LORD KINCAIRNEY—I entirely concur with the conclusions stated by Lord Trayner, and in the main with the considerations stated in support of them.

At the same time, I am not able to say there was no proof of malice, or that the witness Mackenzie was the only witness who gave evidence as to the alleged malice. I think there was more evidence of malice that the jury might quite fairly take into consideration, and I think I quite rightly left it to the jury to say whether there was malice on the part of the defender. But I agree that the verdict is against the evidence to such an extent and degree as to warrant us recalling it and granting a new trial. It is certain no malice was proved to have been shown by the defender.

In the fourth issue malice and want of probable cause was libelled, and had to be proved. I think it is proved that these two doctors paid considerable attention to the case, and came to a certain conclusion as to the cause of Mrs Moore's death, and that the opinion they then formed was an honest opinion formed after consideration. Whether it was a right or a wrong opinion, it was arrived at deliberately, and if that be so, it is impossible for us to affirm that they had no probable cause for what they did.

LORD JUSTICE-CLERK—I concur in the result at which your Lordships have arrived. As regards the first issue, the direction given by the learned Judge to the jury was that if they found for the pursuer they must find that the defender was actuated by malice against her, and as that was a proper direction, I assume that the jury found there was malice on his part. Now, it is remarkable that the only basis upon which the pursuer went in making an allegation of malice under this issue was a statement said to have been made by the defender to a Mrs Peters sometime before the occurrence of the event which led to this case. But when Mrs Peters is examined she denies that the defender ever made any statement showing ill-will against the pursuer. Now, this allegation, which was false, was the only proof of malice against the defender except the evidence of Mackenzie, the detective officer. Mackenzie's evidence does not relate to that time at all; it is concerned solely with what happened after the death of Mrs Moore, but the pursuer maintains that in some way it may be carried back and used as corroborative evidence of the malice libelled under the first issue. But malice is a definite and separate part of the case, requiring to be alleged and proved as much and as clearly as any other part of a case, and Mackenzie's evidence is not evidence that the defender bore any malice against the pursuer before the death of Mrs Moore at all.

As regards malice and want of probable cause in the fourth issue, the doctors who had attended the case considered it before they gave a certificate as to the cause of death, and came to the conclusion which was embodied in the certificate, and I think it quite clear that they had probable cause for coming to that conclusion. There, I think, the pursuer has not proved what she was bound to prove under this issue, that there was a want of probable cause for the defender acting in the way he did.

The Court granted a new trial.

Counsel for the Pursuer—Shaw—M'Watt. Agents—Carmichael & Miller, W.S.

Counsel for the Defender—Comrie Thomson—Burnet. Agents—Cuthbert & Marchbank, S.S.C.

Tuesday, January 24, 1893.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ROYAL BANK OF SCOTLAND *v.* PRICE AND OTHERS.

Process — Multiplepoinding — Double Distress—Competency.

A sum lodged with a bank on deposit-receipt was claimed after the depositor's death by his granddaughter, who alleged that the deceased had made her a donation of the deposit-receipt and its contents. The sum was also claimed by the deceased's sons in name of *legitim*. The granddaughter was executrix-nominate under the will of the deceased, but declined to confirm or stand upon her title as executrix.

Held that there was double distress, and that it was competent for the bank to raise a multiplepoinding.

This action of multiplepoinding was raised by the Royal Bank in the following circumstances, the narrative being taken from the opinion of the Lord Ordinary (KYLLACHY):—The Royal Bank raised the action as holders of a fund of over £1000, which the deceased Charles Dunlop deposited in one of their branches on 1st June 1891. He received, it appears, in exchange, a deposit-receipt which, it is said, he at the same time endorsed in the presence of the bank agent. Some months afterwards, his granddaughter (Mrs Price) brought the deposit-receipt to the bank and desired payment, alleging that her grandfather had made her a present of the amount. The bank agent, however, learning from her that her grandfather had been very ill, and was in fact, unconscious, declined in the meantime to pay the money, and next day the old gentleman died.

It appears that the granddaughter claims the money exclusively, on the ground of the alleged donation. That is the sole title which she puts forward. She says, no doubt, that she is also executrix-nominate of the deceased, and his universal legatory. But she expressly declines to stand upon her title as executrix. That is to say, she declines to confirm so as to give the bank a valid discharge in that character.

On the other hand, the deceased's two

sons, who are his next-of-kin, have intimated to the bank that they dispute the alleged donation, and claim that the money belongs to them in whole or in part. It does not appear whether they propose to reduce the deceased's will, or merely claim to bring the fund into the executry with a view to claiming *legitim*. But there can be no doubt that they propose to lodge a claim in this multiplepoinding if it is allowed to proceed.

Mrs Price lodged defences, pleading that the action was incompetent, there being no double distress, but the Lord Ordinary repelled this plea, and sustained the competency of the action.

"*Opinion.*— . . . Practically, therefore, the case just comes to this—A deposit is held by the bank, which is, on the one hand, claimed by an alleged donee, and is, on the other hand, claimed by the next-of-kin of the deceased. And in that state of matters (the donee's alleged title as executrix not being put forward) I do not see how I can be asked to hold that there is no double distress. The bank are not, I think, bound to try with the alleged donee the question whether this is a valid donation. Neither can they in the circumstances, and in view of the attitude of the next-of-kin, safely assume that it was a valid donation. The objector could remove all difficulty by confirming as executrix of the deceased, but, as I have said, she declines to do that. And that being so, I do not see how I can view the case otherwise than simply a competition between an alleged donee of the deceased and his next-of-kin. I shall accordingly repel the objections, and allow the multiplepoinding to proceed. I do so all the more willingly because I do not think that any cheaper or more convenient mode could be devised for trying the question, which sooner or later must be tried."

Mrs Price reclaimed, and argued—There was nothing better settled than that a person claiming *legitim* was not entitled to sue directly for the recovery of monies belonging to the deceased. He must proceed against the deceased's executor. No claim made by the deceased's sons, therefore, could compete with the claim of the reclaimer, who was the executrix-nominate under the will of the deceased, but such claim could only be made through her. There was, therefore, only one claimant, and the action was incompetent—*Connell's Trustee* v. *Chalk, &c.*, March 6, 1878, 5 R. 735.

Argued for the bank—The reclaimer based her claim on the alleged donation, and refused to put forward her title as executrix, and the claim of the deceased's sons was, therefore, a competing claim, and created double distress.

At advising—

Lord President—I think the Lord Ordinary was quite right to sustain the competency of the action. His Lordship puts the matter rather tersely in the last paragraph of his note—"A deposit is held by the bank, which is, on the one hand, claimed by an alleged donee, and is, on the other, claimed by the next-of-kin of the deceased. And in that state of matters (the donee's alleged title as executrix not being put forward) I do not see how I can be asked to hold that there is no double distress." The fallacy of the reclaimer seems to lie in not recognising the complete distinction between the demand actually made upon the bank, and the demand which the reclaimer might have made in her character of executrix. Accordingly, I think there is a distinct competition between the next-of-kin and the reclaimer, who claims, on the footing of the alleged donation, that the money is to go into her pocket.

Lord Adam and Lord Kinnear concurred.

The Court adhered.

Counsel for Royal Bank—Dundas—Fleming. Agents—Dundas & Wilson, C.S.

Counsel for Mrs Price—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel for Dunlops—A. S. D. Thomson—W. Thomson. Agents—W. & J. L. Officer, W.S.

Tuesday, January 24.

FIRST DIVISION.

M'CALLUM *v.* M'CALLUM.

Parent and Child—Action of Divorce—Interim Custody of Children—Conjugal Rights (Scotland) Amendment Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 9.

Section 9 of the Conjugal Rights Act 1861 provides that in any action of separation or divorce the Court may make such interim orders as to it shall seem proper, with respect to the custody of the pupil children of the marriage to which the action relates.

A husband, after raising an action of divorce against his wife on the ground of adultery, presented a petition to the Inner House for the custody of his children pending the result of the action of divorce.

Held that where an action of divorce was in dependence, it was, in general, more expedient that questions as to the interim custody of the children of the parties should be determined by the judge in such action, and petition *refused.*

This was a petition presented by James M'Callum, quarryman, Pretoria, South Africa, on 21st December 1892, in which the petitioner craved the Court to find him entitled to the custody of the four children of the marriage between him and Alice Carlyle or M'Callum, his wife, the eldest of whom was nine, and the youngest three years of age, and to ordain his wife to deliver the said children to his sister, who resided at North Queensferry.