bank to be then made, viz., that he denied responsibility because he was no party to the bill. I must confess that I am unable to see how a man in such circumstances has adopted the bill. There is no circumstance which can be pointed to as amounting to this, that he "held himself out, or suffered himself to be held out, as liable in the contents of the bill" as the drawer or endorser of it. It appears to me that in order to constitute adoption of a forged signature upon a note or any other obligation or adoption of a transaction in which a third party has unwarrantably represented that he was acting for another, and in order therefore to accept responsibility for any such acts in a question with the bank or other creditor, there must be something said or done in communication with the bank or other creditor by which, although no obligation exists, responsibility is nevertheless accepted. I do not differ from my brother Lord Deas when his Lordship says that a person must not say or do anything to deceive the bank, but in saying so I think the statement must refer to some dealing with the bank, or communication made to them by which they have been deceived or misled. Silence, even obstinate silence, or inaction will not constitute adoption, and in a case of forgery I do not see that knowledge either that the friends of the guilty party are making efforts to save him, or that he is preparing to abscond, can make any difference on the legal rights or relations of the parties. Indeed, in a case of this kind, I am unable to see any ground for saying that there is any relation between the parties which can give the creditor any legal right, and so it appears to me there must be something actively done by the party said to have adopted the forgery in dealing with the creditor. If that be so, what has the suspender done in a question with the bank? He never made any communication to the bank till 29th July, and then his communication was that his signature to the bill was a forgery. In these circumstances there is no evidence whatever upon which I can proceed in saying that this bill admittedly forged was so adopted by the suspender as to make him responsible for the contents of it, or in the words of the issue in *Finlay* v. *Currie*, saying that he held himself out, or suffered himself to be held out, as the drawer or endorser of the bill. He certainly got the notices which I have mentioned. He took steps to have a communication made in answer to the second notice, but I do not know of any legal obligation under which he was to answer the notices of such a nature that if he failed to answer he thereby adopted the bill. Though the bank had advanced money on what had been represented to them as his signature, he was a stranger to them in any transaction, and therefore free from obligation of any kind to them.

In the whole circumstances, I agree with the Lord Ordinary in holding that the bank has failed to establish responsibility against the suspender.

The Court recalled the Lord Ordinary's interlocutor and found the charge orderly proceeded, finding the chargers entitled to expenses, subject to deduction of any expense that may have been caused to the complainer by the respondents' (reclaimers') denial of the averment of forgery.

Counsel for Complainer (Respondent)—J. C. Smith—Brand—Rhind. Agent—William Officer, S.S.C.

Counsel for Respondents (Reclaimers)—Solicitor-General (Balfour), Q.C.—Gloag. Agents—Mackenzie & Kermack, W.S.

Saturday, June 5.

FIRST DIVISION.

[Lord Adam, Ordinary.

LATTA (MUIRHEAD'S JUDICIAL FACTOR), PETITIONER.

Nobile officium—*Judicial Factor—Trust—Advances to Beneficiary from Trust-Funds.*

A testator directed his trustees to accumulate the principal and free income of his trust-estate till his widow's death, at which period the residue was to be divided equally among his then surviving children, the issue of any deceased child to come in place of their parent. Before the period of division arrived, a petition was presented by a judicial factor, who had been appointed to manage the trust-estate, on behalf of a married daughter of the testator who was living in very straitened circumstances with her husband, a man of no occupation, for authority to advance a yearly sum out of her prospective share of the estate for her own maintenance and the education and clothing of her four pupil children. The application was approved of by the lady's brothers, the other beneficiaries under the trust.—The Court *granted* a sum for one year, to be administered and applied by the judicial factor personally for the education and clothing of the children, but refused any advance for the mother's maintenance, and superseded consideration of the petition to enable the father, if necessary, to make further application to the Court.

Charles Muirhead, poulterer, &c., died on May 23, 1865, survived by his widow and by four children, Charles, James, Mrs Agnes Christie, and Mrs Jessie Crellin, who died without issue in 1866. He left a trust-disposition and settlement dated 18th July 1861, by which he conveyed his whole estate to trustees, but the trustees named having either predeceased or declined to act, a judicial factor was appointed on the trust-estate.

By the said trust-deed Mr Muirhead directed—"(*Fourth*) My said trustees are hereby directed to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal; (*Fifth*) As soon after the death of my said wife as convenient, my said trustees are hereby directed to dispone, assign, convey, and make over to my said daughter Agnes Muirhead, exclusive of the *jus mariti* and right of administration of any husband to be after the date hereof married by her," certain heritable subjects. Certain specific provisions followed in favour of the testator's other three children; and the settlement provided (*ninth*) for the division of the residue into four equal shares, for the benefit of the four children re-

spectively, Mrs Christie's share to be paid over to her or invested for her behalf, "exclusive of the *jus mariti* or right of administration of any husband to be after the date hereof married by her." It was further provided that "if any of my children predecease the term of payment of their provisions under this deed, the said provisions shall lapse and become part of the residue of my estate, unless in the event of the predeceasing child or children leaving lawful issue, in which case such lawful issue shall succeed, equally among them, to the provisions their parent would have received had that parent survived the term of payment foresaid; and in the event of the predeceasing child dying without lawful issue, and that child's provisions becoming part of the residue of my estate, my said trustees are directed to divide the residue of my estate into as many shares as I have children surviving the said term of payment, or children who, though dead, have left lawful issue, and to pay over, divide, and invest the same in the proportion of one share to each surviving child, and one share to the children of each deceasing child who has left lawful issue."

The widow, Mrs Muirhead, who was aged 79 at the date of this petition being presented, declined to accept the provisions in her favour under the trust-deed, and claimed and received her legal rights instead. Mrs Christie had four children, the eldest aged nine, her husband followed no occupation, and their only income consisted in the interest of a sum of £1280 invested in the names of their marriage-contract trustees, and the liferent of the cottage in which they lived. By their marriage-contract, dated in 1868, the provisions to which Mrs Christie was entitled were assigned to certain trustees for the purpose, *inter alia*, of paying the income or interest thereof to her for her own exclusive alimentary use and behoof, expressly excluding the *jus mariti* and right of administration of Mr Christie, who, if he survived his wife, was to receive the income as an alimentary provision. On the death of both spouses the capital was payable to the children, whom failing as therein mentioned.

The judicial factor, Mr Latta, S.S.C., presented a petition for special powers. He stated that the annual income of the trust-estate to be accumulated in terms of the trust-deed was £600, and that the trust-estate was at the date of petition divisible among Mrs Christie and her two brothers, under the directions of the deed, the share of capital to which Mrs Christie would be entitled, and to which with further accumulations and subject to the provisions of her marriage-contract she or her children would be entitled on the death of the truster's widow, must be estimated by him at £6400, the annual income from which, under certain necessary deductions, would be about £200. The petitioner stated that Mrs Christie's present income being quite inadequate to clothe and educate her family, she desired (with concurrence of her husband) to receive an instalment to account of the interest of her share in the trust-estate, and craved authority from the Court for a payment of £150 per annum for the maintenance of herself and her children, to be deducted from such share. Mrs Christie's brothers Charles and James Muirhead signified their approbation of this arrangement.

The Lord Ordinary (ADAM) refused the prayer of the petition. His Lordship added this note:—

"*Note.*—The period of division of the residue of the trust-estate in this case is the death of the truster's widow.

"On that event taking place the truster directs his trustees to pay one-fourth part of the residue to his daughter Agnes, now Mrs Christie. In the event of her predeceasing the period of division without issue, her share will lapse. If she leaves issue, her issue will take her share.

"The truster's widow is still alive, so that the period of division has not come. Mrs Christie has consequently as yet no vested interest in the residue.

"The surplus income of the estate is directed to be accumulated till the period of division, so that Mrs Christie derives no immediate benefit therefrom. Mrs Christie has four children, all under the age ten. The amount of the residue to which she or her children will become entitled is estimated at £6400. Mr and Mrs Christie's present income amounts to £55 per annum and the liferent interest of a cottage in which they reside.

"In these circumstances the judicial factor on her father's estate asks authority to make payment to her of £150 per annum 'for her maintenance, and for the maintenance and education of her said children.'

"In so far as authority is asked to pay any sum for the maintenance of Mrs Christie, the Lord Ordinary has no power to deal with the application.

"The application to authorise payments to be made for the maintenance and education of the children is founded on the 7th section of 'The Trusts (Scotland) Act 1867.'

"The children are minor descendants of the truster, but the Lord Ordinary does not think that they are in a position of minor descendants to whom the Court can authorise trustees to make advances out of the capital of the trust-estate. It is clear that if the succession were now to open, the capital of the fund in question would vest, not in them, but in their mother Mrs Christie. They are not beneficiaries who have the primary interest in the fund; they are therefore not beneficiaries having a vested interest in that fund, interpreting these words as they were interpreted by the Court in the case of *Pattison*, Feb. 19, 1870, 8 Macq. 575, and in which the Lord Ordinary concurs."

The petitioner reclaimed.

The application, so far as concerned the children, was originally made under sec. 7 of "The Trusts (Scotland) Act 1867," but in the Inner House the petitioner appealed entirely to the *nobile officium* of the Court.

Authorities—*Hamilton*, July 20, 1859, 21 D. 1379; *Briggs*, Dec. 4, 1869, 8 Macph. 242.

At advising—

LORD PRESIDENT—In this case the mother Mrs Christie, if she survives the testator's widow, will be entitled to one-third of the residue of the estate, amounting apparently to about £6500, but if she predecease that sum will go to her children, and if both mother and children predecease the widow the sum will lapse to residue, and be divisible between Mrs Christie's two brothers. In these circumstances there is no vested right in the fee in either the mother or the children; and there is this additional peculiarity in Mr Muir-

head's testamentary arrangements, that he directs the surplus income to be accumulated during the survivance of the widow. The free income is apparently about £600, and if it were not for the direction to accumulate, the portion of the income corresponding to Mrs Christie's share would be £200. But great difficulty arises from this direction to accumulate; and the question is, Whether we can, by exercising the *nobile officium* of the Court, get over it in order to meet the pressing demand for money to clothe and educate these children, of whom there are four, all in pupillarity.

As regards the proposal to make an allowance of a certain sum per annum to Mrs Christie herself for her maintenance, I think it is impossible to entertain it, for it might amount to simply paying her money out of the portion of Mr Muirhead's estate which ultimately belongs to her children and not to her. But the children's case is different. There seems to be a pressing necessity from their condition; but I should hope that their present condition is not to continue, and that the father of the family, who does not appear to suffer from any incapacity, bodily or mental, will not continue to subsist entirely on the very small income belonging to his wife. Therefore whatever we do in the meantime to meet the existing and pressing necessity must be for one year only, for I hope before the end of that time their condition will be very different. For that year I think we shall be justified in making an allowance for the education and clothing of the four children. As to their maintenance, it is in a different position, for it would be impossible to give anything for their maintenance without giving it substantially for the maintenance of the parents, which is the very thing we cannot do; but to the extent of providing for the education and clothing of the children I think we may fairly allow £30 for each child out of the income of the estate, and on condition that the judicial factor sees to the expenditure of this money, and its proper application to the two objects of education and clothing.

Lord Deas and Lord Mure concurred.

Lord Shand—I concur; and I may add that a strong element of the case, in the view which I take, is that the two brothers, who are the ultimate beneficiaries under Mr Muirhead's settlement, desire that this arrangement should be carried out.

Lord President—That is very important. I had forgotten to mention it. Without that circumstance it would have been difficult to grant the application.

The Court recalled the Lord Ordinary's interlocutor, authorised the judicial factor to apply a portion of the income of the estate in his hands to the education and clothing of the four children of Mr and Mrs Christie to the extent of £30 for each of the four children, for one year from date of the interlocutor, the said sum to be administered and applied by the judicial factor personally, and decerned; and superseded consideration of the petition to enable him, if necessary, to make further application to the Court.

Counsel for Petitioner (Reclaimer) — Blair. Agent—Robert Denholm, S.S.C.

Saturday, June 5.

SECOND DIVISION.

[Lord Craighill, Ordinary.

KYD *v.* WATERSON AND OTHERS.

Process—Multiplepoinding—Competency.

W. executed a voluntary trust-disposition for behoof of creditors. A non-acceding creditor raised an action of multiplepoinding in the name of the trustee, on the ground that undue preferences were being given to other creditors to her prejudice. *Held* (*rev.* Lord Craighill) that such an action was incompetent.

On 9th June 1879 John Waterson, a farmer at Garth of Airntully, executed a trust-disposition in favour of George Kyd, an auctioneer at Perth, for behoof of his creditors. The trustee accordingly realised the estate in the autumn of 1879, and the proceeds amounted to about £2500.

Mrs Waterson, the mother of the truster, was one of the creditors to the amount of £525, and had not acceded to the trust, and accordingly, as she believed that undue preferences were being given to some of the other creditors to her prejudice, she raised an action of multiplepoinding in the name of the trustee George Kyd, as pursuer and nominal raiser, for the purpose of obtaining the adjudication of the Court upon the rights of the several creditors.

Kyd objected to the competency of the action, on the ground that there was no double distress or conflicting claims in regard to the funds in dispute, and that the same had not been rendered litigious by arrestments.

The Lord Ordinary (Craighill) found that the action was not incompetent, and appended the following note to his interlocutor:—

"*Note.*—The Lord Ordinary refers parties to the statement of Professor Bell relative to procedure under voluntary trust-deeds for creditors (Commentaries, 7th edition, vol. ii., 391):—'When an estate vested in trustees is sold, and disputes arise as to the division of the price, the only practicable mode of settling matters is by a multiplepoinding raised either by the trustees or in their name; and there can be no doubt that such a proceeding is competent.' This, the Lord Ordinary thinks, fully covers the present case if the question is to be decided upon authority."

The trustee reclaimed.

At advising—

Lord Ormidale—The dictum from Bell's Commentaries which has been quoted is very comprehensive, and comes to this, that in every case where there is a private trust-deed granted, the creditors can come to the Court of Session to take the place of the trustee. There is no precedent for such a proceeding. I referred during the discussion to a case in which the trustee who had carried through a private trust and could not get his discharge from the acceding creditors, accordingly brought a multiplepoinding and exoneration to get his discharge from the creditors. That is a very different case from this, where the ground is that the trustee refuses to recognise the claim of one of the creditors. The creditors