sent, and she takes under that deed just in the same way as a person lending his money may take the destination as he pleases, it may be, to himself, and to others failing himself. He is thereby practically granting a disposition of that estate to those who are to succeed; it is his disposition in a question with those who come after him, and it is practically his disposition even with reference to himself. As the succession in this case is therefore, in my opinion, in any view, a succession to property within the meaning of section 12, I should certainly hold that if the case did not fall under section 2 the succession-duty claimed is nevertheless due. On these grounds I agree with your Lordships in thinking that we should alter the judgment of the Lord Ordinary and give effect to the claim of the Crown.

The Court recalled the Lord Ordinary's interlocutor, and in answer to the questions put to them, found (1) that the sum of £3333, 6s. 8d. was a succession in the sense of the Succession-Duty Act 1853; (2) that Miss Christian Constable was the predecessor, and (3) Miss Christian Constable Nicoll Constable the successor, within the meaning of the said Act; and decerned against the second parties accordingly.

Counsel for Inland Revenue—Lord Advocate (Watson) — Solicitor-General (Macdonald) — Rutherfurd. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Miss Constable's Trustees—Balfour —Macfarlane. Agents—W. & J. Cook, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Adam, Ordinary.

MACKENZIE *v.* BRITISH LINEN COMPANY.

(*Ante*, p. 241, 20th Dec. 1879.)

Bill—Forgery—Adoption.

Facts and circumstances which *held* (*rev.* Lord Adam, Ordinary, and *diss.* Lord Shand) to amount to adoption of a bill of exchange by a person whose signature had been forged as drawer and endorser thereon.

Opinion (*per* Lord Deas) that a person in knowledge that his signature to a bill had been forged was both morally and legally bound to inform the bank of the fact.

Opinion (*per* Lord Shand) that the duty of disclosure was in each case a question of circumstances; and that something active was necessary to constitute adoption over and above mere silence, however obstinate.

In February 1879 John Fraser, grocer, Greig Street, Inverness, discounted with the British Linen Company's Bank at Inverness a bill for £76, at two months' date, which bore to be signed by himself as acceptor, and by Duncan Mackenzie, contractor, Abriachan Wood, and John Macdonald, crofter, Ballintore, as drawers and endorsers. The bill fell due on 10th April, and on the 12th the bank's agent wrote to each of the drawers and endorsers that such a bill was lying in his hands under protest for non-payment, and desiring them to order it to be retired immediately. No answer was received from either of them. On the 14th Fraser called at the bank with a blank bill bearing to be signed by the same parties as before, and requested the agent to renew the former bill, and on his refusal to do so for the full amount Fraser paid £6 to account in cash, and the bill was filled up for £70, at three months' date; the former bill was given over to Fraser. On 14th July, three days before this bill fell due, the agent wrote to the drawers and endorsers—"Your bill on John Fraser p. £70 is due on 17th July, and lies at the office for payment." On 18th July, the bill not having been honoured on the 17th, he wrote to each of them —"Your bill on John Fraser, 14th April, 3 m./d., for £70, is lying in my hands under protest for non-payment. Be so good as to order it to be retired immediately." No answer having been received, and the bank agent having put the matter in his law-agent's hands, Mackenzie by his law-agent intimated that he would not pay the bill because the signatures bearing to be his were forgeries. Mackenzie was accordingly charged by the bank for payment of the £70, with interest. He brought a suspension, and averred that he "never subscribed or adhibited his name to the said bill either as a drawer or endorser thereof, and never authorised any person or persons to do so on his behalf." He pleaded—"(1) The signatures upon the bill charged on, bearing to be the complainer's, never having been written by him, or with his authority or knowledge, and the respondents' averments of adoption being unfounded in fact and insufficient in law, the complainer is entitled to have the charge suspended."

The bank averred that at 14th April, the date of the renewal of the bill, "the complainer knew that the said bill had been renewed in whole or in part by means of the said blank acceptance." They also stated—"The said bill was drawn and endorsed by the complainer, or with his knowledge and authority, and the respondents believe and aver that the complainer was aware that the said bill, having his name as drawer and endorser thereon, was presented to the bank, and that the bank discounted it in reliance thereon. He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and endorse the bills himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and endorsing them." They pleaded—"(1) The said bill having been drawn and endorsed by the complainer, or with his knowledge and authority, there are no sufficient grounds for suspending the charge thereon. (2) The complainer having adopted said bills, is barred from pleading the forgery thereof."

Proof was led, the material portions of which are set forth in the Lord President's opinion; and on February 3, 1880, the Lord Ordinary (ADAM) suspended the charge complained of, and whole grounds and warrants thereof, and decerned. His Lordship added this note :—

"*Note.*—This is a suspension by Duncan Mackenzie of a charge at the instance of the British Linen Company on a bill for £70, dated 14th April 1879, at three months' date, bearing to be drawn by Mackenzie and John M'Donald upon and accepted by John Fraser, and to be endorsed by Mackenzie and M'Donald to the bank.

"The bill which came due on the 17th July was a renewal in part of a previous bill for £76, dated 7th February 1879, and which came due on 10th April. This bill was admitted to be drawn, accepted, and endorsed in the same way as the bill charged on.

"It is proved that the signatures of Mackenzie and M'Donald to both of these bills are forgeries, and the only question about which the Lord Ordinary has difficulty in the case is, Whether it is proved that Mackenzie has by his acts adopted the bill charged on, so as to bar himself from now disputing his liability for it?

"There is some conflict of evidence in the case, but the Lord Ordinary thinks that the evidence adduced by Mackenzie is to be believed, and that Mackenzie himself is a respectable man, and gave a substantially true account of the various transactions which took place with reference to the bills.

"Whether a person who has not signed a bill has nevertheless so adopted it as to make himself liable is a question of circumstances in each case. The material facts in this case would appear to be that on 12th April 1879 a notice was sent to Mackenzie by the agent of the bank, intimating that his bill on John Fraser, dated 7th February, at two months' date, was lying in his hands under protest for non-payment, and requesting that it might be retired immediately. Mackenzie received this notice on a Saturday night. He did not know who the John Fraser referred to was, but thinking it might be a John Fraser of Greig Street, Inverness, he on the Monday following went to him. Mackenzie then saw Fraser, who admitted to him that he had forged Mackenzie's signature to the bill. The bill, however, had by this time been retired, and Mackenzie got it and brought it away with him. Fraser at the same time assured him that the bill had been paid in cash, and the Lord Ordinary does not doubt that Mackenzie believed this to be the fact. Mackenzie thinking that all trouble about this bill was at an end, gave no information either to the bank or the legal authorities that his name had been forged. The fact, however, remains that Mackenzie knew that Fraser had forged his name to a bill, and had obtained money from the bank on the faith of it.

"On 14th July 1879 a notice was sent to Mackenzie by the accountant of the bank intimating that his bill on John Fraser for £70 became due on the 17th, and lay at their office for payment.

"Upon receiving this notice Mackenzie again went to Fraser, who admitted to him that he had again forged his name; but on Fraser's assurance that he would take up the bill when it became due, Mackenzie did not communicate with the bank, or take any other step in the matter.

"On the 18th July, the bill having in the meantime become due, notice was sent by the agent of the bank to Mackenzie that the bill was lying in his hands under protest for non-payment. On receiving this notice Mackenzie went again to Inverness. He did not, however, see Fraser, but he put the matter into the hands of a Mr M'Gillivray, who was then his agent, instructing him to protect him against the forgery. Mr M'Gillivray did not at once tell the bank that Mackenzie's name had been forged. Mr M'Gillivray has not been examined, but it would appear from the evidence in process that Mr M'Gillivray, with the view of saving Fraser, spent some time in endeavouring to raise money to retire the bill. He was unsuccessful, and the result was that on 21st July the agent for the bank sent Mackenzie a third notice to the effect that the bill had not been retired, and that if not paid on Friday (the 25th) the bill would be put into the hands of their law-agent, with instructions to proceed against all the parties for recovery of the amount. It is not clear whether Mackenzie took any steps on receiving this notice, but the bank put the matter into the hands of their law-agent Mr Ross, who on the 25th wrote to Mackenzie that unless the bill, with ten shillings of expenses, was paid on or before Monday the 28th, the bill would be protested. Not being himself able to leave his work, Mackenzie sent this letter by his sister to Mr M'Gillivray on Monday the 28th. On the 29th of July Mr M'Gillivray intimated to Mr Ross, the law-agent for the bank, that Mackenzie's and M'Donald's signatures were forgeries. A day or two afterwards Mackenzie himself went in person, and had a meeting with Mr M'Gillivray, Fraser, and M'Donald, when Mr M'Gillivray and Fraser endeavoured to get him to put his name to another bill in order to retire the forged bill, but he refused to do so, and then he and M'Donald went personally to Mr Williamson, the agent of the bank, and intimated to him that their signatures were forgeries. Some further delay took place in consequence of Mr M'Gillivray, acting apparently for Fraser, representing that the bill was or would be immediately settled; but that does not appear to be material, as neither he nor Mackenzie ever receded from their position that the signature was a forgery. Mr M'Gillivray failed to raise money to retire the bill, and the bank charged Mackenzie to pay the amount.

"It is in these circumstances that the question arises, whether Mackenzie is liable for the bill? The case against him is that he was bound at once, upon the bank demanding payment of the bill from him, to have intimated to them that his name was a forgery, seeing that he knew that Fraser had previously obtained money from the bank by forging his name to a bill, and that not having done so he must be held to have adopted the bill.

"The case must, of course, be decided on its own facts, but previous decisions in similar cases throw light upon the view which ought to be taken of these facts. There would appear to be no doubt that when a bill is exhibited to a person bearing to be signed by him, and he does not at once repudiate his signature, he cannot afterwards be allowed to plead that it is forged—*Finlay* v. *Currie*, Dec. 7, 1850, 13 D. 278; *Boyd* v. *Union Bank of Scotland*, Dec. 12, 1854, 17 D. 159. So also very much on the same principle when proceedings are taken upon a bill, and the defence of forgery is not at once pleaded, it will not be allowed to be afterwards insisted in—*Provan* v.

Gray, June 29, 1821, 1 Shaw 92; *Paterson* v. *Sparrow*, Dec. 20, 1821, 1 Shaw 223; *Maiklen* v. *Walker*, Nov. 16, 1833, 12 Shaw 53.

"On the other hand, where intimation is made to a person of the existence of a bill alleged to be granted by him, unaccompanied by any demand for payment, he does not seem to be barred from afterwards pleading that the bill is a forgery, although he may have taken no notice of the intimation—*Warden* v. *British Linen Company*, Feb. 13, 1863, 1 Macph. 402. There would also seem to be some authority for holding that even when an intimation is accompanied by a demand for payment, a person is not barred from afterwards pleading forgery when he simply keeps silence—*M'Arthur* v. *Paterson*, March 3, 1825, 3 Shaw 607. In this case a bill became due in March 1822. In May following a demand was made by the charger on Mrs M'Arthur for payment of it. Two or three days after this demand was made she was informed by Newlands that he had forged her name to the bill. She, however, made no communication of the fact to the charger, or that she denied liability for the bill, until the 5th of August, when a second demand for payment had been made. She was held not liable.

"The present case seems to lie between that case and the cases of *Brown* v. *The British Linen Company*, May 16, 1863, 1 Macph. 793, and *Urquhart* v. *The Bank of Scotland*, June 14, 1872, 9 Scot. Law Rep. 508. It differs from both these cases, in respect that Mackenzie did no act whereby the bank was prejudiced, either in taking the bill or in recovering payment of it. In *Brown's* case, Brown was alleged to have retired a previous bill which he knew was forged, and had otherwise acted so as to induce the bank to believe that the bill was a genuine bill. In *Urquhart's* case it was proved that Urquhart well knew that on several previous occasions Gair had forged his name to bills for the purpose of raising money, and on one previous occasion had given him money to retire one of these bills knowing it to be forged. In this case Mackenzie knew that on one previous occasion Fraser had forged his name to a bill, and had obtained money on it from the bank, but he did not know the fact until after the bill had been retired. It cannot be doubted that Mackenzie knew, when he received the several intimations from the bank, that his name on the bill charged on was forged, and that he did not communicate the fact to the bank until about a fortnight after he had received the first notice. So far as the bank were concerned, Mackenzie simply did or said nothing. The bank in the meantime were free to take what course they pleased to recover payment of the bill. They do not appear to have been in any way prejudiced by Mackenzie's silence. It is to be regretted that Mr M'Gillivray did not at once inform the bank that Mackenzie's name was forged. Had he done so, probably no question would have arisen. But however that may be, the Lord Ordinary has come to the conclusion, though with much doubt, that the facts and circumstances proved are not sufficient to establish that Mackenzie adopted the bill in question."

The British Linen Company reclaimed.

John Fraser was tried for the forgery and convicted at Inverness Spring Circuit, and the debate in the Inner House was solely on the question of adoption.

At advising—

LORD PRESIDENT—This is a suspension of a charge upon a bill for £70 dated 14th April 1879, payable three months after date, bearing to be drawn by the complainer and one John M'Donald upon a person of the name of John Fraser, grocer, Greig Street, Inverness. The ground of suspension is that the complainer's signature thereupon is a forgery, and although originally the chargers denied that allegation, it must now be taken that the complainer's signature certainly is a forgery. But there is another answer made to this suspension, viz., that the complainer adopted the signature upon this bill and allowed the bank to rely upon it as being his genuine signature. That, of course, is a question of fact upon the evidence before us, and I think the case is one that requires very close consideration, because the evidence is undoubtedly of a very peculiar character, and I quite sympathise with the difficulty which the Lord Ordinary has felt in dealing with that evidence. The averment of the chargers is that they "believe and aver that the complainer was aware that the said bill having his name as drawer and endorser thereon was presented to the bank, and that the bank discounted it in reliance thereon." But there is another averment which brings out elements of particular importance in this case. This bill was a renewal of a previous bill with the same names upon it for the sum of £76. Upon the face of that bill the complainer and M'Donald were drawers, and John Fraser was the acceptor, and that bill had been also discounted with the British Linen Company, and this £70 bill as I have said, was a renewal to the extent of £70 of that previous bill. The averment made is further—"He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and endorse the bills himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and endorsing them."

There are two averments here which require to be distinguished. The one is that the complainer was aware that this first bill with his forged name on it as drawer was presented to the bank and discounted by the bank in reliance upon his name being genuine. That means of course that at the time at which it was presented to be discounted the complainer was aware that his signature thereon was a forgery, and if that is established I think the case is clear indeed, because in that case the complainer would be distinctly *particeps fraudis*, and probably answerable criminally.

But the other averment is this—that by his conduct, not silence merely, but silence combined with his conduct, he allowed the bank to rely upon his signature being genuine, and so adopted it as his genuine signature.

Now, we must examine the evidence in reference to both of these allegations. The first bill was dated 7th February 1879, and was a bill due at two months' date. It thereafter became due on the 7/10 April 1879, and when it became due the bank sent an intimation to the complainer dated 12th April in these terms—"Your bill on John Fraser, 7th February, 2 m./d., for £76, is lying in

my hands under protest for non-payment; be so good as to order it to be retired immediately." This is sent by the bank's agent at Inverness. Now, Mackenzie, the complainer, sent no answer to that intimation. He became, as we shall see, immediately aware from the time of receipt of that intimation that his name so upon that bill was a forgery, but he made no intimation of that fact to the bank. The bill was retired in the manner which I have already specified, viz., by the substitution therefor of the bill now charged on for £70 and £6 in money, and the latter bill thereafter came to be regarded by the bank as a genuine bill, and the silence of Mackenzie on that occasion was certainly very much the reason why the bank was led into the inference that the signatures on it were genuine signatures. But, then, let us see what the complainer did upon receipt of this notice. I think his conduct on that occasion is of the greatest possible importance in leading us to a conclusion in regard to the state of his knowledge of what took place then. We have his statement thus—He says he got the intimation from the bank on the Saturday night, and "I went into Inverness on the Monday morning." He says, some lines before, that he did not know who John Fraser was who bore to be the acceptor of the bill, but he says, "I thought it might be Fraser of Greig Street, Inverness, and I went to him accordingly." Now, it certainly is very strange how it was he thought that it was Fraser of Greig Street, Inverness, who was the acceptor of the bill, and who was probably the forger of his name, for there were other Frasers, and particularly there was another John Fraser, a miller, with whom he had had previous bill transactions, but still he did not think it was Fraser the miller's bill, but Fraser of Greig Street, Inverness; and when he is asked at a subsequent part of his deposition whether he thought it was Fraser of Inverness that had signed the bill, the question is put to him in these terms—"Why did you suspect that it was Fraser of Greig Street that had signed the bill?" he answers, "I had a line from him, or he sent me word by a party belonging to our place that he had something particular to tell me. I do not mind the date of that note. It was before the first bill fell due. I would say it would be about a month before. I did not go to his shop at that time. I think that line or letter should be in Court. (Shown No. 43, dated 11th February 1879)—"This is the line I refer to. I received it through the post." Now, that line as he calls it is a letter, and is very peculiar in its terms. It is dated 3 Greig Street, Inverness, February 11, 1879, and is addressed to the complainer—"My dear Sir, Will you be so kind as to call to see me the first time you will come to the town, for I wish to see you very particular. Barny Stewart was seeing me to-night. I am keeping very bussy since I opened. Remember and do not forget to call, for I have some particular thing to tell you." Now, he is asked—"The line says 'Remember and do not forget to call, for I have some particular thing to tell you;'" and his answer is—"I did not call, because I did not think it was my duty to call. I did not want anything particular out of him. I know there was no business between us that I would lose by not calling. (Q) What did you fancy he wanted to tell you?—(A) I could not say; I do not think I ever mentioned the letter to him afterwards. I do not think it was mentioned between us. I did not think the letter related to a loan of money or a bill. I would not say what it might be about. I had no way of forming the least opinion of what it might be about. I thought it might be some story that a man called Stewart might be telling him about. Before the notice came from the bank I had no communication from John Fraser, Greig Street, except that letter." Now this is rather a peculiar piece of evidence certainly. The letter is a very singular one in its expression. It is very open, and yet the complainer pays no attention to it. But when he receives intimation that the bill is lying protected in the bank, that letter at once suggests to him that Fraser has forged his name. One cannot help suspecting—I go no further at present—that when he received that letter he had a pretty good notion that that was the cause of it too. That is the explanation which he attempts to give of his reason for suspecting Fraser, because the receipt of that letter too is very well otherwise accounted for. Now, there is another matter to be taken into consideration in connection with this, and that is that it appears pretty clearly that the complainer very well knew that Fraser was not a man who had money to return a bill of that amount. He says that he had heard that Fraser was to open a shop in Inverness; he told him so, and told him that he had everything right, and he said he had a book with him, and said—"So to that I said I am not a scholar, but you are very clever that you can go and do that. He said, Oh yes it is all right now; I am to open the shop directly. (Q) Did you think he had not money enough to open the shop?—(A) I did not know whether he had it or not, and he did not lead me to any understanding on that subject. I know he was only a poor man's son. (Q) Did you think he was too poor to have money enough to open that shop?—(A) I did not know whether he had or not. I thought I was doing as well as I could do myself, and I knew it would come very hard on myself, although I was an older man than him, to go into such a business." It is quite clear that at the time of the institution of this transaction Mackenzie knew quite well that Fraser had embarked in a business apparently beyond his means and beyond his strength, and could not have a penny to spare. Now, then, let us see what the complainer does when he receives this notice from the bank. He goes to Fraser, and here are his own words—"When I went into the shop I found his father and sister there, and I asked if he was busy, and whether he could speak a minute with me. He said he could, so we went into a back room, where, showing him the notice, I asked him if he had anything to do with this. He said he had, 'but' he added 'it is not going to trouble you any more.' I asked him what he meant by doing such a thing? (Q) Doing what?—(A) By forging that bill in my name. He said, 'I did not know the danger of it at the time.' I told him I would not pass him, but would give him up to the Fiscal at once. He said 'You need not do that; I have the bill here, and it will not meddle with you after this.' He showed me the bill. (Q) Was anything said between you about the renewal of the bill?—(A) Not a word. I told him at the same time—'See that you do not put in another to relieve this one;' and he said upon his soul and body he would not. He told me that he

paid it in clear cash." Now, it appears afterwards—and I need not go into that part of the evidence in detail—that the complainer got up this first bill from Fraser. He got delivery of it, and he did not destroy it, but he put it into the hands of somebody else, and it was preserved accordingly—why, he cannot say—but still he received delivery of the bill, and he saw his name forged upon it, and he knew from Fraser's own confession that he had forged his name upon that bill.

Now, it is in these circumstances that we come to the next step of this history, and that is with regard to the making of the bill charged on. That was on the 14th of April 1879. That was the time when the complainer had been in Fraser's shop, and had learned from him the fact of the forgery of the first bill and got it up. And that same day the bill is made with the same names upon it—I mean the two drawers—forged as before—and that is discounted immediately with the British Linen Company, and made to replace the former bill with a payment in cash of £6. Now, there is one other document connected with this evidence which I cannot pass over without a word of observation, and that is the document dated 15th April 1879, and signed by John Fraser, the forger. It opens with these words—"Before the above date Mr Donald Mackenzie did not sign a bill in my favour." Now, it appears pretty clearly that 15th April is not the true date of this paper, and that it must have been written upon the 14th April, the day that the second forged bill was made, and why it was made and signed at all or written is not quite intelligible. But let us take the complainer's own statement upon the subject. He says (being shown the letter)—"This letter was written by Fraser when the first bill was got up. He told me he would give me that letter to show that I had nothing to do with it, and that he had cleared me with cash. I asked him for a letter to that effect. (Q) Did you say you wanted the letter to show to your sister?—(A) No. (Q) Did you say your sister had been angry at you for going into the bill?—(A) I could not say that, for I did not go into the bill. I had no quarrel with my sister about the bill. I told her from the first day that I got any notice of it that it was forged. On the day when I got No. 18 I daresay Fraser and I had a dram together, I think in the Lorne. I was not very long with him. I think he lent me £3 or £4 for two or three days. I was parting with him on the other side of the bridge, and said I had to look for £2 or £3 for a day or two, and he said 'I will give you that,' and he gave me £4. That was repaid three or four days after I got it." Now this is a very singular bit of history. The injured man whose name has been forged goes and charges the forger with the crime he has committed. He obtains possession of the forged bill, and he cautions the forger not to put in another forged bill to take its place, and then he receives an assurance, "Oh no, it has been done with cash," he knowing that Fraser was not the man to have cash for such a purpose; and then he gets a letter from the forger, not of the true date, but dated on a day after the true date, for the purpose of testifying that he (Mackenzie, the complainer) had not signed a bill before that date in favour of Fraser, so that by means of the date the words of the letter are made to comprehend the new forged bill of the 14th, and accordingly the complainer is certified under the forger's hand that he did not sign a bill for him on the 14th. And then having adjusted all this they go and drink together, and then the injured man borrows £4 from the forger. Now this is all very graphic, and throws a world of light upon the relations subsisting between these two parties. It is impossible not to see that there are intimacies existing between the forger and the person forged upon that do not exist in ordinary circumstances. Now, all this takes place before the question arises that we are dealing with here, which arises of course only when the second forged bill comes to be presented for payment. And we must now proceed to consider what happens then. The British Linen Company, the holders of the bill, having no reason whatever to suspect that the previous bill was forged, but, on the contrary, being very well justified in thinking that was a perfectly genuine bill so far as the complainer was concerned, in respect of his silence when the previous one was intimated to him, wrote to the complainer on the 14th of July—"Your bill on John Fraser, Greig Street, Inverness, p. £70, is due on 17th July, and lies at this office for payment." There was no notice taken of that by the complainer, and thereafter a further letter was written upon the 18th July—"Your bill on John Fraser, 14th April, 3 m./d., for £70, is lying in my hands under protest for non-payment; be so good as to order it to be retired immediately." There is no answer to that, and a third intimation is given on 21st July—"I beg to call your attention to the acceptance of John Fraser to you and John Macdonald p. £70 which fell due on the 17th inst., and has not been retired. I have now to intimate that if it is not paid on Friday first it will be put into the hands of our law-agent, with instructions to proceed against all the parties for recovery of the amount." And then it is put into the hands of the law-agent, who writes a letter. Now, how did the complainer deal with these notices? We have his own account of that matter in his evidence. Speaking of the first note of the 17th, he says—"Upon getting it—which I did at my own house—I went to Fraser of Greig Street and said to him—'You were not through with it in doing it yon way. How did'nt you tell me you had put in a new bill to relieve the other?' He said—'I was afraid to tell you that.' I said—'I went away that time without doing anything, but I am ready to bring you up this minute.' My sister was not with me. A clerk from the bank was in at the same time, and asked him—'Why did you not attend to the office as you promised?' I am not exactly sure about this, but he said, I think—'Tell Mr Williamson I will attend to it when it becomes due.' That was the second bill, which was not due at that time." This notice of the 14th was before the bill had become due. "I did not go to M'Gillivray on that occasion. I expected Fraser would attend to the bill by the way he spoke, and he pleaded with me to allow him until such times as the bill would fall due, for he would be ready to meet it, and if he was not, the uncle, who was away from home at the time of the renewal, would be ready to do it for him at any time. I got another notice about the bill, and when I got it I went to M'Gillivray, my agent at that time, and told him about it. I did not see Fraser on that occasion.

I got a third notice about the bill, and not desiring to neglect my work so much, of which I thought more at the time than of the bill, and being afraid of losing my situation if I neglected it, I sent my sister with it to M'Gillivray." And then after the third time the fact of the forgery comes out in considering the position in which the complainer stood with reference to the first bill, and in all that had taken place previous to the occasion I am now dealing with, the conduct of the complainer on this occasion is, to say the least of it, very extraordinary. He receives the notice that the bill is long past due at the bank, but first of all he gets notice that the bill is coming due, then it is past due and under protest, and all the time he knows perfectly well that that is a forged bill so far as he is concerned, and he sees perfectly well that it is the forged bill which was due—the forged bill put in to replace the former forged bill. That appears very distinctly from what he said in his examination, that he went to Fraser and reproached him for doing that which he had assured him he had not done, replacing the one forged bill by another. The receipt of that notice made him aware that that was so, and the effect of it was to impose on the bank. In explanation of these circumstances he takes no notice of the fact that the bill is lying in the bank dishonoured. Now, in these circumstances let me refer to two questions which are raised by this record—first of all, Whether it has been shown that at the time the second bill was made and discounted, the complainer was aware that it had been made and discounted with his name upon it? and secondly, Supposing that not to be made out in evidence, whether he has not by his conduct accredited his subscription as his genuine subscription to the bank?

As regards the first of these questions, there are some other pieces of evidence which it is necessary to take into view as bearing directly upon the knowledge of the complainer that his name was upon the second bill when it was discounted. In the first place, there is the evidence of Fraser's father. He says that he saw him (Mackenzie) one day, and it appears that this was after the second bill had been discounted but before it became due. He said to me the bill was all right, meaning the first bill. "I did not speak to Duncan Mackenzie that day, but when I was repairing the road 150 yards from his house I saw him one day, and he stood speaking to me, and said—'I am sure John would tell you about the bill.' I said 'yes.' He said, 'Well I have put it all right now.' This was after the bill was due in April—that is, the first bill. Mackenzie said, 'The bill is in my possession now.' He tapped his breast as he said so. (Q) Did he speak to you about the second bill?—(A) He said the second bill was in before he got the first one out. I cannot say that he said that, but he meant that the second was in the bank before he got the first out. (Q) Did he say how much the second bill was for?—(A) He said there was too much in the first bill, that there was £76 in it, but that £6 has been taken off; I am quite certain he said that about that time." Now, that is during the currency of the second bill. If that is true—and there is no particular reason to doubt the honesty of this witness—it is conclusive of the fact that he knew that his name was upon the second bill when it was in the course of its currency, and if he knew it, then it is perfectly plain that he must have known at the time it was made and discounted, because he said £6 was taken off it because it was too much in the first bill. This witness is the father of the forger, but the evidence which he gives is not evidence which can be supposed to be given in the interest of the forger, for it does nothing in the world to cause one to think so, especially when taken in connection with the evidence which Mr Williamson, the bank agent, has given. He says, after the matter of the forgery came out, Mackenzie and M'Donald, the two drawers whose names had been forged, called at the bank, and he is asked—"Did they call just to tell you that the signatures were not theirs?—(A) That was about all they did. Mr Mackenzie found very great fault with me for having taken his name, he not being a customer of the bank, and for not insisting on a further reduction when the first bill became due. He did not say why a larger deduction should have been made." Now, that is a very curious circumstance, how he could have known anything about that reduction, for he is supposed not to have known anything about the second bill at all. These two pieces of evidence being so important in themselves lead me to the conclusion that we shall be justified in taking them in connection with the statement of the forger upon this subject, which I should not be disposed to receive as evidence in itself unless it was confirmed and corroborated by that which I have just read, and particularly by the evidence of Fraser senior. But when there is any independent testimony I think it is not at all unfair in a question of this kind to see what the forger may have said of the knowledge of Mackenzie himself as to this second bill. He is asked with regard to the first bill—"When did you see Mackenzie first after you got that notice?—(A) I think the first time was in my shop in Greig Street; as far as I can remember Mackenzie came to my shop. (Q) When did you go to the bank about the bill?—(A) Not until I saw Mackenzie. (Q) Did you expect Mackenzie to call upon you at that time?—(A) Yes. (Q) Why?—(A) To get the bill renewed. (Q) Why did you expect him to call?—(A) To get the bill renewed. (Q) What took place between you and Mackenzie when he called after the bill fell due and before you went to the bank?—(A) Mackenzie asked me how much I could pay, or could I pay it all. I forget most of the conversation. I told him I could not pay it. I refer to the bill of 7th February. (Q) How much did you say you could pay?—(A) I told him I was not sure, but that I could not pay it all at that time as I took in too much stock. I don't remember the exact sum I said I could pay. I think something like £6. He asked me if I could pay £20 of it. I said I thought I could if I had time. (Q) Could you have paid the bill at that time?—(A) Yes, if I was pressed for it. (Q) What did you say to this proposal that you should pay £20?—(A) I said I could not pay it as I took too much stock, and there were some other accounts falling due which I wanted to clear off. (Q) Did he mention anything about the bank in which the bill was to be discounted?—(A) Yes, he said the bill was protested, or something of that kind, and that his credit was not good in the British Linen Bank after that. He wanted the bill to be put

into the Aberdeen Town and County Bank, for the reason it was there that he had an account." Now, taking that evidence altogether, and not attaching too much weight to the testimony of the forger, and attaching no weight to it except so far as confirmed by other testimony, I confess I am disposed to come to the conclusion that the complainer was perfectly aware, or, to say the least of it, he had very good reason to believe that the first forged bill was replaced by the second forged bill, and that he permitted that to be done and acquiesced in the proceeding, and was clearly participant in the fraud that Fraser had committed upon the bank.

But even supposing that your Lordships should be of opinion that that is hardly made out in the evidence, or that the evidence is altogether hardly satisfactory or sufficient to convict the complainer of participation in this fraud, the question comes to be, whether we have any other circumstances, acts, or conduct upon the part of this complainer such as to amount to an accrediting of the forged subscription to the bank, because that is really what is meant by adoption of a forged bill. If a party whose name is forged to a bill causes a bank by his conduct to believe that it is his genuine subscription he thereby accredits or adopts the subscription as his own. And I confess upon that second question of fact I do not feel much doubt. I think this is a strong case of adoption. The state of knowledge in which the complainer was before the bill fell due is almost peculiar to this case. It is a very singular story altogether. In the first place, we have clear suspicion, and then perfect knowledge, on the part of the complainer that Fraser was forging his name. I cannot doubt that that peculiar letter of 11th February 1879 did convey that information to the complainer's mind, and starting with that he finds his suspicions fully realised that his name has been forged upon the first bill. He condones that, and conceals the forgery from the bank—actively conceals it—there can be no doubt about that—and allows them to think that the bill retired is genuine, and in that way he leads the bank to believe that he and Fraser have bill transactions together, and that his signature, such as it appears upon that first bill, may be regarded by the bank as his genuine subscription, and then, with all this knowledge in his mind, and when this stage is reached, and considerable intimacy has been carried on between the two, he gets intimation that another forged bill is lying in bank with the names of Fraser and Macdonald on it; then he knows at once when he receives that notice that Fraser has put in the second bill as a renewal of the first. In these circumstances he still maintains an obstinate silence, and takes no notice of the repeated intimations made to him by the bank. I think he thereby accredited his signature, and led the bank to believe that his signature was genuine, and thus actively deceived them by his conduct. I am therefore of opinion that the Lord Ordinary's interlocutor must be altered, and that the letter and charge should be found orderly proceeded.

Lord Deas—I think the word "adoption" is not a very fortunate expression, and in a case of this kind not a very plain expression. I believe the rule applicable to such cases as this is neither more nor less than is stated—as I think I have explained in former cases—that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby—for anything that he can tell—prevent the bank from recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering the bill which otherwise they would. I rather understand that my brother Lord Shand agrees so far with me, and that your Lordships agree with me, in thinking that there is or may be a moral duty upon the part of anyone on whom a demand is made for a bill that he knows to be forged not to do anything that shall prejudice the holder of the bill. But I understand, however, that Lord Shand is of opinion that there is no legal duty upon a party whose name is forged to the effect I have stated. So very narrow is this that it is very difficult to distinguish between moral and legal duty in cases of this kind. Every man has a duty to the world as well as to himself. He is not entitled to mislead his neighbour to his loss. In cases of this kind, where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something, or not saying or doing something, to lead his neighbour to think that his signature is genuine to his neighbour's loss. It is a very important principle. If that duty were not enforced there would be no security against collusion between the party whose name is forged and the forger. They might be art and part in schemes to deceive innocent third parties, and great facilities could be given to protect or to permit the escape of a forger if there was no duty upon the party whose name was forged to give information when payment of a forged bill is demanded. I think the case of a person with such knowledge remaining wilfully and obstinately silent so as to mislead his neighbour would also fall within the general principles I have laid down. Now, holding these principles to be applicable in the general case, the only other question is, how far they apply to the circumstances of the present case. I have read this proof with great care and attention, and I have attended to all the circumstances that have been enumerated by your Lordship, and I think that enumeration is perfectly accurate, and leads me to think that these general principles are *a fortiori* so clearly applicable to this particular case that I do not feel myself called upon to enter into them, which I could not do without taking up more time than the importance and necessity of my doing so would justify. Some of them are stronger than I have ever heard in a case of this kind, and on the whole, therefore, I come unhesitatingly to the conclusion that there was here not only a moral but a legal duty on the part of this suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill. But he failed to do so, and I hold he failed in his legal duty to the bank, and that he is not to be permitted to escape from the consequence of his fault and then leave the bank to suffer.

Lord Mure—It appears to me that this is a case

that depends mainly upon the view which one takes of the evidence which has been adduced. I do not think there is much, or indeed any, difficulty in the law applicable to the case. I think that what we have to inquire into, and what the Lord Ordinary has inquired into, is whether Mackenzie knew during the currency of these two bills that his name had been forged to each by Fraser? and secondly, whether he knew that when the first forged bill fell due it was taken up by another bill to which his name was placed by Fraser to enable him to take the first forged bill out of the way? and that he allowed his name in that way to appear before the bank as drawer and endorser of both of these bills for the whole currency of the bill, thereby leading the bank to suppose that his name had been put there with his sanction. What is the state of the facts? It is, I think, that Mackenzie was in the position of a party who has substantially authorised the forger to use his name, and if that be the position of Mackenzie upon the evidence, I think that in law he is not entitled to recede. The claim which the bank makes upon him is under the second of the two bills. Your Lordship has gone over the most material parts of the evidence, and upon these leading facts I come to the same conclusion as your Lordship. I think that it is proved by Mackenzie's own account of matters that he knew that his name had been put to the first forged bill, for he admits that this letter of 11th February 1879 from Fraser, and which does not say so, was the ground of his suspicion that his name had been placed by Fraser on a forged bill. The letter itself is peculiar. It has been read by your Lordship already, and I do not stop to do it again. But taking the letter by itself, apart from any other evidence, I think it would be difficult, and it would not be right, to come to the conclusion that Mackenzie knew that the letter related to a bill on which his name was forged. Let us see what was the history of it as given by Mackenzie himself in his evidence. I think it is clear that he substantially admits that that letter referred to a forged bill, because in the passage which your Lordship has read, when he is asked, "Why did you suspect that it was Fraser of Greig Street that had signed the bill?" he answers—"I had a line from him, and he sent word by a party belonging to our place that he had something particular to tell me. I don't mind the date of that note. It was before the first bill fell due. I would say it would be a month before. I did not go to his shop at that time. I think that line or letter should be in Court. (Shown No. 43, dated 11th February 1879)—This is the line I refer to." That was the first of the forged bills that he referred to. He does not pay attention to the letter from Fraser, and allows it to remain unanswered until he gets the notice from the bank on 12th April 1879 intimating that "Your bill on John Fraser of February 2d, signed for £76, is lying in my hands under protest for non-payment." He paid no attention to that notice either. At anyrate, he does not go to the bank, but he goes to Fraser on the 14th, and on this day the second bill for £70 is put into the bank, and the first bill is got up, and Mackenzie gets possession of it. I cannot resist the conclusion at which your Lordship has arrived, that this second bill was made and issued on this very day, and that Mackenzie knew at the time that that was so, and further that Fraser had not the money to take the first bill up. And I think the explanation given by Fraser's father and by Fraser himself about this second bill is very important. Speaking of a conversation he had with Mackenzie on a day subsequent to the 14th of April, the father says—"I saw him (Mackenzie) one day and he stood speaking to me, and said—'I am sure John would tell you about the bill.' I said 'Yes.' He said, 'Well, I have put it all right now.' This was after the bill was due in April. Mackenzie said—'The bill is in my possession now.' He tapped his breast as he said so. (Q) Did he speak to you about the second bill?—(A) He said the second bill was in before he got the first out. (Q) Did he say how much the second bill was for?—(A) He said there was too much in the first bill; that there was £76 in it, but that £6 had been taken off. I am quite certain he said that about that time. The evidence of Mr Williamson is also, I think, conclusive of Mackenzie's knowledge of the making of this bill, and if we are to believe that of the forger himself there can be no doubt about the matter. Your Lordship has read these, so that I do not need to do so, and on this part of the case I can only say that I agree with your Lordship in the conclusions at which you have arrived, for it is quite plain to my mind that during the currency of the second bill, and before he got actual notice from the bank, Mackenzie was perfectly well aware that the first bill had been taken out of the way by the second bill on which his name was. And these circumstances must mean this, that he certainly allowed his friend Fraser to mislead the bank, for the bank gave up the first forged bill for the renewed forged bill on which his name is, and he is thus substantially in the position of a party who has authorised another to use his name, and I think that is the position of matters. He has substantially authorised Fraser to use his name from the 11th of February 1879 till the end of July 1879, and that being so, what is the law? I think the law is very well laid down in the passage in Bell's Com., vol. i. p. 389, p. 415 of M'Laren's edition, where he says, speaking of forged bills—"A bill of which the signature is forged is no legal ground of action or of diligence, and will not sustain a claim in bankruptcy. But if one have given sanction and currency to acceptances or endorsations forged by a particular person as binding on him he will be liable as having adopted that subscription and authorised it as his own, and it would seem that not only action but summary diligence may proceed on such a bill, the plea of forgery being effectually met by that of adoption and virtual procuration." Now, I think there was here a virtual procuration. Mr Mackenzie is in the position of having authorised Fraser to use his name and to place it on the bill charged on, and therefore I think he is liable for the contents of it. I agree with your Lordship in thinking that we should alter the interlocutor of the Lord Ordinary so that the judgment should be to that effect.

Lord Shand—I find myself unable to agree in the decision which your Lordships are now about to pronounce, for I think with the Lord Ordinary that the bank has failed to make out any ground of responsibility against the suspender for payment of the bill which is the subject of the proceedings.

It is not now maintained, although it was alleged by the bank on the record, that the signature of Mackenzie as drawer and endorser of the bill is genuine. It is admitted that the signature is not his, and the argument was taken on this footing. It is proved that the signature is not his, and it is as clearly proved that the signature of the other drawer M'Donald was also a forgery. I need say no more upon this subject than that Fraser who forged these signatures was convicted of the forgery at the Inverness Circuit Court and sentenced accordingly. Nevertheless the bank maintains that the suspender is liable in payment of the bill having his forged signatures on it, and this contention, as your Lordship has explained, is supported on two separate and alternative grounds. These are contained in the respondent's statements on record which your Lordship has read. The first of these grounds is that the bill was drawn and endorsed by the suspender or with his knowledge and authority. The second is, that if not drawn and endorsed with his knowledge and authority, he adopted the signature as his, and assumed the responsibility attaching to the drawing and endorsing of the bill.

The first of these grounds was obviously not maintained before the Lord Ordinary, for he takes no notice of it. I can scarcely say it was maintained at this bar, for I certainly understood the argument with reference to the history of the first bill referred to in the proceedings to be used in order to make out if possible a case of adoption rather than to support a case of antecedent knowledge and authority. If it be the case, as I gather from the observations of some of your Lordships, that you are of opinion it has been substantially proved that Mackenzie knew of and authorised the use of his name on the bill in question—that there was "a virtual procuration" to write his signature as an obligant on the bill—then I can only say it appears to me that Fraser has been very hardly dealt with, for he has been found guilty of having wickedly and feloniously forged the signatures and altered the forged document without any authority from the alleged drawers and endorsers. I do not suppose that in any case in which if it is proved to the satisfaction of a jury that the signature alleged to be forged was authorised by the person whose signature it bears to be—that there was a virtual procuration to sign his name—the person accused would be convicted of having feloniously forged and altered the document, and would be punished accordingly. And so when your Lordship speaks of this suspender as being "*particeps fraudis*," meaning, as I take it, that he was a party to the issuing of this bill, having given authority to use his name either expressly or impliedly by his conduct, I think that that this state of facts, if true, should have had the effect of relieving Fraser from the charge of forging and uttering the bill.

Upon the whole questions involved in this case I think it important in dealing with the evidence to resolve, in the first place, whether Mackenzie is to be believed upon that subject. I turn to the Lord Ordinary's note and I find his Lordship expresses himself thus—"There is some conflict of evidence in the case, but the Lord Ordinary thinks that the evidence adduced by Mackenzie is to be believed, and that Mackenzie himself is a respectable man, and gave a substantially true account of the various transactions which took place with reference to the bills." Your Lordship in the chair expresses sympathy with the Lord Ordinary in having a difficulty in dealing with the evidence. I see no trace in his Lordship's judgment of his having had any difficulty of this kind. All his Lordship's difficulty was, as I think he explains, in the application of the law to the facts, and for my part I heartily sympathise in this, for I think the law as it is to be gathered from the reported cases that have occurred is upon a very loose and unsatisfactory basis, at least in regard to what is called adoption in the case of forged documents. As regards the evidence, however, I take the case as the Lord Ordinary has done. I have read the proof carefully, and I see no reason to differ from the Lord Ordinary in thinking that Mackenzie is honest, and has given a substantially true account of what happened in regard to these bills. He is a labouring man, working apparently with his own hands at contractors' work, whose ordinary language is Gaelic, and who does not easily speak English, and that he was at considerable disadvantage in that respect appears to me throughout his evidence from first to last. It also appears that at the time the two bills, which are the subject of what I must call a very discursive examination of the suspender, were current, he was not living at home, but at a distance, engaged at a contract, and going home only at intervals. I do not think that either in his conduct or his evidence he is to be judged at all in the same way as if we were dealing with an educated or experienced person or a man of business, or a man having many transactions with bills and familiar with them. I take the case on the footing that he was a working-man with a very limited knowledge of business, and who has given an honest and true account of what took place with him in relation to the two forged bills.

The first question is, Was the bill on which the bank is now doing diligence drawn and endorsed with his authority? In the view I take of the case I do not mean to say much on this subject, because if Mackenzie is to be believed—and I do believe Mackenzie—there is an end of the question. It is true that there had been a previous bill discounted by the bank on which the suspender's name was forged, and that he had received a notice on the 12th April informing him that this bill drawn on John Fraser was due, and requesting that it be retired. I see nothing in the evidence to lead me to believe that he knew of the existence of this forged bill until he got the bank's notice, nor is there evidence by any other witness to that effect. When he got the notice, and was thus made aware that his name had been forged, he went to Fraser of Inverness and charged him with the forgery. It appears that Fraser did not deny that he had been guilty of the forgery, but he assured the suspender that the bill had been met, and that he would hear no more about it. The proof on this point was read by your Lordship in the chair. His words are—"I thought it might be Fraser of Greig Street, Inverness, and I went to him accordingly. When I went into the shop I found his father and sister there, and I asked him if he was busy, and whether he could speak a minute with me. He said he could, so we went into a back-room, when showing him the notice I asked him if he

had anything to do with this. He said he had, 'but,' he added, 'it is not going to trouble you any more.' I asked him what he meant by doing such a thing. (Q) Doing what?—(A) By forging that bill in my name. He said—'I did not know the danger of it at the time.' I told him that I would not pass him, but would give him up to the Fiscal at once. He said—'You need not do that; I have the bill here, and it will not meddle with you after this.' He showed me the bill. (Q) Was anything said between you about the renewal of the bill?—Not a word. I told him at the same time—'See that you don't put in another to relieve this one;' and he said upon his soul and body he would not. He told me that he paid it in clear cash. This conversation between us was in Gaelic." And, again, in cross-examination he is brought back to the same subject. He is asked whether there had been any previous conversation about the bill, and he answers "never," and that he never understood Fraser to be in need of a bill. "(Q) And you never told him then to sign the bill himself?—(A) Never; I swear that; and that I never was asked. I did not see him after that until I got the first notice from the bank. I never spoke a word about the first bill in his shop between these two times. He swore on soul and body that he paid that with clear cash, and of course I believed that that was done, and that it would never hurt me again." Now, what does the Lord Ordinary say with reference to this evidence, having seen Mackenzie and all the witnesses, including the forger and his father, and having thus had the great advantage of judging them not only by what they said, but by their demeanour and manner of giving their testimony. The Lord Ordinary says —"The bill, however, had by this time been retired, and Mackenzie got it and brought it away with him. Fraser at the same time assured him that the bill had been paid in cash, and the Lord Ordinary does not doubt that Mackenzie believed this to be the fact." This is the view of the Judge who saw the witnesses. He did not decide the case at the close of the proof, but took time to consider the case maturely, and he has given a careful and discriminating opinion in support of his judgment. I cannot lay this evidence aside or disbelieve it on the strength of one or two circumstances in the conduct of Mackenzie, which I quite admit to be unusual and peculiar, and taking these together come to the conclusion by inference that he either expressly authorised his name to be used in a renewal bill or connived at this being done. I do not feel warranted in following that course. I agree with the Lord Ordinary, for it appears to me that Mackenzie has given a true account of what occurred, and of what we would naturally expect to occur in the circumstances in which he was placed, as he himself explains them. The fact that he took or kept the forged bill in the way he did—handing it to another—is certainly no evidence against him, though it shows a singular want of business knowledge. But it is said, why did Mackenzie go to Fraser on getting this notice? And it is suggested he must have had some guilty knowledge or suspicion in connection with the note of 11th February preceding. The first answer to this is that he did not go to Fraser of Inverness in the first instance, but to another person named Fraser, on getting the bank's notice. The first person he went to was John Fraser, miller, with whom he had previously had some bill transactions, and said to him—"Have you had anything to do with this," showing him the notice he had got from the bank. It was only after the miller said "no" that he went into Inverness and saw Fraser of Greig Street there, who admitted that he was guilty of the forgery. I do not say that the letter or line of 11th February is not a point to be considered in this case. I have no doubt it was considered by the Lord Ordinary, and I give due weight to it. If it had been a key to guilty knowledge on the suspender's part, or had led to knowledge on his part before he got the bank's notice, he would surely not have preserved it and put it into this process, and he certainly would not have addressed himself to Fraser the miller as he did. I cannot read it as in any way intimating to Mackenzie that a forgery had been committed, or calculated to convey to him the fact that the writer had forged his name. There is no evidence to that effect. I assume that Fraser possibly did mean to confess the forgery when he asked in this letter—"Will you be so good as to call to see me the first time you will come to the town, for I wish to see you very particular . . . Remember and do not forget to call for I have something very particular to tell you." But the parties, so far as I can see, never met till after the bank's notice of dishonour of the bill had been received, and never discussed the subject. Mackenzie lived at a distance from Inverness, and his business engagements took him still further away, and kept him occupied, and Fraser does not seem to have gone to him, and so he seems not to have paid attention to the request. I must observe with reference to what is put as the first alternative view of the case—I mean antecedent authority given expressly or by implication to use the suspender's name in the bill now charged on—that it is of course essential that the bank should show that there was really knowledge on the part of Mackenzie that a new bill was to be substituted for the old one. He says he had no such knowledge, and the Lord Ordinary says he believes him. I say the same, and my confidence in this opinion is not diminished by the fact that your Lordships not only reject Mackenzie's evidence, but place reliance on the evidence of Fraser, the forger, and his father. When they were in the witness-box what was their position? The son had this charge of forgery hanging over him, and anything he could say to throw responsibility on Mackenzie might aid him in relieving himself from it, while his father had his sympathies in the same direction. On the question, am I to take as true the evidence of the man whom the Lord Ordinary believes, or of the man who was charged with the forgery and has since been convicted, and his father who had every desire to shield him, I have no hesitation in saying that I take the former. Observations have been made on the facts that the suspender on the occasion of the interview with Fraser when he charged Fraser with forgery, and was assured that the first bill had been retired with cash, borrowed £3 or £4 from him, and took from him the letter dated 15th April declaring and admitting that he (the suspender) had signed no bills in Fraser's favour, and also that the parties had some drink together in a public-house. The last

circumstance is really worthy of little notice, when it is kept in mind that the parties were in some degree of intimacy, and it is the habit of people of that rank to talk over business in a public-house. The other circumstances are no doubt peculiarities entitled to some consideration. But it surely cannot be supposed that a loan of £4, repaid a few days after, was a consideration taken in return for the use of the suspender's name; and the document referred to might well be regarded by a man not familiar with business as an acknowledgment which he ought to have from one who admittedly had forged his name. An ingenious argument was pressed on the Court founded on the date of the document. It was said it must have been post-dated to cover the renewal bill, and the Court was asked to infer from this that the suspender at least knew of the renewal at that time. Even if this were so, it would not make a case of adhibiting the suspender's name with antecedent authority. It is plain the new bill had been given in to the bank before the interview with Fraser, inasmuch as Fraser then produced the retired bill and gave it up. But apart from this I cannot accept an argument founded on the date when not a word was said as to this to the witness, whose attention was never directed to the date. It may very well be that the date 15th was a mistake for 14th, and that this would have been explained, or some other explanation might have been given which would have shut out the inference which the Court is asked to draw only from the date of the document, but without the explanation which the witness might have given.

On the whole, on the first point I agree with the Lord Ordinary, and therefore hold that the respondents fail in their contention that this bill was drawn and endorsed with the suspender's authority.

The next question is, Whether after the bill was forged and uttered the suspender adopted it? that is, I presume, accepted responsibility for the contents. On this point I concur very strongly with my brother Lord Deas in thinking that the term adoption is an unfortunate expression as used in this class of cases, because I think it is a great deal too often used without a proper comprehension of the full sense and meaning which its use as a legal term implies. I think perhaps the best explanation of the true sense of the word as a legal term in such a case as this will be found in the form of issue that was settled for the trial of the case of *Finlay* v. *Currie*, and which will be found in 13 D. 281. It is as follows—"Whether the complainer . . . after a demand having been made upon him, adopted his signature to the said bill now alleged to be forged as his, and held himself out, or suffered himself to be held out, as liable in the contents of the same as co-acceptor." I take this case upon that issue, Whether it has been proved that although this signature was not the signature of the suspender, yet notwithstanding he has adopted it as his, and held himself out, or has suffered himself to be held out, as liable in the contents as drawer and endorser?

Now, what are the facts upon which it can be said that he held himself out, and suffered himself to be held out, as the drawer of this bill. The Lord Ordinary has given a careful and correct statement of the evidence on this part of the case. Mackenzie got a notice from the bank while the bill was still current, dated 14th July, stating:—"Your bill on John Fraser, Greig Street, Inverness, p. £70, is due on 17th July, and lies at this office for payment." Immediately on getting that notice, and remembering what had occurred in regard to the previous bill, he went to Fraser on the subject. Your Lordship has read what took place between the parties, and I therefore need not do so again. Assuming the truth of Mackenzie's account of what had previously taken place, his conversation with Fraser is just what might be expected. He reproached Fraser, reminding him of his assurance that the last bill had been retired with cash, and that in consequence he had refrained from giving information to the Fiscal, and nevertheless here was another bill in the same position. I think there is corroboration of Mackenzie's truthfulness in the very form of his statement and in the way in which his evidence is given. Can it be said that this account has been all got up, and that such a thing never occurred? I cannot think so. Well, he goes on to say—"You have done the same thing again, and I will now send you to the Fiscal." Fraser begs he will not do so, and asks for a short delay to enable him to have the bill taken out of the way. I am not prepared to say that there was a moral duty incumbent on the suspender at once to go and give information to the public authorities. I think it must often be a question of circumstances whether a person in the suspender's circumstances is under a moral duty at once publicly to denounce the forger, or give information to the holder of a bill, which is the same thing, to the irretrievable ruin of the delinquent and his family. It may well be that the interposition of friends may not only lead to the pecuniary obligation being met, but to the reclamation of the offender, whose family and connections are saved from very painful consequences. But whatever may be said of the existence of a moral duty or obligation in such a case, I see no ground for holding that there is any legal obligation to give information to the bank or other holder of a bill. Such an obligation infers the existence of a relative right on the part of a creditor of the bill, and I am unable to see that such a right exists, or to state the legal ground on which it can be said to rest.

The notice of 14th July was followed by an intimation of 18th July that the bill had become due, and what did Mackenzie do then? Though busy with his own affairs he went into Inverness, saw his agent M'Gillivray, and instructed him to protect him from the forgery. Unfortunately M'Gillivray did not fulfil his instructions, and then other two notices were received, one dated the 21st and another the 25th of July. Again, he sent the first of these to his agent by his sister, and took the second into Inverness to M'Gillivray. Thereafter the first and only communication from the suspender to the bank was made, and that was an intimation that the signatures of the suspender were forgeries. So it appears to me the evidence comes to this, that the suspender got four notices from the creditors regarding this bill, that he instructed his agent after receipt of the second notice to intimate the forgery, and finding that had not been done he went himself to Inverness with the fourth notice, and caused the only communication which was made to the

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-