The LORD JUSTICE-CLERK was absent.

The Court refused the petition.

Counsel for Petitioners—Mackintosh—Pearson. Agents—Morton, Neilson, & Smart, W.S.
Counsel for Respondents—Jameson. Agents—Neilson & Bell, W.S.

Saturday December 22.

SECOND DIVISION.

[Lord Lee, Ordinary.

PATERSON *v.* WILSON.

Loan — Acknowledgment of Debt—I O U — Proof —Presumption.

A person signed and delivered to another two I O U's. In a subsequent action for the amount contained in them, he alleged that they were truly granted as receipts for repayment of money which had been previously advanced by his brother to the pursuer. *Held*, after a proof *prout de jure*, that he had failed—the *onus* of proof being upon him—to establish his averment, and decree pronounced against him for the amount of the I O U's.

Process — Expenses — Decree in Name of Agent-Disburser.

The pursuer of an action having obtained decree and been found entitled to expenses, the defender objected to decree for these expenses going out in the name of the agent-disburser, on the ground that in another litigation in which the pursuer was truly though not nominally the party interested, and which had been decided some time previously, and the subject-matter of which was different, he had obtained a decree for expenses which he desired to set off against the pursuer's claim. The Court *repelled* the objection, and allowed decree to go out in name of the agent-disburser.

Thomas George Paterson raised this action against Thomas Wilson for payment of two sums of £20 and £30 which he alleged to have been lent to him on 4th October and 4th November 1878, and for which defender had granted I O U's or acknowledgments of these dates. The defender stated that the pursuer had obtained advances from his (defender's) brother D. H. Wilson, and that he had repaid them on the dates mentioned, and that the documents founded on were truly receipts for these sums.

LORD ADAM, Ordinary, allowed a proof. The import of the evidence led fully appears from the opinion of the Lord Ordinary.

The Lord Ordinary (LEE) found "that the I O U's libelled were holograph of the defender, and were granted by him to the pursuer of the dates they respectively bear, repels the defences, and decerns against the defender in terms of the conclusions of the summons."

"*Opinion.*—This action concludes against the defender for payment of two sums of £20 and £30, and is laid upon two I O U's dated respectivly 4th October and 4th November 1878, and alleged to have been granted by the defender to the pursuer of these dates.

"The pursuer's allegation is denied; and it is alleged by the defender that the only sums of £20 and £30 which he received from the pursuer at that time were received by him as cashier for his brother David Hay Wilson, S.S.C., in repayment of two previous advances by the latter to the pursuer of these amounts.

"Lord Adam allowed a proof; and the proof has been taken before me. The parole evidence, in my opinion, is not satisfactory on either side. On the one hand, if the I O U's libelled were taken at the time as a record of the transaction, the pursuer appears to have made, or suffered to be made, in his books a most unfortunate mistake. For the first sum was originally entered by his brother as a loan to D. H. Wilson, and the second sum was originally entered as a loan to the firm of D. H. & T. Wilson. I cannot say that the correction of this mistake is satisfactorily cleared up. On the other hand, if the I O U's were intended to represent (as alleged by the defender) mere receipts for sums got in repayment of previous loans, it is remarkable that each sum should be entered in the books of the firm of D. H. & T. Wilson as received from the pursuer in loan and that the defender and his brother should only be able to represent them now as not received in loan by going into an alleged adjustment of accounts upon which no final settlement and discharge has taken place.

"The first question between the defender and the pursuer is, whether these I O U's were written by the defender of the dates they bear, and were delivered to the pursuer to be held as his writs? If so, each of them is an acknowledgment of debt instructing a loan, and constituting a good ground of action. I did not understand this to be disputed. At all events, I hold it to be well settled (*per* Lord President, *Haldane* v. *Speirs*, 10 Macph. 541). Now upon this question of fact I think that the evidence is clear. It shows that whatever may be said now about the money having been paid over by the defender to his brother D. H. Wilson, and as to D. H. Wilson being the true borrower, it was the defender who received the money and who granted the documents of debt. I think that these documents must be regarded as records of the transactions. I think that they were given as such at the time, and that to allow the defender—a man of business—to represent them now as recording transactions in which he had no concern, excepting as a mere hand, is inadmissible.

"But a second question is raised upon the proof which has been adduced, viz., whether these documents of debt, though bearing to instruct loans, did not truly represent payments of money in extinction of debt? I must assume that proof on the subject is competent, for proof has been allowed. But the *onus* here is upon the defender (*Ross* v. *Fiddler*, Nov. 24, 1809), and I think that he has failed to prove his averment. The averment is not reconcileable with the evidence. Indeed, both the defender and his brother practically admit that the money was at the time received in loan, and that it is only by a subsequent statement of accounts that they are able to represent the sum as payments to account.

"A third point is raised by the defender, viz., that the pursuer in May 1879 adjusted an account with Mr D. H. Wilson, in which he

accepted credit for these sums as against sums due by him to D. H. Wilson. If the account had been discharged, or had been proved to be a fitted account, I think that this would have been very material. It would have supported a plea of payment. But there is no proof sufficient to establish the fact, and no such plea is stated. In my opinion, the evidence that the pursuer went over the draft account, No. 39, and had the adjusted account rendered to him, is not sufficient to discharge the defender of the obligation undertaken by him in granting the I O U.

"On the whole, I find that the I O U's libelled are holograph of the defender, and were granted by him to the pursuer of the dates they respectively bear, and I repel the defences and grant decree in terms of the conclusions of the summons, with expenses."

The defender reclaimed. The Court adhered and found additional expenses due.

After the account had been audited, the pursuer moved that the report should be approved of and decree allowed to go out in the name of the agent-disburser.

The defender objected, on the ground that two years previously he had obtained decree for expenses (which had not been paid) in an action at his instance, which, though nominally a decree against the Krisuvik Sulphur Co., of which the pursuer was a shareholder, was truly against the pursuer, the company being subject to judicial winding-up as having ceased to contain more than seven members, and pursuer therefore being liable for its debts. He was entitled to set off these expenses against the present award, and he could not do so if decree was given in the agent's name.

The pursuer replied — The former action was not an action raised against him personally, but one against the Krisuvik Sulphur Co., of which he was merely secretary and a shareholder, and for whose debt he was in no way liable. The company was in liquidation, and the defender's claim must be made to the liquidator who had been appointed. Compensation could only be pleaded between counter awards of expenses where the awards had been granted in the same action. The only exception was the case of *Portobello Pier Company* v. *Clift*, but although there were there two processes, they related to the same subject-matter, the parties were the same, and the cases proceeded at the same time and might have been conjoined.

Authorities—*Portobello Pier Company* v. *Clift*, March 16, 1877, 4 R. 685; Begg on Law Agents, 194; Stokes on Liens of Attorneys, p. 110; *Stothart* v. *Johnston's Trustees*, May 23, 1823, 2 Mur. 549; *Washerton* v. *Hamilton*, May 30, 1826, 4 S. 631 (N.E. 639); *Halliday* v. *Halliday*, January 12, 1828, 6 S. 406; *Graham* v. *M'Arthur*, Nov. 28, 1826, 5 S. 49 (N.E. 46); *Gordon* v. *Davidson*, June 13, 1865, 3 Macph. 938.

LORD YOUNG—We must proceed on the rule, and we think this is no exception to it.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court gave decree in name of the agent-disburser.

Counsel for Pursuer (Respondent) — Boyd. Agent—A. Menzies, S.S.C.

Counsel for Defender (Reclaimer) — Lang. Agent—D. H. Wilson, S.S.C.

Friday, September 28.

OUTER HOUSE.

[Lord Kinnear, Ordinary on the Bills.

THE VALE OF CLYDE TRAMWAY COMPANY *v.* MUNRO.

Valuation Cases—Act for the Valuation of Lands and Heritages in Scotland (17 *and* 18 *Vict. cap.* 91)—*Tramway Company—Tenants' Profits.*

In an appeal by a tramway company from the valuation put upon their property by the assessor of railways and canals under the Valuation Statutes, on the ground that the principle adopted by the assessor was erroneous—*held* to be a settled rule that the amount of tenants' profits should be estimated at a percentage on the value of plant and rolling stock.

This was an appeal to the Lord Ordinary on the Bills by the Vale of Clyde Tramway Company against the valuation put upon their undertaking by the assessor for railways and canals. It was presented on the following grounds—(1) That the assessor had arrived at the annual value of the appellant's line upon a totally wrong principle; (2) That the principle followed in calculating the deduction for tenants' profits was unsound, or at least did not apply to their case; (3) That the assessor was not entitled in making his estimate to deduct from the value of the working stock, tools, &c., the sum of £1442, 11s. 4d., being the amount of reserve fund against depreciation.

The Lord Ordinary on the Bills (LORD KINNEAR) dismissed the appeal.

"*Note.*—The appellants object to the principle upon which the assessor has estimated tenants' profits for the purpose of arriving at the hypothetical rent which in terms of the statute is to be taken as the yearly value of the subject in question. The rule by which this item has hitherto been calculated at a percentage on the value of plant and rolling stock is founded on obvious considerations, and has been too long fixed to be lightly disturbed. The appellants suggested no reason for holding it to be erroneous in principle or unsatisfactory in the general case. It is said to operate unfairly in the case of the appellants' undertaking, because it appears that the actual sum allowed is considerably smaller in proportion to their revenue than in the case of other companies. But the assessor's answer appeared to me conclusive, viz., that if this be so, it must be because the appellants are in the advantageous position of carrying on their undertaking with a comparatively small expenditure of capital for plant in proportion to the revenue earned."

Counsel for Tramway Company — Pearson. Agents—Murray, Beith, & Murray, W.S.