case, to give the pursuers an opportunity of calling B. On application B paid the sum sued for. On the case coming up again on the question of expenses, *held* that the pursuers ought to have called B at first, and were therefore liable to A in expenses. At the same time the Court were of opinion that the Lord Ordinary's judgment on the merits was well founded.

The present action was raised by Nicholson & Wilson, ironfounders, Blaydon-on-Tyne, against G. C. Bruce, civil engineer, Edinburgh, concluding for payment of £120, 17s. 11d., being the amount of an account for railway chairs. The defence was that Mr Bruce had ordered the chairs in question as engineer for the Ballater Extension Railway, a private undertaking belonging to Colonel Farquharson of Invercauld; that the pursuers were fully aware of this, and transacted with him in the capacity of engineer; that by the usage of trade the defender in giving the order did not engage his personal credit, and that the pursuers in executing it relied for payment on Colonel Farquharson alone. The defender pleaded that the action ought to be dismissed, in respect that all parties concerned were not called.

The Lord Ordinary (MURE), without noticing the preliminary plea, allowed both parties a proof of their averments. A considerable amount of evidence, both documentary and parole, was accordingly led, in regard to the circumstances under which the order for the goods was given and accepted. The letters of the defender in regard to the transaction, though they did not bear *in gremio* that the order was for the railway, were uniformly headed "Ballater Extension Railway." Evidence was led in regard to the communings which passed between the pursuers and a Mr Eckersley acting for the defender. The Lord Ordinary found that the pursuers had failed to prove that the goods in question were furnished on the personal credit of the defender, and assoil-

zied him accordingly, and found the pursuers liable in expenses. His Lordship added the following Note:—"The goods to which this action relates were ordered by the defender when engineer for the 'Ballater Extension Railway,' of which Colonel Farquharson of Invercauld is the proprietor. They were consigned by the pursuers to the defender's address as civil engineer at Ballater, to the care of the party employed as resident engineer, and used by him in the formation of the line. When payment, however, was applied for to the agents of Colonel Farquharson, upon an account duly certified by the defender, they declined to pay it, in consequence of a dispute which had occurred between Colonel Farquharson and the defender. In these circumstances the present action has been brought against the defender, upon the ground that he had interposed his personal credit in the matter, and was liable in payment of the price. The question raised is attended with considerable difficulty; but, upon a renewed consideration of the evidence, the Lord Ordinary has come to the conclusion that it is not sufficient to establish the pursuers' case.

"In the letters of offer and acceptance, on which the action is laid in the record, the defender appears to have taken up the position of a party acting not on his own account, but as engineer and agent for another; and in every communication sent by him to the pursuers in relation to the transaction, whether by telegram or letter, he seems to have continued to disclose his position as that of a party acting for the 'Ballater Extension Railway.' In the letters addressed by the pursuers to the defender they do not at first allude directly to the railway; but their letter of the 30th of March 1869 is headed 'Ballater Extension Railway,' and seems to indicate that at that date they recognised the defender as acting not on his own account, but for the railway.

"Dealing with the case, therefore, upon the correspondence alone, the question arises whether the defender, in thus accepting the pursuers' offer, can be held to have rendered himself personally responsible to them for the value of the goods? If the defender's letters, instead of being headed 'Ballater Extension Railway,' had borne, *in gremio*, that the defender accepted the offer for the railway, no doubt could, it is thought, have been entertained as to the defender being free from all personal liability for the price. The case would then just be the ordinary one of a party transacting, *factorio nomine*, for a disclosed principal, in which the agent is held not to bind himself, and the party with whom he transacts is held to look to the principal alone.

"But a difficulty arises in the present case from the circumstance that it is in the heading, and not in the body of the letters, that the defender indicates that he is acting for another. In the view which the Lord Ordinary takes of those letters, they appear to him to bear, *ex facie*, that the defender was not acting on his own account, or pledging his personal credit, and to have been sufficient, at all events, to put the pursuers on their guard. The question, however, as to the precise meaning and import of the letters is one which cannot perhaps be held to admit of being conclusively solved by the terms of the letters alone, but to depend to some extent upon the understanding and usage of trade upon the subject. Now, as to this, the evidence for the defender appears to the Lord Ordinary to be conclusive to the effect that an engineer giving orders in terms similar to those founded on in the present case is not understood in the trade to bind himself personally, and that the manufacturer must look for payment to the railway, or other party on whose account the goods were ordered. This evidence is not met by any counter evidence for the pursuers, and is, in the opinion of the Lord Ordinary, considerably strengthened by that given by one of the pursuers, who says that when they offered to furnish chairs for the same railway in the summer of 1868, on the order of the defender as engineer, they would have looked to the railway, and not to the defender, for payment, if the offer had been accepted.

"The written evidence—more especially when read with reference to the proof of the usage of the trade—being thus, in the view the Lord Ordinary takes of it, adverse to the pursuers, it remains to be considered whether the communings which took place between them and the witness Eckersley can be held to control the terms of the defender's letters, and to justify the pursuers in maintaining that they were entitled, notwithstanding those letters, to rely on the personal credit of the defender. The evidence as to what occurred at this meeting is very contradictory. The pursuers say that they were informed by Eckersley that the defender was to be paymaster, and that they were not made aware at the time that the chairs were for the Ballater Extension Railway. The evidence of Eckersley, on the other hand, is distinct that he told the pursuers that the chairs were for the railway, of which the defender was engineer and Colonel Farquharson was proprietor; and that he never informed them that the defender was to pay, but that they would get a certificate from him when the goods arrived, and would then get the money.

"In this conflict of evidence the Lord Ordinary has seen no reason to think that either party has given an intentionally inaccurate version of what passed. But he is, upon the whole, disposed to place more reliance on this point upon the evidence of Eckersley than upon that of the pursuers.

"But even if the preponderance of the evidence were in favour of the pursuers' version of what occurred, that would not, in the view the Lord Ordinary takes of the case, entitle them to recover against the defender. They ought, he conceives, in consequence of what had passed between them and the defender a few months before, to have been aware that he was engineer for a railway in the course of formation, called the 'Ballater Extension Railway;' and when they received the defender's letter of acceptance and other communications, in which he disclosed his position as still acting for that railway, they were, it is thought, distinctly warned that he was not the principal party in the transaction in question, and ought, if they intended to rely on the personal credit of the defender, to have made that clear to him at the time, which one of the pursuers seems to be under the erroneous impression they had done."

The pursuers reclaimed.

SCOTT and KEIR for them.

WATSON and ROBERTSON for the defender.

After hearing parties, the Court were of opinion that Colonel Farquharson should be made a party, and sisted the case, to allow the pursuers an opportunity of calling him.

The pursuers in consequence communicated with Colonel Farquharson, who at once paid the amount of the account.

The case, which now resolved itself into a question of expenses, again came before the Court.

For the pursuers it was argued that Mr Bruce was the true debtor in the obligation, and that accordingly they were justified in suing him without calling Colonel Farquharson. They were entitled to their expenses; or at least no expenses should be found due to either party.

For the defender it was maintained that the whole expense of the action had been unnecessarily caused by the pursuers, who, if they had gone against Colonel Farquharson at first, would have got their debt paid, as the result showed.

At advising—

LORD DEAS—I have no doubt that, upon the face of this action, it was one to which it was right that Colonel Farquharson should have been called as a party. The case could not otherwise have been satisfactorily disposed of. When that plea was stated, the pursuer ought to have called Colonel Farquharson. One of two things must then have happened. Either it would have turned out that this was right and proper, which would have showed that the pursuers ought to have done so at first. Or else, in the event of its turning out that calling Colonel Farquharson was unnecessary, the pursuers would have had a claim against Mr Bruce for the expense so occasioned. It would have been better if the Lord Ordinary had insisted on this step being taken. But this does not exonerate the pursuers. When the case went to a proof, it became still more clear that Colonel Farquharson ought to have been called. There is no incompetency in calling a party at any stage, and the pursuers should have done so then if they had not before. The Court sisted the case to give the pursuers an opportunity of calling Colonel Farquharson. They have communicated with him, and the result is that he has paid the money. This is to me very good ground for finding the pursuers liable in expenses. The only question then would be, whether there ought to be some modification, in respect of the defender not sufficiently insisting on his plea? But, on the merits, I am of opinion that the Lord Ordinary is right, and in that view the defender is entitled to full expenses.

LORD ARDMILLAN concurred.

LORD KINLOCH — The pursuers should have called Colonel Farquharson at first. I do not say that they were so bound to call him that they could not otherwise go on with the case, but it was a very expedient step. They might have raised an action against Colonel Farquharson as liable on the statement of Mr Bruce, with an alternative conclusion against Bruce. To their not doing so the expense is mainly attributable.

I may at the same time state that, on the merits, I agree with the Lord Ordinary.

The LORD PRESIDENT—I concur. The chairs were furnished for the Ballater Railway, which belonged to Colonel Farquharson. These facts were known to the pursuers. *Prima facie*, then, Colonel Farquharson was the proper debtor. It may have been that Mr Bruce, though acting as engineer, may have interponed his personal credit, but *prima facie* the proper debtor was the person for whose benefit the goods were furnished. The pursuers chose to proceed, not against him, but against the engineer. It is possible that such an action might succeed. But Bruce being called, states a plea of all parties not called. This puts the pursuers in this position, that if they go on without calling Colonel Farquharson, and it turns out that Colonel Farquharson is liable, even though Bruce may be liable too, they cannot recover expenses against Bruce. They have chosen to run the risk. They took no notice of the defender's plea. They took an order from the Lord Ordinary for proof. This raised a question in evidence, and though I am not prepared to differ from your Lordships on the merits, it was a case of some little difficulty. The pursuers were not justified, while they had a clear case against Colonel Farquharson, in bringing a very doubtful case against Bruce. This is proved by what has occurred. Colonel Farquharson has paid the money. Had they called *him* alone, or along with Bruce, they would probably have got the money without further expense or litigation As your Lordships are clear on the merits, the defender must have full expenses.

The Court adhered.

Agents for Pursuers—Nisbet & Mathieson, S.S.C.
Agent for Defender—Thomas White, S.S.C.

Friday, June 2.

YOUNG *v.* CAMERON.

Joint Adventure—Managing Partner—Liability of Copartners—Loan. Where the subject of a joint adventure (which was latent and unknown to the public) was the lease of a sheep farm and the stock thereon, and the managing partner borrowed money, by means of an accommodation bill, avowedly for the purpose of paying the rent, and, having discounted it at the bank, afterwards applied the money for the purpose assigned—*held* that he had rendered his copartner liable, though he had not disclosed that there was a joint adventure, and had obtained the money solely on his own credit.

Observed that the judgment was confined to the question of borrowed money—the action being laid on the case, and not on the bill.

In this case the appellant Young had, in the year 1865, entered into a joint adventure with M'Nab, the then tenant of Dalchully sheep farm near Kingussie. The subject of the joint adventure was the lease of the farm held by M'Nab, and the sheep stock thereon. M'Nab was to remain as the sole managing partner; and, as the lease prohibited assignees, Young's name was not disclosed either to the landlord or to the public. In these circumstances, at Martinmas 1865, M'Nab went to the respondent Cameron, and asked him to advance him £150 to meet his rent then falling due. Cameron ultimately agreed, and the money was obtained by means of an accommodation bill drawn by Cameron, accepted by M'Nab, indorsed by Cameron to M'Nab, and then discounted with the British Linen Company's Bank, and the proceeds applied by M'Nab in payment of his rent. The bill was several times renewed, and finally on M'Nab's bankruptcy was met by Cameron. On receiving information of the existence of the joint adventure, Cameron thereafter sued Young as jointly liable with M'Nab for the money advanced for the benefit of the joint concern and so applied.