nary (Jerviswoode) without a jury, in terms of sec. 48 of the Court of Session Act, under which his judgments on facts is final. His Lordship found (1) that it was not proved that the defender on the forenoon of 11th July tendered payment as averred to the pursuers' agent; (2) that the letters above quoted were written and received; and (3) that no tender was made before the pursuers had lodged the summons for calling.

The defender reclaimed, and urged that the conduct of the pursuers' agents in going on incurring expense after the letter of 13th July was unreasonable; and that on the principle of the case of Ramsay, 19th March 1864, 2 Macph. 891, the party who had acted so unreasonably should be found liable in expenses. It was stated that the dispute about the expenses arose from the fact that the pursuers' agents charged the defender £8, 3s. 4d., as incurred on 13th July, and that the whole sum allowed by the auditor up to that date was £2, 18s. 6d.

The Court adhered.

The LORD PRESIDENT said—All questions of expenses depend very much on the conduct of the party. In this case I think some concession might have been made by the pursuers after the calling when a tender of payment was made. The case, however, of the defender was that a tender was made before the calling, which the Lord Ordinary has found not to be proved, and we cannot review his judgment as to that. I think the letter which the defender's agent wrote might have led to an adjustment of the matter if there had been any disposition to adjust it, but it did not. The question as it has been argued to us might have been left to the Lord Ordinary to dispose of on the letters themselves; but, instead of that, the defender went to trial on his averments, and he has failed to prove them. We must therefore adhere.

SECOND DIVISION.

EDINBURGH AND GLASGOW RAILWAY CO. *v.* MILLER.

Poor—Assessment—Deductions. (1) Held that, under section 37 of the Poor Law Act, deduction is to be given for the average expense of *actual* repairs only; (2) Held that one ratepayer is not entitled to deduction on the ground that too large deductions have been allowed to other ratepayers; (3) Circumstances in which held that a railway company was entitled to deductions to the extent of 28·60 per cent.

Counsel for the Suspenders—The Solicitor-General and Mr Mackenzie. Agents—Messrs Hill, Reid, & Drummond, W.S.

Counsel for the Respondent—Mr Patton and Mr W. M. Thomson. Agent—Mr Wm. Burness, S.S.C.

This was a suspension of a charge at the instance of the respondent, who is collector of poor-rates for the City Parish, Glasgow, against the suspenders, the Edinburgh and Glasgow Railway Company, for payment of £862, 15s. 4d., being the arrears of assessment due by the Company for 1858 and 1859, including 10 per cent of additional charges due under section 88 of the Poor Law Act. The assessment for relief of the poor in the City Parish is imposed, one-half on the owners and the other half on the tenants or occupants of all lands and heritages within the parish rateably according to the annual value of such lands and heritages. Since the Lands Valuation Act, 17 and 18 Vict., cap. 91, came into operation, the assessment in the parish has been based on the valuation rolls made up under that Act; a deduction of 20 per cent from the gross rental of all lands and heritages being allowed "for repairs, and insurance, and other expenses necessary to maintain the lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same," conform to 8 and 9 Vict., c. 83, section 37. The suspenders pleaded that this indiscriminate and equal deduction of 20 per cent. allowed to all lands and heritages is illegal and injurious to them, and that they are entitled to have the assessments rectified; and also that they are entitled to a much larger deduction for the expenses of maintaining the railway under section 37 of the Act. On 17th July 1862, the Lord Ordinary (Kinloch) remitted to Mr George Dods to report "what amount of deduction is proper to be made from the suspenders' lands and heritages within the City Parish of Glasgow, in order to cover the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same." Mr Dods reported that, in his opinion, a deduction of 38 per cent. should be allowed to the company. His estimate was founded on an average of the expenses incurrred by the company for maintenance and renewal of way, and for taxes, &c., during the twelve years from 1852 to 1864; and he recommended an additional deduction of 5 per cent. to be allowed in respect of the cost of renewing the line, taking the average period of endurance of a railway at sixteen years; and a further deduction of 1·53 per cent. in respect of the deduction of 20 per cent. allowed to other lands and heritages in the parish, being to that extent greater than is allowable under the Act. On 21st June 1865 the Lord Ordinary "found that in estimating the deduction proper to be made from the valuation from the railway, under sec. 37 of the Act, the rates, taxes, and public charges are to be taken as actually payable for the year of valuation, and not to be estimated on any annual average; that there are not sufficient grounds for allowing the percentage of 5 per cent. allowed by the reporter, in respect of the cost of renewing the line over and above the other percentages as allowed by him, nor for the percentage of 1·53 proposed by him in respect of the alleged overestimate of the deduction made in the case of other than railway property. To the above-mentioned effects he sustained the objections to the report by Mr Dods, *quoad ultra* repelled the objections, and approved of the report; and found that a sum amounting to 28·60 per cent. on the valuation of the year, with the amount of rates, taxes, and public charges actually payable for the said year added thereto, represents the legal and proper deduction to be made in terms of the said statute." Against this interlocutor the railway company reclaimed, but the Court to-day unanimously refused the reclaiming-note and adhered to th judgment of the Lord Ordinary.

The following extract from the Lord Ordinary's note explains the nature of the different points decided:—

"1. It appears to the Lord Ordinary, that although, in regard to repairs and other similar expenses, a probable annual average is appointed to be taken, yet as to rates and taxes, it is those actually paid for the year which are to be deducted, and not any hypothetical estimate. The words of the statute seem to him to involve this conclusion. So does its presumable intention; for there is no difficulty in ascertaining the actual taxes, and no necessity for resorting to a hypothetical estimate. If this view be correct, it will result in substituting the actual amount for the percentage of 2·90 proposed by the reporter. Probably the arithmetical difference will not be very great.

"2. It was objected by the respondent, the poor-law collector, that in striking the 'probable annual average' of repairs and other expenses, the reporter had gone wrong in taking any other than the years preceding the year of valuation, because it was only these years which could be possibly taken into view by the Poor Law Board when making their estimate for the particular year. The reporter has taken an average including five years preceding and five subsequent. Now it is quite true that it is only previous years that could be absolutely known

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.