the case as to bills differently situated, I think a bill signed in blank is not issued when so transmitted. There may arise nice questions as to when such a bill shall be held to be issued; and questions which cannot be solved by laying down any absolute rule beforehand. In the present case, where the question is exclusively between the drawer and acceptors, I think the bill was not issued till the drawer filled it up in the bank with which he discounted it. The drawer, as already said, held a mandate from the acceptor to fill up the instrument. When he proceeded to fill up the bill with its necessary elements, including the date, he was in substance just the acceptor doing the same thing. The case must be held the same as if the acceptor had himself, in the presence of the drawer, filled up the date, and then handed him the bill. In that case there would be no ground for holding that the date was inserted after issue; and as little, I think, is there in the present case.

On this ground, also, I think, the Mercantile Law Amendment Act inapplicable to the present case.

Agents for Complainer—Leburn, Henderson, & Wilson, S.S.C.

Agent for Respondent—J. C. Baxter, S.S.C.

Thursday, January 21.

OLIVER *v.* WALLACE.

Bankrupt—Evidence of Claim—Trustee. When a trustee on a bankrupt estate thinks that evidence is required in support of a claim, he ought to give the claimant an opportunity of leading that evidence.

Where a claim has been rejected by a trustee as unsupported by evidence, and the claimant appeals, it is matter of discretion for the Court either to take the evidence or to remit to the trustee to take it.

The estates of James Orr were sequestrated on 6th September 1867, and the respondent was appointed trustee. Certain claims on Orr's estate, lodged by Oliver, were rejected by the trustee, he alleging that many of the items were manifestly unfounded, and that no evidence was offered in support of them.

Oliver appealed, and craved the Court "to recal and alter the decision complained of; and to ordain the trustee to rank the appellant in terms of his claim; and to make payment of the dividend corresponding to the debt for which the appellant claimed in his oath; to be ranked with bank interest on the dividend from the time the same shall be deposited by the trustee; and to find the appellant entitled to expenses."

The Lord Ordinary (MANOR) pronounced this interlocutor:—"Remits back to the trustee to require and receive evidence of the several items of the appellant's claim, and to dispose thereof as he shall see fit: Finds the appellant liable in expenses," &c.

"*Note*—It appears to the Lord Ordinary quite incompetent for the appellant to come to the Court and ask for a proof, which he might have had, and ought to have led before the trustee."

The appellant reclaimed.

SCOTT and REID for reclaimer.

BURNET for respondent.

At advising—

LORD PRESIDENT—The Lord Ordinary says—"It appears to the Lord Ordinary quite incompetent for the appellant to come to the Court and ask for a proof, which he might have had, and ought to have led before the trustee."

I understand all your Lordships to be of opinion that it is not incompetent for the appellant to ask for a proof here, or for the Court to allow it if they see cause; and it is matter of discretion in the circumstances, whether the course adopted by the Lord Ordinary should be followed, or a proof allowed in this Court.

I should desire, however, to add that I hope it will not be understood that if we take the course of allowing the proof to be taken here, that imports in any way an expression of opinion that a trustee is justified in not taking evidence, when necessary, in support of a claim, or that what we do here can have any effect on the decision in *Adam and Kirk*. As far as I am concerned, I adhere to what I said in that case. When a trustee considers that evidence is required in support of a claim, he should give the claimant an opportunity of leading that evidence, for generally that can be done more easily and more cheaply before the trustee than here. But in this case I think it would be most expedient to take the proof here.

The other Judges concurred.

Agent for Reclaimer—John Walls, S.S.C.

Agent for Respondent—John Thomson, S.S.C.

OUTER HOUSE.

(Before Lord Manor)

GOW'S EXECUTORS *v.* GOW.

Approbate and Reprobate—24 *and* 25 *Vict. c.* 114—*Testament—Domicile*—Animus revertendi—*Construction of Will—Foreign Law.* A, a Scotchman, lived abroad in an English colony from 1842 to 1863. A few days before finally leaving the colony for Scotland he executed a will in the English form, giving certain legacies to his heir-at-law, and the whole residue of his estate to a nephew. After his return, he lived sometimes in Scotland, where he bought a piece of land and began building a dwelling-house, and partly in England, where, however, he had no fixed residence. He died a domiciled Scotchman. Admittedly his residence abroad had been merely for trading purposes, he always having an *animus revertendi*. *Held*, (by LORD MANOR) that the domicile at death being Scotch, the will must receive effect according to the law of Scotland; and that the principle of approbate and reprobate applied to prevent the heir from taking both the legacies and the heritage.

Remit to English Counsel *held* unnecessary, there being no technical terms in the deed requiring interpretation.

Opinion, that A's domicile at the date of the will was foreign.

In 1842 David Gow, a Scotchman, left Scotland for Singapore. After remaining at Singapore for three or four years he went to Hong Kong, where for many years he carried on the trade of a shipbuilder, in partnership with George Harper. About the year 1861 Gow proposed finally leaving Hong Kong and returning to Scotland, his partner Harper remaining to take charge of the business at Hong Kong, but Harper asked Gow to remain, in order that he, Harper, might first come to this country to see his

friends. Gow consented to this arrangement. Harper intended going back to Hong-Kong in about six months, but he remained away for about two years. About two months after Harper's return to Hong Kong Gow left, leaving Mr Harper to wind up the business at Hong Kong, and returned to Scotland.

On 29th May 1863, a few days before he left Hong Kong, Gow executed a last will and testament, in the English form, whereby he directed his executors thereinafter named to get in and convert into money, as soon as conveniently might be after his decease, subject, however, to the provision in that behalf thereinafter contained and expressed, all his property, estate, and effects, of whatsoever kind, not consisting of money or securities for money, and thereout, in the first place, to pay and discharge his just debts and funeral and testamentary expenses. He gave and bequeathed to each of his sisters, Miss Betsy Gow, Miss Jane Gow, and Mrs Margaret Kemp, the sum of 10,000 dollars current in Hong Kong: he gave and bequeathed to each of his executors thereinafter named the sum of £100 sterling, as a mark of his esteem and regard; all the residue of his property and estate he gave and bequeathed to George Harper, of Victoria, in the colony of Hong Kong, shipbuilder, and James Kemp of Hamilton, in the county of Lanark, in Scotland, their executors, administrators, and assigns, in trust, that they and the survivor of them, and the executors and administrators of such survivor, and their and his assigns, should invest the same in their or his names or name, in or upon such securities, whether government or public, or real or personal, and whether in the United Kingdom or in any other of the colonies, or in the East Indies, as to them or him should in their or his discretion seem fit, with power from time to time to alter, vary, and transpose the same securities for others, and should stand possessed of and interested in all such trust monies, stocks, investments, and securities, and the interest, dividends, and annual proceeds thereof in trust for his nephew, David Gow Kemp, defender, his executors, administrators, and assigns, his interest therein to become vested on his attaining the age of twenty-one years: And in case his said nephew, David Gow Kemp, should die under the age of twenty-one, then in trust as to two-thirds thereof for the said James Kemp, his executors, administrators, and assigns, and as to the remaining one-third for his said sisters, Miss Betsy Gow and Miss Jane Gow, and their respective executors, administrators, and assigns, in equal shares, &c.

On his return from China, Gow visited his relatives in Scotland; and while there he, in the month of August 1864, purchased a small house, and piece of ground attached thereto, called Silverwells, near Bothwell, Lanarkshire. This house, which he furnished at his own expense, he allowed his sisters Betsy and Jane Gow to occupy; but he likewise resided in this house himself when in Scotland after the date of its purchase. After this date he usually spent the summer in Scotland and the winter in London. He had no fixed residence, however, in England, and when residing in London, or elsewhere than in Scotland, he resided almost exclusively in hotels. Toward the end of 1864 Gow purchased a larger piece of ground adjoining Silverwells, and entered into contracts for building thereon a dwelling-house for his own occupation. This house was in course of erection, but uncompleted, at the time of Gow's death, on 21st November 1866. He was possessed of no other heritable property in Scotland than these subjects.

Besides these facts, which were admitted by all the parties, it was further admitted that the will was executed by Gow a few days before he left Hong Kong, when he had not only avowed his intention of returning to this country, but must have been making preparations for doing so; that during the whole time Gow was abroad he kept up a correspondence with his relatives, and for the last two or three years of his residence abroad he wrote by almost every mail; that Gow's letters and correspondence, more especially his letters, for two or three years before his return to this country, all showed that he had an *animus revertendi*, and that his wish was to make a fortune and return to his native land.

This action was now raised by Gow's executors for the purpose of having it found that Gow's sisters, defenders, were not entitled both to retain the heritable property belonging to Gow at his death, and also to take the legacies bequeathed to them by him.

The executors pleaded—"(1) The domicile of the said David Gow was Scotch both at the date of executing his last said will and testament and at the time of his death, and the same must be construed according to the law of Scotland. (2) On a sound construction of the said last will and testament the defenders, the said Misses Betsy and Jane Gow and Mrs Margaret Gow or Kemp, are not entitled both to the legacies left by the testator, and to his heritable estate."

For Gow's sisters, defenders, it was pleaded—"(1) The domicile of the said David Gow, at the date of the execution of the said testament, was in Hong Kong, and the said testament must therefore be construed according to English law. (2) According to English law the present defenders are not, by the terms of the will, put to their election between the legacies given to them by the will and the heritage which belonged to the testator, but are entitled to take both. (4) Assuming that, at the date of the execution of the said will, Mr Gow's domicile was Scotch, his testament was invalid according to Scotch common law, and its only efficacy is conferred by the Act 24 and 25 Vict. c. 114. (6) Assuming David Gow's domicile at the date of the execution of the said will to have been Scotch, there is not on the face of the said will any such indication of a purpose to deal with the Scotch heritage as to allow of the application of the doctrine of approbate and reprobate."

The nephew, who was also called as a defender, maintained the same pleas as did the executors.

The Lord Ordinary pronounced an interlocutor sustaining the claim of the pursuers, adding this note:—"From the history of the life of the testator Mr David Gow, which is very clearly given in the record and relative minute of admissions, it appears that he was a Scotchman by birth, and lived in Scotland till he was about 25 years of age, when he went abroad to seek his fortunes." His Lordship then gave a narrative of the facts, and continued:—

"These are the whole material facts connected with Mr Gow's residence abroad, extending over a period of between twenty-three and twenty-four years. While still at Hong Kong, within a few days of his finally leaving it, and when he must have been making preparations for doing so, Mr Gow, on 29th May 1863, executed the last will and testament which has given rise to the present action. It is in the English form, and expresses his purposes in very plain and intelligible language. By it he means his partner Mr Harper and his

brother-in-law Mr David Kemp to be his executors, and directs them to get in and convert into money, as soon as conveniently may be after his decease, all his property, estate, and effects of whatsoever kind, not consisting of money or securities for money, and thereout, in the first place, to pay his just debts and funeral and testamentary expenses. He then gives and bequeaths to each of his three sisters, Miss Betsy Gow, Miss Jane Gow, and Mrs Margaret Kemp, the defenders in this action, the the sum of 10,000 dollars current in Hong Kong; and after a trifling legacy to each of his executors, he gives and bequeaths all the residue of his property and estate to his said executors, and their executors, administrators, and assigns, *in trust*, to invest the same in their names upon such securities as to them shall seem fit, for David Gow Kemp, his nephew, whose interest therein is declared to become vested on his attaining the age of 21 years; and in case of his nephew, the said David Gow Kemp, dying under the age of 21 years, then in trust for James Kemp, the husband of Mrs Margaret Kemp, and her two sisters Miss Betsy Gow and Miss Jane Gow, and their several executors and assigns, in certain proportions, with various provisions as to the application of the income and annual proceeds of the residue in and towards the maintenance, support, and education of the said David Gow Kemp, until the same should become indefeasibly vested or payable as aforesaid. The will was duly proved in the Prerogative Court of Canterbury on 23d January 1867.

"In this state of the facts, questions were raised at the debate with regard both to the domicile of the deceased and the construction of his will. For the pursuers, his executors, it was contended that, notwithstanding his long residence abroad, the testator had never lost his original domicile, and was a domiciled Scotchman not only at the date of his death, but at the date of the execution of his will at Hong Kong, on 29th May 1863, in respect of his intention to return home having been plainly indicated and declared before his will was made. In support of that proposition they relied chiefly on the cases of *Whicker* v. *Hume*, 7 Clarke, p. 124; *Udny* v. *Udny*, 5 Macph., p. 164; and *Jopp* v. *Wood*, Eng. Law Journal, Chancery Reports, p. 212, in which last case the native domicile was held to have been retained even though the party had had a continuous Indian residence for thirty years all but a single year. Founding upon these authorities, the pursuers maintained that the will executed at Hong Kong must be read and construed according to the law of Scotland, that being the law in the language of which the testator intended to speak, though driven by the accidental necessity of his position to have the deed executed according to the forms of the law of England, which was the law of the colony where he was living at the time. But according to the law of Scotland the defenders are not entitled both to the legacies bequeathed to them and also to the heritable estate left by the testator at his death. They are met by the doctrine of approbate and reprobate.

"For the defenders, on the other hand, while it was admitted that the domicile at death was Scotch, it was contended that it was foreign at the date of the execution of the will, and that consequently the will required the aid of the foreign law in order to ascertain not only the perfect formality and validity of its execution, but also the interpretation of its meaning and intention; and they pleaded that, according to the foreign law, which is English, they are not put to their election between the legacies given them by the will and the heritage which belonged to the testator, but are entitled to take both,—the former by the terms of the bequest in their favour, and the latter as heirs at law of the testator.

"The Lord Ordinary has not thought it necessary to determine the somewhat nice and difficult question which is raised by the decision in the case of *Jopp* v. *Wood*. Had he been forced to do so, he would have determined it against the pursuers, and would have held that David Gow had lost his native domicile, and was domiciled in Hong Kong at the date of the execution of his will. But assuming that to be so, the Lord Ordinary is satisfied that the admitted fact of the domicile at death being Scotch is quite sufficient for the decision of the question as to the rights of the parties under this will. Had any inquiry been needed as to the validity of the execution of the will, or as to the legal meaning of its terms, these matters must have been determined by English law. But no such inquiry is necessary. The will having been admitted to probate in the English Court has thereby been ascertained to be a valid testamentary writing according to the forms of the law of England; and as regards its meaning and import, these are so plain and unequivocal on the face of the instrument as to need no interpretation of foreign law to say what they are. There is absolutely no technical expression giving rise to any difficulty, but the words employed are such as may be construed by any Judge conversant with the language in which the will is written. See *Thomson's Trustees* v. *Alexander*, 14 D. 217.

"The testator gives 10,000 dollars to each of his sisters, and to his nephew, through his executors, as trustees, he gives and bequeaths all the residue of his property and estate; that is to say, every thing that was not otherwise disposed of. At the time when he made this settlement, which was evidently a settlement of his entire means and estate, he was possessed of no heritable property. He did not acquire that till after his return to Scotland, and accordingly in his will he makes no mention of heritage, and cannot be presumed to have had it specially in his contemplation at all. But the bequest of residue includes everything belonging to him at his death in whatever form it might happen to be. His intention with regard to such residue admits of no doubt. His nephew was the favoured person to whom it was wholly given. His sisters were to have none of it. They were to receive, in the first instance, no more than their pecuniary legacies; and to make the intention in that respect all the more clear, it is only in the event of the nephew dying before a specified age that a provision is made for the distribution of the residue among the sisters.

"In these circumstances, having regard to the plainly evinced intention of the testator, and holding that his will is to receive effect according to the law of Scotland, where he had his domicile at the time of his death, the Lord Ordinary thinks that this is a clear case for the application of the principle of approbate and reprobate in bar of the claim of the defenders. The validity of the will being established, and the meaning of its terms free from any ambiguity, he apprehends that there is no ground for having recourse to the law of England in order to inquire what would be the effect of such an instrument according to that law."

The defenders acquiesced.

Counsel for Pursuers—Mr Duncan. Agents—Adam, Kirk, & Robertson, W.S.

Counsel for Heirs at Law—Mr Lancaster. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Nephew—Mr Spittal. Agents—Mackenzie, Innes, & Logan, W.S.

(Before Lord Jerviswoode.)

RENTON *v.* NORTH BRITISH RAILWAY COMPANY.

Bastard—Parent and Child—Title to Sue—Reparation. Held that the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child.

This was an action concluding for damages and *solatium* at the instance of the mother of an illegitimate son, who was killed at the Portobello Station of the North British Railway Company through the fault of the railway company's servants. The defenders admitted their liability for the culpable negligence of their servants in causing the death of the pursuer's son, but pleaded (1) that the pursuer has no title to sue; (2) that the deceased having admittedly been an illegitimate son of the pursuer, the pursuer could not maintain the action for damages, and, *separatim*, could not maintain the same for *solatium;* and (3) that the defenders having settled with the widow and child of the deceased, the pursuer could not maintain the action.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the 1st, 2d, and 3d pleas in law stated in defences on the part of the defenders, and considered the record, with the minute for the pursuer, No. 7 of process, repels the said pleas, and allows the pursuer to lodge an issue or issues with a view to the trial of the cause as she may be advised within eight days from the date hereof."

"*Note.*—The question to which the pleas in defences, with which the Lord Ordinary has now dealt, relates, is one of considerable importance, more especially in respect to that branch of it which arises directly under the 1st and 2d pleas for the defenders.

"It seems somewhat singular that, as admitted on both sides of the bar, as the Lord Ordinary understood, no direct decision of this Court is reported on which a claim in all respects the same as that of the pursuer here has been either sustained or repelled.

"It is said, however, and the Lord Ordinary believes correctly, that in certain Sheriff-courts such claims have been made and sustained, and the Lord Ordinary has a distinct recollection of a question having been raised before himself as to the liability of an illegitimate child to support his mother who was in poverty, and where he sustained the relevancy of the claim. But, so far as he is aware, the case did not go farther, or at least is not reported.

"On the merits of the question itself the Lord Ordinary cannot say that he has here entertained much serious doubt. It may be true, and the Lord Ordinary proceeds on the footing that it is so, that the person who, either by admission or on proof, may be dealt with, and held to be the father of an illegitimate child, cannot insist in such an action as the present, and this may, and indeed must, be so held while the principle of law is recognised that the full relation of parent and child does not exist between them.

"But the position of the mother is altogether different. The relation in which she stands to her child admits of no doubt. She is in fact and in law its mother, and although the circumstances of the birth may, as here, bring sorrow and reproach upon her, still her comfort and consolation is that her child is spared to her, and is not the less dear to her affections, because for and on account of it she may have suffered much.

"On the whole, the Lord Ordinary is of opinion that the case for the pursuer is relevant, and should proceed to trial."

The action was subsequently compromised.

Counsel for Pursuer—Mr Robert Johnstone and Mr J. A. Reid. Agent—Jardine Henry, S.S.C.

Counsel for Defenders—Mr Shand. Agents—Dalmahoy & Cowan, W.S.

Wednesday, January 6.

(Before Lord Barcaple.)

REID *v.* HART.

Bill—Value—Banker—Security given to Banker by Promissory-Note granted by the Friend of a Customer. Held (1) that the security was terminable at any date by intimation from the granter; (2) that the note did not prove value, and the *onus* lay on the banker to prove that any debt was due at the termination of liability.

The pursuer in this action is the agent of the City of Glasgow Bank at Glasgow, and he sues the defender for payment of the sum of £150, being the amount of a promissory-note. He makes the following statements:—"(1) Of this date (August 27, 1866) the defender granted to the pursuer his promissory-note, in the following terms:—

'63 *Renfield Street,*

'£150 stg. *Glasgow, 27th August* 1866.

'One day after date I, Thomas Hart, writer, Glasgow, promise to pay to William Reid, Esq., at City of Glasgow Bank, No. 2 Bridge Street, Glasgow, the sum of £150 sterling for value received.

'THOS. HART.'

"(2) The defender is due to the pursuer the said sum of £150, contained in the said promissory-note; but although he has been repeatedly required to make payment thereof he refuses, or at least delays to do so, whereby the present action has become necessary."

The defender maintained the following pleas in answer to the action:—"(1) The instance, in so far as regards the pursuer or pursuers, is defective and ambiguous. The pursuer or pursuers have no title to sue upon the document libelled. (2) The pursuer, William Reid, having fraudulently and wrongously retained the said document without delivering or sending to the defender the back-letter which he required in exchange therefor, the said document was not granted or delivered to the said William Reid, and he has no right of action thereupon. (3) The document in question never having been delivered to the pursuer, and, *separatim*, if delivered, having been so by the defender's messenger without authority from the defender, and in the knowledge by the pursuer that it was delivered without authority, the pursuer cannot enforce payment thereof. (4) At least the said back-letter having been kept and retained by the said William Reid, along with the said note or document, the defender is entitled to assume that the said two documents can only be read together.