amount legally due in any question as to arrears, and until formal intimation is made of an intention to exact the full measure of legal right. Against this judgment the Duke of Buccleuch reclaimed.

The case was advised to-day.

Lord Benholme, who delivered the leading judgment, said, that the plea which had been sustained for the defenders by the Lord Ordinary was the second which proceeded upon an alleged tack arrangement or use of payment. It appeared that in the year 1726 the chamberlain of the Duke of Queensberry received directions to take payment from the burgh of Sanquhar of the sum of £5, 18s. 2d., and therefor to grant them a complete discharge, but without specifying any amount. The chamberlain acted in terms of these instructions down to 1810, since which time no payments have been made, but it is quite clear that the arrangement was purely gratuitous, and that the titular was no longer bound than he chose to abide by it. His Lordship then referred to the cases upon which the Lord Ordinary's judgment was founded, and said that the principle of these cases was, that when a party took upon himself the character of titular, and in that character granted discharges for teinds, this was a colourable title under which the heritor might possess and consume surplus teinds. In the cases referred to the discharge had been granted by the minister, who, in so doing, necessarily assumed that he was parson, and had right to the teinds as such. His Lordship also referred to an older case, as illustrating the difference in reference to this question between a parson and a stipendiary. In the present case the Lord Ordinary's judgment appeared to proceed upon the ground that stipend was paid to the minister throughout the period to which the claim for arrears applies, and he can see no reason for distinguishing it from the cases in which such payments have been sustained as constituting a colourable title. But the minister of Sanquhar was notoriously a stipendiary, and therefore the ground of judgment relied upon by the Lord Ordinary completely failed. There was, however, another ground which, though not expressly pleaded on record, appeared to have been in the Lord Ordinary's mind. After the accession of the Dukes of Buccleuch to the Queensberry estates the sum of £5, 18s. 2d., which had been exacted from the burgh of Sanquhar in name of teind, was transferred to their rental books, and appears entered therein down to the year 1860. But these entries were not communicated to the burgh, and could not be regarded as limiting the titular's right to the sum in question. On these grounds the Lord Ordinary's interlocutor must be recalled. Whether that will prove beneficial to the titular or not he could not say.

The other judges concurred.

The interlocutor of the Lord Ordinary was therefore altered, the defenders' second plea-in-law repelled, and the case remitted back to the Lord Ordinary.

Tuesday, Dec. 14.

FIRST DIVISION.

CLOUSTON AND OTHERS *v.* EDINBURGH AND GLASGOW RAILWAY CO. AND OTHERS.

Public Company—Railway—Companies Clauses Act—Powers of Company. Held (1) that under the Companies Clauses Act, section 70, a motion involving special matter could not be made at a general meeting of a railway company without notice; (2) that a company which had ceased to exist except for the purpose of paying claims against it, and dividing the balance of its funds among the shareholders, could not legally appropriate its funds to any other object. *Question*—Whether a majority of a going company is entitled to make a gift of any of its funds against the will of a protesting minority.

Counsel for Complainers—The Lord Advocate, the Solicitor-General, and Mr Watson. Agents—Messrs Webster & Sprott, S.S.C.

Counsel for Respondents—Mr Gordon and Mr Anderson. Agents—Messrs Hill, Reid, & Drummond, W.S.

This was an interdict at the instance of several shareholders of the Edinburgh and Glasgow Railway Company against that company and its directors, by which it was sought to interdict the respondents from "voting, paying, or applying the sum of £16,600 of the monies, funds, or revenues of the company, or any parts of these monies, funds, and revenues, as a donation, gift, or present, by any name, or under any pretext," to Messrs Latham, Jamieson, Thomson, Tawse, and M'Gregor, sometime officials of the said company, or to Mr Blackburn, sometime chairman of the directors; or from "voting, applying, or paying any part of the said monies, funds, or revenues to all or any of these persons, otherwise than in discharge of legal obligations or debts justly due and resting-owing to them by the said company." The grounds on which the interdict was asked were—(1) That the voting of the money as proposed was *ultra vires* of the company or its directors; (2) That by the 12th section of the recent Act amalgamating the company with the North British Company, the directors were bound to divide the assets among the shareholders after all "claims" against the company are discharged; and (3) That the money was proposed to be voted although in the notice of the meeting no intimation was made of the proposal to do so, as was necessary under the Companies' Clauses Act.

Lord Curriehill, on 19th September last, granted interim interdict, and ordered answers; and on 25th September, after considering the answers and hearing parties, he passed the note and continued the interdict. His Lordship thought that the important question as to the power of the company to make donations to its office-bearers and servants for past services had not been settled by authority; and that the circumstances in which the question now arose were peculiar. No injury could arise by postponing the payment of the money until the question is settled. The respondents reclaimed.

Argued for the reclaimers—(1) At common law a private or joint-stock company has power to act by a majority in regard to matters within the proper sphere or province of the business of the company, at a meeting competently convened for the purpose. (Hodges on Railways, p. 57, and Lindley on Partnership, p. 509.) (2) The Court will not inquire very minutely into whether the thing to be done is strictly within the power of the company if it is fairly within the spirit of the contract. (Taunton *v.* Royal Insurance Company, 29th February 1864. 10 Jurist, 291.) In this case it was held by Vice-Chancellor Wood that the directors of an insurance company were entitled to pay loss sustained by an explosion of gunpowder, although the policy excepted all loss caused by explosion other than of gas. It was held that the damage was caused by something, though not within, yet analogous to, the risk insured against; and that a dissentient shareholder was not entitled to complain. Reference was also made to the cases of Clark *v.* Imperial Gas Company, 1832 (4 Barn. and Ad., 315), and Hamilton *v.* Geddes (4 Paton's Ap., 657), to show that it was competent for a company to remunerate retiring servants for faithful services, and that this was a matter of internal management in regard to which the Court could not interfere with the majority of a company. (3) This being the common law, there is nothing in the Company's Acts to derogate from it. In regard to the objection that notice was not given, it was contended that no notice was necessary. In regard to all the officials except the secretary, the directors might themselves have voted the money without consulting the shareholders; and if so, surely they might ask the opinion of the shareholders on the subject without giving notice beforehand that they intended to do so.

Replied for the complainers—This company has

been dissolved by a recent statute, and it only subsists now for the purpose of paying its debts, and dividing the assets among the shareholders. There is a divisible fund of £107,000, and the directors recommend that only £83,000 should be divided, and that large sums should be voted as compensation to certain officials whose occupations have ceased with the dissolution of the company, but for whom the Amalgamation Act did not provide any compensation. The proposal is not to remunerate them for past services, for their salaries have all been paid, but to give them compensation. This is *ultra vires* of the company so long as one shareholder objects. It may be a very common thing to do—nay, it may be very proper; but it was illegal, if objected to, because not within the scope of the company's powers. Private and ordinary joint-stock companies are very different in regard to this from companies such as the present, whose powers are defined by the statute which creates them. Mr Lindley (p. 517) recognises this distinction. The case of Taunton is therefore not applicable. But, besides, in that case the directors were authorised to do everything which "might appear to them best calculated to promote the interests of the company." The question now raised has not been expressly decided, but a strong opinion was given on the subject by the Master of the Rolls in the case of the York and North Midland Railway Company *v.* Hudson (16 Beavan, 485). On the other point it was clear that the meeting could not entertain the question without notice being given. The Companies Clauses Act, section 70, expressly provides this.

The Court gave judgment to-day. The interlocutor of Lord Curriehill was unanimously adhered to.

The LORD PRESIDENT, after narrating the nature of the interdict sought, said—It appears that this Edinburgh and Glasgow Company has been amalgamated with the North British Company, and is now in a manner merged in that company. That took place on 1st August 1865. In September following, a report is made to the annual meeting by the directors, in which they state that the total revenue assets of the dissolved company amount to £107,039, 8s. 9d., and propose that out of this sum justice and liberality require that a sum of £11,600 should be paid as compensation to certain officials of the company who have lost office in consequence of the amalgamation. They also state that they have received a communication intimating that it is to be proposed to the meeting that a sum of £5000 should be voted to Mr Blackburn, the chairman, in respect of the zeal and ability which he has devoted to the service of the company. These proposals are objected to by certain partners on two grounds—first, because it was incompetent to do what was proposed at a general meeting of the company without notice; and, secondly, because it was *ultra vires* of the company to appropriate the money in the way proposed. Either of these grounds, if well founded, is sufficient for the disposal of this case. It was suggested by Mr Gordon that the interdict applied for was against the company meeting to consider the matter. This is not so. The interdict asked and granted was against "applying" the money in the way proposed. In regard to the first ground, I think the objection is well founded. The Companies Clauses Act, and, I suppose, the special Acts of this company also, appoint general meetings to be held at stated times, of which no notice is necessary; but that does not imply that at a general meeting anything can be done without notice that anybody chooses to propose. The Companies Clauses Act (section 70) says distinctly that no such special matters shall be done unless notice is given. That itself is conclusive. It is said that there are other sections of this Act which show that this is not the true meaning of section 70, and sections 93 and 94 were quoted to us. These sections contain a limitation of the powers of the directors, but do not imply that the things there referred to can be done at general meetings without notice. This is sufficient for the disposal of the case, but the other ground was also argued before us, and perhaps the parties may wish an opinion upon it, as it might be proposed now to call another meeting, giving due notice of it. On that point my opinion is rested, not on the clauses of the Companies Act, nor on the powers which this company had before 1st August last. What is proposed may be exceedingly proper. It may be very wise, or otherwise according to circumstances. I rest my opinion on the position of this company under the amalgamation statute. The company was to be dissolved on 1st August. It was then to cease to have a separate existence. After this date the provisions of the statutes under which it existed were to be repealed "except in so far as requisite for the administration and distribution of the revenue account accruing and owing up to the said date. Then by section 12 it is provided that the directors, "when all claims on the said revenue account are discharged, shall divide the balance remaining on the said account" among the holders of the stock. Two things are to be done by the directors, and two only. The one is to discharge all claims, and the other is to divide the balance. The question therefore is, Are the sums proposed to be voted claims on the revenue account? I do not think they are. What is meant is a good legal claim. So far from being a claim on 1st August, it was only proposed to be created a claim by a vote of the company some time after. Therefore the company are precluded from voting their funds in this way. It may be the opinion of a great many of the shareholders that their notions of justice and liberality should be given effect to, but they cannot legally attain their object against the will of those gentlemen who stand upon the letter of their rights.

Lord CURRIEHILL concurred, but proceeded entirely on the ground that the Amalgamation Act was imperative in its terms as to dividing the whole revenue assets with certain exceptions. He held that the payments proposed were not within the exceptions, because they were not legal claims, for which the officials, who had received their full salaries, could have sued the company.

Lord DEAS thought that if this was a question of expediency it might be well worthy of consideration. He thought it was very expedient that railway companies should treat all their servants with liberality, because otherwise they could not expect to get the best men to serve them. But what he had to deal with was a question of law. He concurred generally with the Lord President, and suggested this additional view, namely, that even although the allowances proposed could be regarded as claims against the company, they were not claims properly chargeable against the dividends for the last year, because the faithful services which it was proposed to reward had been rendered during many previous years. In regard to the third ground upon which the case was argued, namely, whether a going company could do what was proposed against the voice of a protesting minority, his Lordship, as well as all his brethern, held that it was a more difficult and important question than any with which they had now to deal, and as to which he reserved his opinion.

Lord ARDMILLAN also concurred. He held that it would be *pessima exempli* for the Court to sanction what was proposed in the circumstances of this company. If any of the shareholders desire to reward the services of their officials or their chairman, his Lordship said he would recommend to their consideration the advice given by the Master of the Rolls to the York and North Midland Railway Company in the case which was referred to in argument —"The duties and powers of the directors and the shareholders are defined with reasonable accuracy in the statutes applicable to this subject, and the proper and becoming mode of proceeding in the case of services as great as can be conceived, and as are here said to have been performed by Mr Hudson is, that the individual shareholders should, from their

private funds or shares, contribute such sums of money, or give such shares, as each may think fit towards creating a gratuity to reward such persons."

BLACK AND CO. *v.* BURNSIDE.

Proof—Bank Cheque. Held that a holder of a bank cheque has not the same privileges as the holder of a bill, and circumstances in which an averment of non-onerosity held proveable *pro ut de jure.*

Counsel for the Pursuers — Mr Fraser and Mr Gebbie. Agents — Messrs Macgregor & Barclay, S.S.C.

Counsel for the Defender—Mr Gordon and Mr J. C. Smith. Agent—Mr Alex. Morison, S.S.C.

This was an action at the instance of David Black & Co., woollen drapers in Glasgow, against William Burnside, grocer and spirit dealer, Wishaw, for payment of £170, "being the amount of the defender's draft or order on the Royal Bank of Scotland, Wishaw branch, dated 29th April 1861, and payable to himself or bearer, and which was delivered to the pursuers as the equivalent of £170 sterling of cash paid by the pursuers therefor." The pursuers averred that on 30th April 1861 the draft in question was presented to them by James Nisbet, coalmaster, Hamilton, he (Nisbet) alleging that he required the money immediately, and as the cheque was payable in Wishaw he could not get it cashed in Glasgow without the endorsation of some person known to the banks there. Nisbet led the pursuers to believe that he had given value for the cheque, and they were induced to endorse it, and the Clydesdale Bank handed over the contents to Nisbet. The cheque was presented thereafter at Wishaw, and payment was refused—there being "no funds" of the defender to meet it. The cheque was returned dishonoured, and the pursuers were obliged to pay the amount to the Clydesdale Bank.

The defender averred that the cheque was originally signed blank by him, and given to Nisbet for his accommodation, and that he was not owing Nisbet anything at the time, or at least not more than a few pounds of an unascertained balance, which has since been paid. He also averred that this was known to the pursuers when they got the draft from Nisbet; that Nisbet had not endorsed the draft to them; and that it was actually paid by Nisbet himself

The Lord Ordinary (ORMIDALE), on 30th June 1864, found that the allegations and pleas in defence, to the effect that the pursuers are not onerous and *bona fide* holders of the draft or order libelled on, can be competently proved by their writ or oath only. He held that such a draft must be viewed and dealt with as being of the nature of a promissory-note or inland bill of exchange, and was transferable by delivery. The defender reclaimed, and on 29th November 1864 the Inner House recalled the Lord Ordinary's interlocutor, and remitted to him, before answer, to grant a diligence for the recovery of writings. Several documents were recovered which did not materially affect the case, and the Lord Ordinary, on 27th May last, reported the case.

It was now urged for the defender that he was entitled to a proof *pro ut de jure* of his averments. This was resisted by the pursuers, not so much on the ground that the draft was in the same position as a bill of exchange as on the ground that it constituted an obligation in writing by the defender the effect of which he could not remove by parole evidence.

The Court was unanimously of opinion that before answer a proof should be allowed. A bank cheque was different in many respects from a bill. It did not require a negotiation, had no days of grace, was not transferable by endorsation, and did not prescribe in six years. Nor could it be said, except inferentially, that this was an obligation by the defender. It might have been, for all that appears on the face of it, a mandate to the bank to pay to the defender himself. This was the usual purpose for which bank cheques were used. If proof were refused, then any person who found a cheque might sue the drawer for payment, and compel him to pay unless non-onerosity was proved by his own oath. It might turn out in this case that the defender's statements were unfounded, but it would be satisfactory before disposing of it to know how the facts stand.

INVERNESS AND ABERDEEN JUNCTION RAILWAY CO. *v.* GOWANS AND MACKAY.

Expenses. Objection to the auditor's report, allowing the expense of an Edinburgh agent attending the examination of a witness in London, repelled.

Counsel for Pursuers—Mr Lancaster. Agents—Messrs H. & A. Inglis, W.S.

Counsel for Defenders—Mr Moncrieff. Agents—Messrs Lindsay & Paterson, W.S.

This was an objection to the auditor's report. He had allowed a charge of £54, 2s. to the pursuers' agent for proceeding to London and attending the examination of a witness for the defenders, whose evidence was allowed by the Court to be taken to lie *in retentis.* The examination lasted for four days. It was objected for the defenders that it was unnecessary for the Edinburgh agent to attend the examination, and that a London agent should have been employed. The defenders founded in support of their objection in the case of Armstrong's Trustees (12 S. 510) and Lumsden *v.* Hamilton (7 D. 300). It appeared that the Edinburgh agent for the defenders had also gone to London to attend the examination,

The Court repelled the objection.

The ordinary rule undoubtedly was that a party was not entitled as against his opponent to the expense of such a charge as was objected to. It lay upon the pursuers to justify the charge. In this case the importance and propriety of having an Edinburgh agent was shown by what the defenders had themselves done; and it also appeared from the nature of the examination of the witness, who was a witness for the defenders, that the presence of the Edinburgh agent for the pursuers was necessary.

STODDART *v.* CARRUTHERS.

Parent and Child. Circumstances in which the paternity of an illegitimate child held not proved.

Counsel for Pursuer—Mr Strachan. Agent—Mr James Barton, S.S.C.

Counsel for Defender—Mr Johnstone. Agent—Mr John Galletly, S.S.C.

This was an advocation from the Sheriff Court of Dumfries, of an action of filiation and aliment at the instance of Alice Stoddart against Christopher Carruthers, both residing in the parish of Johnstone, Dumfriesshire. The Sheriff-Substitute (Trotter) decided in favour of the pursuer, but the Sheriff (Napier) altered and assoilized the defender.

The pursuer deponed that the defender was in the habit of visiting her at night, coming into her bed-room by the window, and that he had connection with her in her bed-room twice in July 1863. Her child was born in April 1864. She said that the defender's visits continued with frequency up to November, but that there was no connection after July. There was no proper corroboration of the pursuer's evidence. A man named Robert Jardine deponed that he saw the defender twice go in at the pursuer's window—"at least he was in with his head when he came away and left him." Jardine said he had gone specially to watch the defender, and that he himself had gone in at the pursuer's window and been alone with her in her room about eighteen months before. Another witness, Jessie Thorburn, deponed that she had seen the defender, with his arms around the pursuer one night on the way from Moffat fair. This the defender de-