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-

nied. He also denied that he had ever entered by the pursuer's window, or had connection with her.

The Court, after hearing counsel for the pursuer repelled the reasons of advocation. They could place no faith in Jardine's evidence, and without it the pursuer had no case.

SECOND DIVISION.

MAGISTRATES OF ROTHESAY *v.* M'KECHNIE.

Property — Boundary. Interdict against a person building a wall to enclose his property, on the ground that the *solum* of the proposed wall did not belong to him, refused.

Counsel for the Suspenders—The Lord Advocate and Mr Muirhead. Agents—Messrs J. & R. Macandrew, W.S.

Counsel for the Respondent—The Solicitor-General and Mr Orr Paterson. Agents—Messrs J. & A. Peddie, W.S.

In this suspension and interdict the magistrates seek to interdict the respondent from erecting a wall for the enclosure of his property, which wall, they aver, encroaches on the *solum* of the public road between Rothesay and Port Bannatyne, of which they are custodiers. Issues were ordered and lodged. Thereupon the Lord Ordinary (Barcaple) intimated an opinion that the proper and expedient course was to try the case by a proof on commission, and parties having consented, that course was followed. A proof was accordingly led; and the Lord Ordinary, after hearing parties on the proof, refused the suspension and interdict. The suspender reclaimed. On the case being called, the Lord Justice-Clerk stated that he had doubts as to the competency of the course that had been followed, and appointed parties to be heard on the question, whether this was an action on account of injury to land, where the title is not in question, and as such one of the causes enumerated in the Judicature Act, and appropriated to trial by jury. After hearing counsel upon this point the Court took time to consider. On the case being called to-day, parties were directed to speak to the merits, without reference to the objection to the procedure, which was not insisted on. The case raises a pure question of fact. The averments of parties and the proof have reference to the history of the ground in question, and extend back for a period of about fifty years, the contention being whether it is to be treated as part of the road under the custody of the suspenders, or as part of the respondent's property held by him as tenant under a long lease from the proprietor of Ardbeg. The main points relied upon are (1) the planting of a hedge and the forming of a ditch along the road at the part in question, between 1815 and 1850; but the Lord Ordinary has found that the proof clearly instructs both these operations to have been performed by the agricultural tenant of Ardbeg; (2) a call made by the magistrates in 1849 upon the proprietor of Ardbeg to fill up the ditch, as being dangerous and offensive, which not being responded to, the magistrates undertook themselves. The suspenders maintain that the ditch is the watercourse of the road; but the Lord Ordinary has found that it is impossible so to regard it, looking to its nature and origin, and to the position taken in regard to it by the suspenders in 1849. On the whole, the Lord Ordinary was of opinion that the history of the ground in question implies that it has all along belonged to the proprietor of Ardbeg and his tenants, and was never either acquired or possessed by the magistrates as trustees of the road. His Lordship accordingly repelled the reasons of suspension, and refused the interdict; and to-day the Court, on the same ground, adhered.

Friday, Dec. 15.

FIRST DIVISION.

HUNTER AND OTHERS *v.* CARRON CO.

Title to Sue—Title to Exclude. Circumstances in which (*aff.* Lord Mure, *diss.* Lord Curriehill,) these defences repelled in an action founded upon the fraud of the defenders.

Counsel for Pursuers—Mr Horn, Mr Adam, and Mr Deas. Agents — Messrs Duncan & Dewar, W.S.

Counsel for Defenders—The Solicitor-General, Mr Clark, and Mr Balfour. Agents — Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This action is raised by the sole surviving trustee and beneficiaries under the marriage-contract of the late John Lothian, S.S.C., and his wife, and under certain deeds of settlement executed by Mrs Lothian. The object of the action is to compel the defenders, the Carron Company, to account for a large amount of profits said to have been realised by them between the years 1824 and 1846, during which period the pursuers' predecessor, Mrs Lothian, was a shareholder in the company, but which profits are alleged to have been fraudulently concealed and misapplied by the defenders for the purpose and with the effect of keeping down the rate of dividend during said period, and thus of withholding from Mrs Lothian and the other shareholders profits which legally belonged to them. The sum sued for is £30,000. The defenders pleaded (1) that the pursuers had no title to sue; and (2) that they were in possession of a title to exclude the action.

The Lord Ordinary (MURE) repelled both pleas and ordered issues to be lodged. The defenders reclaimed.

The title to exclude depended on the effect of a compromise of an action which had been raised by Mrs Macfie, the second wife and executrix of Mr Lothian, against the defenders for restitution of the shares held by Mrs Lothian, which she had made over to her husband, and which after her death, had been sold to the defenders in virtue of a right of pre-emption possessed by the company under the contract. The Lord Ordinary held that the compromise of that action must be viewed in reference to its conclusions, and that, as these were restricted to the profits from 1846 downwards, this action, which had reference only to profits accruing before 1846, was not excluded by it.

The objection to the title to sue was rested mainly on a codicil executed by Mrs Lothian in 1843, by which she directed her trustees to allow her husband the option of taking her ten shares of Carron stock at an estimate of £6000 as part of the specific sum settled upon him in their marriage-contract. This codicil was acted on after Mrs Lothian's death, and it was contended that in this way Mr Lothian acquired right not only to the capital stock mentioned in the codicil, and to the profits which might afterwards accrue thereon, but also to all claim to any undivided profits effeiring to the shares, including those of which it is alleged that Mrs Lothian and her marriage-contract trustees were during her life fraudulently deprived of by the defenders. It appeared to the Lord Ordinary that the codicil had reference only to the capital stock, and not to the profits accruing during her life, which by her marriage-contract the trustees were directed to pay over to herself exclusive of her husband's *jus mariti*.

It was also urged by the defenders that as the pursuers were not now holders of stock they were not in a position to insist on a claim for bygone profits, but this difficulty the Lord Ordinary thought was removed by the fact that the action contained conclusions of reduction of the defenders' title to the stock, in so far as it is interposed as an obstacle to the pursuers' demand, and also by the