tors to allocate certain stock of the company which is still unallocated and yet in their hands. After the winding-up order had been pronounced I do not see that it would be possible for the directors by allocating the unallocated stock in their hands to affect the status of the partners, but it may be they might secure another very important advantage, because if the liquidation were to take place as at the date of this petition, on the 17th of May, it might be very questionable whether the directors would be able to found upon any allocation letters issued after that day, as giving effect to the allocations which took place on the 17th of May. The question that arises is, whether the petitioners have shown that it would be just and beneficial that this winding-up order should date back to the 17th of May, and if they, the petitioners, had therefore presented a case which came within the clauses of the Companies Acts, which provides that the Court may order a winding-up where they think it just and beneficial, their position might have been better. But I am of opinion, that seeing that the whole purpose which is to be served by making the order as of that date is to give one set of shareholders of this company a substantial advantage over the others, it is not just and beneficial that that order should be pronounced. It appears as matter of fact that this company is still carrying on business. There are a number of contracts which it is in the course of fulfilling. No doubt these contracts are being fulfilled now, under the arrangement with the New Company that the profit or loss in connection with these shall ultimately be the concern of the New Company. Notwithstanding, I think the company is still carrying on business, although it may be a limited business in that respect, but still it is the business they were entitled to carry on until the day fixed by their agreements, viz., the 30th of June. And that being so, it seems to me to be premature to give a winding-up order as at the 17th of May.

I am further of opinion with your Lordship, that seeing that the object of this petition is really to give one set of shareholders an advantage over the others in the question whether there is or is not a power to allocate these unallocated shares—and that is the sole purpose of the petition—the petitioners have failed to show any ground for granting the winding-up order asked. And I also agree with what your Lordship has said as to whether the allocation of shares can be proceeded with effectually, or whether the Anglo-American Company have a good right to object to that allocation? All that, I think, is open and unaffected by anything that has taken place, and the directors are to be left free to proceed in that matter, leaving to the Court to say how far their proceedings are valid and effectual.

The Lords refused the petition with expenses.

Counsel for Petitioner—Robertson—Pearson. Agents—Bruce & Kerr, W.S.

Counsel for Respondents — Mackintosh — Lorimer — Dickson. Agent — Thomas Dowie, S.S.C.

Friday, June 23.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Craighill and Rutherfurd Clark.)

[Sheriff of Lanarkshire.

GRIEVE *v.* LYNN.

Bill of Exchange—Payment for Honour—Proof prout de jure.

A third party paid the sum contained in a bill to an endorsee after it was due, the bill being endorsed to him for value, but without recourse against the endorser. He did no diligence on the bill for a year, in the course of which the acceptor became bankrupt. In an action at the holder's instance against the drawer for payment of the sum contained in the bill, the Court *allowed* the latter a proof *prout de jure* of an averment as to the footing on which the holder had acquired the bill, and particularly that he had paid it for the honour of the acceptor, and not, as the pursuer averred, for the honour of both the drawer and acceptor.

Henry Grieve, clothier, Glasgow, presented a petition in the Sheriff Court of Lanarkshire at Glasgow, in which he prayed the Court to ordain James Lynn, coal merchant there, to pay him the sum of £50 sterling, with interest thereon, as the amount of a bill payable a month from its date, viz., 5th October 1880. The pursuer averred that the defender had drawn the bill upon Alexander Lynn, residing at Pollockshields, and the said bill was duly accepted by Alexander Lynn. The defender had endorsed the bill for value to the Commercial Bank of Scotland, who in turn had endorsed it also for value to the pursuer, but without recourse against the said bank. The acceptor of the bill failed to pay it at maturity on the 8th November 1880, and the defender was bound to have retired it at that time. He further averred that he was still the endorsee and holder for value of the bill, and although he had called upon the defender to retire it the latter had refused.

In reply the defender made the following averments—He was anxious to assist his brother Alexander Lynn, who had begun business in Glasgow under the firm or company name of the Clyde Paper Stock Company, and accordingly he arranged with his brother that the sum of £50 should be raised for his use by means of an accommodation bill to be discounted with the Commercial Bank of Scotland, Rutherglen. The bill founded on by the pursuer was accordingly granted, and discounted with the said bank, and the proceeds handed to Alexander Lynn for his use in this business. About the beginning of November 1880 Alexander Lynn assumed John Wilson, accountant, Glasgow, as a partner in his business, and immediately thereafter, in connection with the business, he went to America, leaving instructions with his partner to pay the bill on his behalf when it fell due. Shortly after the bill fell due, the pursuer, who was either a partner with John Wilson, or had money transactions with him, and also with Alexander Lynn, on account of which he desired to support the credit

of both, called on the defender and urged him to renew the bill, which he declined to do.

The bill lay unpaid in the said Commercial Bank of Scotland, Rutherglen, until the beginning of January 1881. When the defender was informed of this, he on 8th January 1881 caused his agents, Messrs Fisher & Watt, writers, Glasgow, to write to the said Clyde Paper Stock Company that unless the amount due under the bill was paid forthwith proceedings would be taken thereon, and immediately thereafter the bill was met, and the defender was informed on inquiry at the bank that it had been paid on behalf of Alexander Lynn. If it was paid by the pursuer, it was so paid by him either on behalf of John Wilson or of Alexander Lynn; but the defender believed and averred that the funds were provided by John Wilson out of the funds of the Clyde Paper Stock Company (Limited). At all events, on the dissolution of the company, in settling the partnership transactions Alexander Lynn was debited with the amount of the bill as having been paid on his account. If the bill was paid by the pursuer with his own funds, it was so paid on behalf of Alexander Lynn, and for the purpose of keeping his credit good with the Commercial Bank of Scotland at Rutherglen, and for the pursuer's benefit, and to enable him to discount with the Commercial Bank of Scotland certain wind bills granted by him and Alexander Lynn. Since the bill was met Alexander Lynn had become bankrupt. In the circumstances the pursuer could have no recourse against the defender. The pursuer further explained that he had retired the bill on the credit and for the honour of both the defender and his brother.

The pursuer pleaded—"(1) The defender being the drawer and endorser of the bill founded on, was bound to have retired the same on the acceptor's failure to do so. (2) The pursuer being endorsee and holder for value of the bill founded on, and the defender having failed to pay the same, decree ought to be granted as craved. (3) The whole of the defender's material statement of facts and pleas-in-law being irrelevant, the same ought to be repelled, and decree ought to be granted as craved."

The defender pleaded—"(1) The said bill not having been paid by the pursuer, he was not entitled to decree. (2) Otherwise said bill having been paid by the pursuer with the funds of the said Clyde Paper Stock Company, of which the said Alexander Lynn was a partner, and on behalf of the said Alexander Lynn, decree of absolvitor ought to be granted. (3) Otherwise said bill having been paid by the pursuer to support the credit of the said Alexander Lynn with said bank, and for the purpose of enabling him to discount certain wind bills to which they were parties, the pursuer had no recourse against the defender, and decree of absolvitor ought to be granted. (4) The said bill being an accommodation bill for the behoof of the said Alexander Lynn, and not having been endorsed to the pursuer during its currency, the pursuer had no recourse against the defender, and decree of absolvitor should be granted. (5) The pursuer was barred by *mora* and taciturnity from insisting in the present action."

The Sheriff-Substitute (Erskine Murray) on 3d March 1882 allowed the defender a proof of his averments by the writ or oath of the pursuer, and to the pursuer a conjunct probation by writ. He added this note:—"The cases of *Adam* v. *Boyd*, June 12, 1830, 8 S. 914, and of *Rae and Hall* v. *Fraser*, February 21, 1800, Hume's Reports, 43, seem necessarily to lead to the above result."

On appeal the Sheriff-Principal (Clark), for the reasons assigned by the Sheriff-Substitute, adhered to the interlocutor, and remitted to the Sheriff-Substitute for further procedure.

The defender in a minute stated that, being advised that he was entitled to a proof at large in the case, he respectfully declined the proof by writ or oath of pursuer allowed to him.

Thereafter the Sheriff-Substitute allowed the minute for the defender to be received, and in respect of his failure to lead proof held him confessed, and decerned as craved.

He appealed to the Second Division of the Court of Session, and argued—His averments on record were such as showed that the bill came into the pursuer's possession through some irregular dealing, and not in the ordinary course of business, and were such as to lead to the inference that no actual value had been given for the bill at the time. He was therefore entitled to a proof *prout de jure* of his averments—*Ferguson, Davidson, & Co.* v. *Jolly's Trustee*, January 22, 1880, 7 R. 500; *Middleton* v. *Rutherglen*, February 8, 1861, 23 D. 526; *Campbell* v. *Dryden*, November 25, 1824, 3 S. 226; *in re Overend, Gurney, & Co., ex parte Swan*, March 1868, 6 L.R., Eq. 344. If the pursuer, as he averred, had interfered as *negotiorum gestor* for the defender's honour, he was bound at once to have given intimation of the fact to the defender—Pothier, Traitè du Contrat de Change, art. 5, 114, p. 69.

At advising—

Lord Rutherfurd Clark—We have heard argument on some curious points in this case, and these may possibly come up ultimately for decision here. At present, however, I think it is inexpedient to enter upon them.

The pursuer of the action is the holder of a bill, and apparently his title to it is good. But the defender says what substantially comes to this, that the pursuer did not acquire it with his own money, but paid it for the honour of the acceptor, the true debtor. I find also, on looking at the record, that though the bill was taken up in January 1881 there was no attempt on the part of the pursuer to enforce the bill against the drawer, and meanwhile the true debtor became bankrupt.

Now, in these circumstances I am disposed to say that the circumstances attending the acquisition and the subsequent dealing with the bill by the pursuer raise such suspicions as to his title and the regularity of his actings that I think we should allow a proof before answer.

Lord Craighill—I am of the same opinion, and like Lord Rutherfurd Clark I am materially influenced by the meagre explanations made by the holder of the bill.

Lord Justice-Clerk—I concur. We must at this stage allow a proof before answer, though of course the important questions raised are reserved for future consideration.

The Lords sustained the appeal, recalled the interlocutor of 3d March 1882, and subsequent interlocutors appealed against, and before further answer allowed the defender a proof of his allegations, and the pursuer a conjunct probation.

Counsel for Appellant—R. V. Campbell. Agent—D. Lister Shand, W.S.
Counsel for Respondent—Dickson. Agent—Thomas Carmichael, S.S.C.

Saturday, June 24.

FIRST DIVISION.

THOMSON AND OTHERS, PETITIONERS.

Process—Presumption of Life Act 1881 (44 *and* 45 *Vict. c.* 47)—*Competency.*

In a petition under the Presumption of Life Limitation (Scotland) Act of 1881, presented by a brother of the absentee, praying for authority to make up a title to his share of the absentee's interest in their father's estate, after the proof had been led certain other members of the family compeared by minute at the diet appointed for hearing the petitioner upon the evidence, and craved the Court to sist them as parties to the petition, and to conjoin them as petitioners therein for their interest in the succession of the absentee. The Court sisted the minuters, and on hearing counsel *granted* authority to the whole parties, both petitioners and minuters, to make up titles to their respective proportions of the share of the absentee in the same manner as if he had been dead.

Counsel for Petitioners — Ure. Agent — R. Ainslie Brown, S.S.C.
Counsel for Minuters—Jameson. Agent—F. J. Martin, W.S.

Tuesday, June 27.

OUTER HOUSE.

[Lord Kinnear, Junior Lord Ordinary.

SPROT, PETITIONER.

Entail — Expectancy — Nearest Heirs — Entail Amendment Act 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 5.

In an application for authority to disentail, *held* that the value of expectancy of one of the nearest heirs who was in pupillarity was to be ascertained as at the date of the instrument of disentail.

This was a petition for authority to record an instrument of disentail presented by James Sprot, Esq., heir of entail in possession of the entailed estate of Spott, in the county of Haddington. The petitioner was of full age, and the consent of the two next heirs had been obtained, but the third was in pupillarity, having been born on 12th November 1881, and unable to grant his consent; during the progress of the petition a *curator ad litem* was appointed to the said pupil. The petition was presented under the Entail Statutes and relative Acts of Sederunt. The petition was remitted to a man of business to value the estate, and also to Mr Sprague, C.A., to calculate the values in money of the several interests of the succeeding heirs of entail.

Some delay took place while the estate was being valued, &c., but on 12th June 1882 Mr Sprague wrote the following letter to the agents of the petitioner:—"Dear Sirs,—In consequence of the delay which has taken place in this matter, I shall be glad to receive instructions as to the date at which the values of the several interests are to be calculated—whether (1) as at the date of presenting the petition, which I believe was the 13th January, or (2) as at the date of the remit, 7th February, or (3) at the present time. In general, the delay of about four or five months would not have made any material difference in the value; but in the present case, where the value has to be determined of the interest of an infant born on the 12th November last, who would therefore be only two months old at the first of the above-mentioned dates, but is now seven months old, the difference in the value, according as the one or the other date is taken, will be considerable,—Yours faithfully,

"T. B. Sprague."

Upon a motion on a minute to obtain a direction from the Court as to the matters contained in the said letter—

Argued for petitioner—This case is practically decided by the case of *M'Donald* v. *M'Donalds*, in which it was held that the expectancy or interest of the next heirs of entail was to be valued as at the date of the instrument of disentail, and that is the proper date to be taken here in place of any of the dates suggested by Mr Sprague.

Argued for respondent (the *curator ad litem*)—In regard to that case no general rule was laid down, and injustice might easily be done by an heir of entail in possession to any infant child, who might be one of the nearest heirs to an entailed estate, as the time when the deed of disentail must be executed was not fixed.

After consideration Lord Kinnear delivered the following interlocutor and note:—"The Lord Ordinary having considered the petition with the minute, and the letter from Mr Sprague, the actuary therein referred to, and heard counsel, Finds that the value in money of the expectancy or interest in the estate of Spott falls to be ascertained as at the date of the instrument of disentail."

"*Note.*—The question as to the date at which the interests of heirs should be valued appears to me to be settled by the judgment of the House of Lords in *M'Donald* v. *M'Donald*, March 12, 1880, 7 R. (H.L.) 41."

Counsel for Petitioner—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Respondent — Low. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.
