to the Poor Law Board; but it does not follow that in every case none but these were to be regarded. In the first year of valuation there were no previous years; and the result must have been obtained on an estimate of futurity. But further, even in a more advanced period, it was necessary, in stating 'the probable annual average,' to consider whether the past average was likely to be sustained or not. The railway might be of greatly augmenting, or, on the other hand, of greatly decreasing value, and it would be proper to make its condition in this respect an element of calculation. In consequence of the delay occasioned by the present litigation, the actual facts of the immediately succeeding years have come to hold the room of mere speculative estimate. And the Lord Ordinary cannot think the reporter wrong in taking these after years as in part his basis for striking a just average.

"3. It was further objected for the collector that the reporter was in error in fixing the allowance for maintenance and renewal on an estimate of the proportion borne by the sum paid in each year to the valuation of the year. He contended that nothing but the actual sum paid in each year should be stated, and the average be found by simply dividing the amount by the number of years. But in the Lord Ordinary's estimation there would be no propriety in looking at the amount laid out in repairs, without considering the value of the subject on which it was laid out. It was the percentage on the value that properly represented the extent of repairs. If the railway was of small value for several years, and then started up to a large figure, the actual amount of the repairs in the previous years would not rightly represent the probable after expense. The percentage on the value which was expended in the repairs would be the only just approximation. The Lord Ordinary therefore thinks that the reporter was right in this respect.

"4. On the other hand, the Lord Ordinary is of opinion that the reporter is wrong in his proposal to add 5 per cent. to the amount otherwise allowed for maintenance and renewal of way. What the reporter does is first to discover from the company's books what sums were actually laid out in maintenance and renewal, which he finds to amount to 24·85 per cent. on the valuation of the line, and certain other small percentages applicable to the canal and the incline. But the reporter thinks that something more than the actual sums should be allowed. He finds, by an inquiry into what he assumes to be the kindred case of the Scottish Central Railway, that the 'life,' as it is called, of the railway in question, ought to be taken at sixteen years; that is, that it would require a complete renewal once every sixteen years. He finds that the sums actually laid out by the company were less than the proportion fairly belonging to the period now in question of the entire expense of renewal so estimated, and he adds an hypothetical 5 per cent. to cover the difference.

"It appears to the Lord Ordinary that this is by much too speculative a proceeding to be safely sanctioned. The sums which the company actually laid out in maintenance and renewal seem to the Lord Ordinary to afford the measure of proper expense. He thinks it must be assumed that the company did, to the fullest extent, what was right in this matter, The company itself cannot well maintain the reverse. If the sums laid out were too small, that was the fault of the company, for which it cannot complain if it suffers. What the company is entitled to is, it must be always remembered, an allowance for repairs, not for reproduction in the absolute sense. It is not what would be necessary to make a new railway, but what was necessary to maintain the old. The reporter's theory of reproduction cannot, therefore, be carried out to an extreme. Again, it is very unsafe in a matter like this to take any one railway as an exact model for another, for the endurance of the railway will depend on the traffic, on the weight of the trains and engines, and on many other circumstances in which no one railway is identical with any other. Altogether, the Lord Ordinary conceives it to be the only safe course to take the actual sums laid out for maintenance and renewal as the criterion of the repairs allowable on the footing of being 'necessary to maintain the railway in its actual state.' Considering what a large portion of the amount was laid out in name of renewal, as contrasted with mere maintenance, the Lord Ordinary is very clear that this view does no injury to the railway company, but emphatically the reverse.

"On the other hand, the Lord Ordinary could not accede to the proposal of the collector, that an inquiry should be instituted into the precise nature of the repairs, for the purpose of detecting how far these went beyond repairs, in the strictest sense of the word. It was said that in relaying the rails a great deal was done on a improved system, as by substituting a superior description of pegs, and joints, and the like; and this, it was said, was reproduction, not repair. But every repair will naturally and properly be made according to the best modern system; and it ought not on that account to lose its character of a repair.

"5. There is an additional percentage of 1·53 per cent. proposed by the reporter in the close of his report, which, the Lord Ordinary is very clear, cannot be sanctioned. The reporter discovers, as he thinks, that the other property in the parish besides the railway property has had too large a deduction allowed on account of repairs, by the Poor Board estimate. The deduction allowed is 20 per cent., whereas the reporter thinks it should not be more than 18·47 per cent. The result is that, in the view of the reporter, the railway property contributes more than its just share to the aggregate of the assessment. The reporter proposes to remedy this inequality by adding the erroneous 1·53 per cent. to the deduction to be allowed the railway company.

"The Lord Ordinary considers this proceeding quite inadmissible. If the deductions allowed to the other than railway property is erroneous, let the error be rectified on its own ground, and by its own appropriate process. But that this distinction is erroneous (assuming it to be so) is no reason whatever for giving to the railway company a deduction in name of repairs, &c., to which the company is not legally entitled. Neither the Court nor the reporter has anything to do in the present process with the inequality of the assessment, real or supposed. Nor can the assessment on the other than railway property be touched, directly or indirectly, in the present proceedings. The proposed proceeding may be very equitable in its intention; but it is altogether away from the object of the present process, which is to fix the valuation of the railway and nothing else. It may only be added that it does not appear clear how the plan proposed would effect the desired equalisation. For 1·53 per cent. on the value of the other properties is by no means necessarily equal to 1·53 per cent. on the value of the railway, nor therefore calculated to represent the same amount of the assessment. Besides, it would not be sufficient merely to lessen the charge on the railway, without at the same time proportionally increasing the charge on the other property; and this cannot possibly be done in the present proceedings."

Saturday, January 20.

FIRST DIVISION.

NATIONAL BANK *v.* BRYCE AND OTHERS.

Donation—Bank Cheque. Circumstances in which held that an averment of donation of a bank cheque had been proved.

Counsel for Miss Bryce—Mr Gordon and Mr Adam, Agent—Mr James Renton, jun., S.S.C.

Counsel for Young's Executors—The Solicitor-General and Mr Gifford. Agent—Mr A. Fyfe, S.S.C.

This was a competition for a sum of £281, 8s., being the balance due on a deposit account kept at the National Bank by the late Matthew Young, formerly of Belfast, Victoria, and afterwards residing at 4 Clerk Street, Edinburgh, where he died on 5th February 1863. Mr Young left a will executed by him in Victoria, and the fund *in medio* was claimed by his executors nominate as part of his estate. It was also claimed by Misses Elizabeth and Mary Bryce, in whose house the deceased boarded for some time prior to his death, and to the latter of whom it was alleged he was engaged to be married. The ground upon which their claim was rested was that the deceased was owing them for board and advances made on his account a sum of £155, 7s. 2½d.; and that on the day before his death he filled up and delivered to Miss Elizabeth Bryce a cheque on his bank account for the sum of £321, 8s., saying at the time of delivering the cheque that she was to pay herself and her sister out of the contents, and that they were to retain the surplus for behoof of themselves. The cheque was presented at the bank on the following day after Mr Young's death, when payment was refused, in respect it was an overdraft; and the bank having in this way come to hear of Mr Young's death, this action was raised. During its dependence Miss Elizabeth Bryce has died, and the claim is now insisted in by her sister, as her executrix, and also for her own behoof.

Lord Jerviswoode reported the case on issues in February 1865, and a discussion thereafter took place, the deceased's executors maintaining that the averments of Miss Bryce amounted to donation, which could not be proved by parole evidence; and Miss Bryce, on the other hand, maintaining that the deceased having granted an order in her sister's favour on his bank account, she was entitled to payment of it even after his death. The Court allowed a proof before answer, and appointed Miss Bryce to begin by leading her proof.

The evidence led was somewhat contradictory. The leading witnesses were, on the one side, Miss Bryce herself, and on the other the deceased's father, Robert Young, who had an interest in his son's succession under his will, to the extent of one-fifth, Miss Bryce, after describing minutely all that passed when the cheque was written out and signed, deponed, that just before it was done the deceased requested his father to leave the room, and that he went into the kitchen; that she afterwards told the father that his son had written out the cheque, and that he, having asked to see it, she got it and showed it to him, when he remarked, "I am very glad Matthew has minded you two girls, for you well deserved it," and urged her to go to bank at once and get it cashed. Robert Young, on the other hand, deponed that on the day before his son's death, when he was supposed to be dying, he called at the house and asked Mary Bryce to get his son to write out a cheque, which was to be drawn out in his own favour, saying that if this was done he would lift the money; that Mary Bryce said nothing, but went away to get the cheque, and that she returned saying that the deceased had begun to write out the cheque, but that he could not finish it. He said she did not show him any cheque, but after his son's death she told him that she had been to the bank for payment of a cheque, and that the bank had refused to pay it, saying it was a forgery. A friend of Robert Young deponed that he had suggested that the father should get a cheque from his son, as there would be expenses to pay after the death, and legacy duty would be saved.

There was also contradictory evidence as to Miss Bryce's allegation that she was engaged to be married to the deceased. She said that she became acquainted with him betwixt 1847 and 1849, when he courted her, and afterwards went to Jamaica, and from that to Australia; that he returned from Australia about seven years ago, when she and her sister, their father having died, kept lodgings; that he lived as a lodger with them for four or five months and then returned to Australia; that before leaving he wished her to marry him, but it was arranged that he should return in five years and marry her; and that he returned in 1862 as promised, but that the marrriage was delayed as her sister was delicate and he was in bad health. Several shopkeepers spoke to their belief that Miss Bryce and the deceased were to be married, and a Mrs Miller deponed that the deceased had once asked her, referring to Miss Bryce, to drink "the intended Mrs Young's health." On the other hand, the deceased's father and sister both deponed that they heard him say in Miss Bryce's presence that he would never marry anyone. It appeared that when he required to draw money from the bank Miss Bryce was in the practice of going with him and going into the bank for the money, he waiting outside until she got it.

The parties having been again heard on the case, and the import of the proof, judgment was given to-day.

The court preferred Miss Bryce to the fund, and repelled the claim of the executors with expenses.

The LORD PRESIDENT, after detailing the circumstances of the case, said—This bank cheque appears to have been intended by the deceased to draw all the money which he had in bank. The question is, whether Miss Bryce is entitled to the amount of it so far as the bank has funds to meet it. It was drawn payable to her, and presumptively for her use in ordinary circumstances. In other cases there may not be this presumption. That may depend on the position of the parties. In the case, for instance, of a merchant sending his clerk to the bank with a cheque, the presumption is otherwise. It appears that the deceased had previously drawn out cheques in which Miss Bryce was the payee, which were intended for his own use. Any presumption in her favour is materially weakened by that circumstance. The previous cheques, however, were different from this one. Miss Bryce states that it was given to her in payment of an account for board and lodging, and for her and her sister's attention to the deceased. There is nothing improbable in her story, and accordingly its veracity was not impeached. Therefore, believing it, was there a donation of the cheque which has been proved by parole testimony? It is said to have been a donation *mortis causa*, made when the deceased believed he was dying, and for the purpose of its taking effect after death. It was not quite of that character. It was given at the time according to Miss Bryce's story. There are various circumstances proved in the case which may also be looked to. The deceased lived in Miss Bryce's house, and was on the most intimate terms with her and her sister. There is no evidence that he paid for his board. He was possessed of considerable means otherwise in Australia. He had made his settlement, and I think, if he intended to make a gift to these ladies he would just have adopted the course he took. When he drew money from bank for his own use he drew small sums; and this cheque, as I have said, was intended to draw all the money he had in bank. That being so, I think Miss Bryce has made out her case. The other parties have adduced the deceased's father. If we are to rely on his story, I think it is double edged. It would go to this, that the money was drawn not for the deceased's own use, but in order to make a gift to him. His story therefore implies that it was intended to make a donation. If it was intended to make a donation to the father. the thing was gone about in very curious way. The cheque was not made out in his name, but he says he asked Miss Bryce to get it made out, and it was made out in her name. I think Miss Bryce's claim the better made out of the two. It was a transference of money partly in settlement of a claim and partly as a gift.

LORD CURRIEHILL—The basis of this case is a written document. I therefore think the question of the exclusion of parole evidence to prove donation does not occur here. The question is *quo animo* was the cheque given? There may be a presump-

tion that the money was intended for the drawer's own use; but if there is, it must yield to parole evidence of the contrary. If we believe Miss Bryce, it is entirely removed, and all the facts and circumstances tend to corroborate her story.

LORD DEAS—This case involves very delicate questions. The great objection made is that donation cannot be proved by parole. To put the rule of law so is putting it rather broadly. Suppose that, in place of handing this draft, the deceased had handed to Miss Bryce the money in bank-notes, I am not of opinion that the rule of law would exclude parole evidence of all the facts and circumstances connected with the handing over. I think such proof would be competent. The great difficulty here is whether we have an equally completed transaction. The document is a cheque drawn on the bank in favour of Miss Bryce herself. There is some difference, in regard to this matter, betwixt a cheque and a deposit-receipt. In some respects there is more difficulty in saying that a donation has been made of a deposit-receipt; in other respects there is less. A deposit receipt is a document intended to be kept. It is a more permanent document; therefore a person who gets such a document, and keeps it without uplifting it till after the death of the donor, is in a more favourable position than a person who gets a cheque. I hold that the possession of a bank cheque does not raise much presumption either one way or another. I think there may always be a proof of *quo animo* it was handed over. There may be questions of *onus*, and the *onus* may be very easily shifted. In the case of a clerk, the moment the fact that the alleged donee is so appears, the presumption would be against him. On the other hand, in the case of a tradesman it would be all the other way. It is not necessary here to go into these questions of *onus*, because the Solicitor-General very candidly admitted that Miss Bryce was telling the truth. I don't think the admission was an improper one, or could well have been withheld, because I agree that there is proof of facts and circumstances which are corroborative of her story. In addition to those already alluded to, there is proof of an engagement on the part of the deceased to marry Miss Bryce, which was not implemented solely on account of the state of his health. Another difficulty raised is that the cheque being a mandate *in rem suam*, it fell on the drawer's death. But to a great extent it was not *in rem suam*, and it cannot well be said of a mandate that one part of it fell, and the other did not. I think there is great difficulty in holding that. Altogether, I look on this case as a very special one, our decision of which does not trench on the authority of any previous cases.

LORD ARDMILLAN—Donation is not to be proved by parole evidence; but that is not the prominent part of this case. We have here proof of a number of facts and circumstances clustering round a written document. I think this case is different from that of a deposit-receipt. The presumption in favour of the holder of a bill of exchange is so strong that it can only be removed by writ or oath. I don't say the same presumption exists in favour of the holder of a cheque, but there is a presumption of the same kind differing only in degree. The thing is examinable. I don't think, as was contended, that there is a presumption either way which cannot be removed by evidence. All I say is, that the matter is examinable. Evidence is necessary. Well, we have here the parties living in the same house—all respectable—engaged to be married —board to some extent proved to be due—a cheque granted by a man when he supposed he was dying—disposing of all his available property— given as a gift to somebody, not for his executors, because he had made a will, but said by the deceased's father to have been given to him. The question therefore is, are we to believe old Young or Miss Bryce? I am happy to find the former saying twice over that his memory is not so good as it once was. On that ground I prefer to believe the story of Miss Bryce.

ANDERSON *v.* SCOTTISH NORTH-EASTERN RAILWAY COMPANY.

Cedent and Assignee—Title to Insist. In an action for reduction of an arrestment of a share in a railway company, a party who was sisted as assignee of the share *pendente processu* held entitled, after the action was dismissed, in so far as the pursuer was concerned, to insist in it for his interest, although the action itself was not assigned.

Companies' Clauses Act. Held that the provision of the Companies' Clauses Act excluding action for dividends, &c., where the party is not registered, does not apply to an action by a party against the company itself, it refusing to register him.

Counsel for Watt—Mr Patton and Mr Thoms. Agent—Mr W. Officer, S.S.C.

Counsel for Defenders—Mr Clark and Mr Birnie. Agents—Messrs Webster & Sprott, S.S.C.

In June 1863, John Anderson, coal merchant, sometime residing in Forfar, raised an action against the defenders to have it declared that an arrestment of one share of the company's stock belonging to him—which had been used by the defenders themselves in their own hands in execution of a decree which they had obtained against the pursuer —was an inhabile or improper diligence to attach the said share, or the dividends which had become due, or might become due, thereon. There were also conclusions for reduction of the arrestment, and for payment of bonuses, dividends, and profits.

In November 1863 the pursuer assigned his said share to Alexander Watt, accountant, in Edinburgh, who in January 1864 raised an action against the secretary of the company to have it declared that he was bound, in virtue of the assignation, to register him in the register of transfers as proprietor of said share. This action was defended on the ground that the company had a lien over the share for the debt due to them by Anderson, which they had secured by arrestment before the date of the assignation to Watt. The Court, on 22d March 1865, dismissed this action, in respect the company had not been made a party to it (3 Macp. 730).

Watt also, on 16th December 1863, asked the Lord Ordinary, in respect of the assignation, to sist him as a party in Anderson's action, "as in right of the stock;" and on 15th January 1864 he was accordingly sisted as a party in terms of his minute.

Anderson having been sequestrated, intimation was made to his trustee, who declined to sist himself; and Anderson having failed to find caution for expenses, the action was dismissed "so far as the said pursuer is concerned." Watt then proposed to insist in the action as assignee, which the Lord Ordinary disallowed, in respect the assignation on which he founded contained no assignation of the action; and farther, he dismissed the action in respect of Watt's failure to obtain himself registered as a shareholder in the railway company, holding that under sections 14 to 17 of the Companies' Clauses Act, a party cannot demand a decree for bonuses, dividends, or profits, accruing on the stock until he is so registered. Watt reclaimed; and the Court to-day unanimously altered the Lord Ordinary's interlocutor, and remitted to him to proceed with the cause.

The LORD PRESIDENT said—This interlocutor is rested on two separate grounds. It is said that the assignation to the stock contains no assignation to this action. It appears to me that it gives Mr Watt a title to maintain that the arrestment of the stock which the company have used in their own hands is ineffectual. I think the assignation to the stock implies that. It might have been a good objection to Anderson insisting in the action that he had assigned to Watt. But this objection was not taken, and Watt was sisted as a party. His direct and palpable interest is to relieve the stock