LORD CHANCELLOR.—I submit to your Lordships, that in this case, considering it is a question of very great difficulty, in which a difference of opinion existed amongst the learned Judges below, and also exists among your Lordships, the costs of both parties should come out of the estate.

Mr. Anderson.—That, my Lord, would be no relief to my client, because he is residuary legatee. I submit to your Lordships, that there should be nothing said about costs. I think your Lordships have laid it down as a rule, that when you differ among yourselves, you affirm without costs. That question arose in the case of *Johnson* v. *Beattie*, 10 Cl. & F. 42; where there was a difference of opinion in this House, and the rule was then laid down, that the affirmation should be without costs.

Lord Advocate.—My Lords, this is a case in which the sum claimed by the successful party is comparatively a very small sum, while the residue I believe to be very large. If the interlocutor is affirmed without costs, it will certainly be a case of great hardship upon the respondents.

LORD WENSLEYDALE.—You say it is a very small sum. It is £3200; that can hardly be considered a very small sum.

Lord Advocate.—We understand that the estate is not less than £150,000.

LORD CHANCELLOR.—The interlocutor will be affirmed without costs.

LORD CRANWORTH.—In referring to what Mr. Anderson observed, I must protest against that rule being the universal rule of the House.

Mr. Anderson.—It is, my Lord, a rule, subject of course to exceptions; but, *primâ facie*, I submit that it is the rule.

LORD CRANWORTH.—We did not lay it down as a universal rule.

Interlocutor appealed from affirmed.

James and Alex. Peddie, W.S. *Appellants' Agents.*—James Carnegie, Jun., W.S. *Respondents' Agent.*

JUNE 14, 1858.

ISABELLA GEIKIE or YOUNG and Others, *Appellants, v.* JOHN MORRIS and Others, *Respondents.*

Process—Multiplepoinding—Decree of Preference—Pedigree—Competition—Right to Compear—*After a decree of preference had been pronounced in favour of one of several claimants, in a multiplepoinding involving a question of pedigree, another set of claimants appeared, and insisted on their right to give in a claim.*

HELD (affirming judgment), *That they may be allowed to do so, but under a condition that the compearers should pay one half of the taxed expenses incurred by the party who had been preferred, even though the compearers had not been cited originally, and averred that they had not heard of the litigation till shortly before coming forward.*[1]

The claimants, Mrs. Geikie or Young and others, appealed against the judgment of the Court of 11th March 1856, and pleaded, in their case, that it ought to be reversed, because—"inconsistent (1) with the legal rights of the appellants, as parties who had not been cited in the multiplepoinding; (2) with the equity of the case in its circumstances; and (3) with the practice in processes of multiplepoinding." Bell's Commentaries, vol. ii. p. 299, § 4.

The respondents supported the judgment in their case on the following ground:—"Because the condition as to prior costs was a fair and proper condition, and one within the competency of the Court to impose, and rightly and properly imposed by them." *Thom*, 24th May 1811, F. C.; *Mack* v. *Mack*, 9 S. 524.

Mundell and *Hale* for the appellants.—There is no ground of law or equity for laying on the appellants the large sum of £1533 as a condition for being allowed to lodge a claim; and to exact it is a denial of justice. The appellants were never cited in the multiplepoinding, and they allege that they had never heard of the litigation till lately, and that they had not been guilty of any negligence since they heard of it. The Court had often stretched its rules of practice to encourage rather than punish poor persons seeking to claim—*Leith* v. *Leith*, 1 S. 468; Shaw's Digest, 1209. The appellants were entitled to appear, so long as the fund was *in medio*—2 Bell's Com. 299. It will be found, that in all the cases where the Court has imposed a payment, there

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[1] See previous reports 28 Sc. Jur. 263, 346. S. C. 3 Macq. Ap. 347 : 30 Sc. Jur. 594.

had been some negligence in the parties, as in *Gray* v. *Henderson*, 4 S. 482 ; *Martin* v. *Hadden*, 12 S. 155 ; *Dimsdale* v. *Ware*, 8 S. 262 ; *Goodsir* v. *Chalmers' Trustees*, 1 S. 15 ; and 19 D. 174 ; *Johnston* v. *Elder*, 10 S. 195. Lord Justice Clerk and Lord Cowan in *Magistrates of Dundee* v. *Lindsay*, 19 D. 168, expressly say, "There is no rule making it imperative on parties coming in late in a multiplepoinding to pay a share of expenses."—See also *Scott* v. *Campbell*, 2 D. 631.
[LORD CHANCELLOR.—Supposing you are not let in, you can still establish your claim by declarator?]

A declarator would not be the proper course. We would have to reduce the decree. Besides, it leads to circuity of action, which Courts always discountenance.
[LORD CHANCELLOR.—The first question seems to be, Whether you had an absolute right to come in, *i. e.* without terms? If you had not, then the Court could impose terms; and the sole question would be, Whether those terms are fair? Is that not peculiarly a question for the Court below?]

Even though we had not an absolute right to come in, the conditions imposed were unfair, and the House will review the discretion of the Court below. We do not object to have expenses given against us ultimately at the end of the suit, but we object to pay them at this stage. We have derived no benefit from the previous litigation, which has proved abortive. It is one thing to pay a large sum down, and another to be liable to pay it. We are willing to accept the latter obligation.

Lord Advocate (Inglis), and *Sir R. Bethell* Q.C., for the respondents.—After a decree of preference in a multiplepoinding, it is entirely a matter of discretion for the Court to let in a party claimant, and the Court has granted the favour in the present case on just conditions. It would be most unfair to let parties lie by till near the close of an expensive suit, and then come in to share the benefit without having borne the burden. The fight hitherto has been between the next of kin, and the respondents had to bear the expense of driving the Morgans, who were prior claimants, out of the field. The appellants, who profess to be in the same degree of relationship with the respondents, ought to share these expenses. Though they deny having known about the litigation earlier, that allegation should be viewed with suspicion ; for the facts of this succession were largely advertised, and were matter of common notoriety all over Scotland. The Court below has exercised a wise discretion in apportioning part of the costs on the appellants, and the House will not lightly interfere with such discretion. What has been done is to put them in the same condition as if they had appeared at the first.

Mundell replied.—The difficulty seems to be to know, what is the meaning of the fund being *in medio*. We say it is *in medio*, even after a decree of preference, so long as the fund is not actually paid over to the party preferred ; and this seems to be the doctrine of Stair, 4, 16, 3, of *Goodsir* v. *Chalmers*, 1 S. 15, and of 2 Bell's Com. 298. We had, therefore, a right to come in without having any terms imposed.

LORD CHANCELLOR CHELMSFORD.—My Lords, this question arises upon two interlocutors pronounced by the Court of Session, allowing the appellants to lodge a claim in a process of multiplepoinding, only upon the terms of paying one half of the taxed accounts of the expenses incurred by parties in whose favour decrees of preference had been pronounced.

The process of multiplepoinding was raised by Mr. D. Lindsay, the judicial factor on the estates of John Morgan deceased. Upon this proceeding many claimants appeared, claiming the right to the succession, and amongst them two persons named Alexander and James Morgan, and the respondents. Alexander and James Morgan, who are brothers, claimed to be entitled to the whole succession, as the first cousins of the deceased. None of the other claimants alleged that they were in so near a degree of relationship ; and, therefore, if Alexander and James Morgan had established their claim, they would have excluded all the rest. Under these circumstances, the Court directed that the case of the Morgans should be first tried upon certain issues, which were framed for the purpose. The Morrises, the respondents, undertook the expense of opposing the claim of the Morgans, and the issues, so far as it is necessary to regard the result as bearing on the present question, were decided in favour of the respondents. On the 20th of February 1856, the Second Division of the Court "Repelled the claims of Alexander and James Morgan, and found them liable in expenses ; and on the 27th February 1856, they pronounced an interlocutor in favour of the respondents, sustaining the claims of the claimants, John Morris, William Morris, Mrs. Euphan Wanless or Lyall, Mrs. Ann Wanless or Duncan, and Mrs. Alison Wanless or Ritchie, as next of kin of the late John Morgan, of Coates Crescent, Edinburgh, to the whole of that part of the fund *in medio* which consists of moveable and personal property, and rank and prefer them accordingly, and decern."

On the 5th March 1856, the four appellants and George Leckie, appeared, and prayed to be permitted to lodge condescendence and claim. And the Lords of Session "Appointed the parties to give in a minute, stating (among other things) at what time, and from whom, and in what circumstances, the disputed succession and proceedings under the multiplepoinding came to the knowledge of each of the said parties respectively."

Upon this it appeared, that two of the parties first heard of the disputed succession in July

1855, and the three others in September 1855. And upon this, the Court pronounced the interlocutors appealed from. The first is dated on the 11th March 1856, and is in these terms:—"The Lords having considered the motion for Isabella Geikie or Young and others, named and designed in the note, No. 1846 of process, for liberty to lodge a claim in this multiplepoinding to the fund *in medio*—Find, that after all the procedure which has occurred, they can only be allowed to appear on the condition of paying one half of the taxed accounts of the expenses incurred in the discussions with Alexander and James Morgan by the parties in whose favour decrees of preference have been pronounced, being the sum of £1533, before such claim can be received, the right of the said parties compearers to obtain, on a motion to the Court, an assignation to the decrees *pro tanto* being reserved."

Upon this sum of £1533 not being paid, another interlocutor was pronounced on the 21st May 1856,—"The Lords having considered the note for John Morris and others, No. 1849 of process, in respect of the failure on the part of Mrs. Isabella Geikie or Young, and of other persons for whom the note, No. 1846, was presented, to pay the sum of £1533, mentioned in the interlocutor of 11th March 1846, and to lodge the claim also therein mentioned. Refuse the desire of the said note, No. 1846 of process, and decern."

Your Lordships will probably find no difficulty in coming to a conclusion, that in the stage of the proceedings in which the appellants first appeared, they had no absolute right to lodge a claim; and if they were asking for an indulgence, the Court would have a discretion to decide upon what terms they should be admitted, subject to correction, if that discretion were unreasonably exercised. In this case, the parties never attempted to intervene until there had been a decree of preference.

The effect of this decree is explained by several text writers, to which I may refer your Lordships, and amongst others, by Lord Stair in his Commentaries (4, 16, 3,) in these terms:—"The other remedy is, when parties are or may be pursued by different pursuers upon distinct rights, in which case they cannot found upon a third party's right; and, therefore, the law allows, that they may cite all parties that do or may pretend right against them, for that which they do acknowledge they may be liable to, either by a personal or real action, to the effect, that they may dispute their rights and preferences, and, that the pursuer in this action may be only liable in once and single payment or performance, and, that he, nor no right of his, may be liable to double distress, but that he may safely pay or perform to the party that shall be preferred and found to have best right. Whereby a decreet of preference and performance secures the performer for ever; and that albeit the decreet of preference were in absence, or though thereafter it were reduced, whether it had been in absence, or upon compearance, so that the party thereafter preferred will only have access against those who were formerly preferred, for, as payment made *bonâ fide* secures the payer when no other party is called, so much more are those secured who pay or perform *auctore prætore*." And in a passage from Erskine, (4, 3, 23,) the learned author says, "A decree of preference, grounded on this action, secures the pursuer, who makes payment agreeably to the directions of the decree, from the claims of all persons whomsoever. The creditors or claimants who were made parties to the suit have no remedy left them; but as those who were neither called as defenders, nor appeared for their interest, cannot be hurt as to their right of recovering from a third person what he has received in consequence of an erroneous decree to which they were no parties, they are entitled, if they are found to have a right truly better than that of the creditor preferred, to have an action against that creditor for recovery of the sums received by him."

It seems clear, therefore, that a creditor, that is, a person who has a claim upon the fund, may come in as long as that fund is *in medio*. And the question is, What is the meaning of the fund being *in medio?* And whether, when a decree of preference has been pronounced, the fund does not cease to be *in medio?* Because, as I understand it, the fund is *in medio* only as long as there are conflicting claims asserted against the fund; and when once a preference is decided in favour of any particular individual, the fund then ceases to be *in medio*. And that I gather to be the meaning of a passage to which I have already adverted in the course of the argument, and to which I have again to refer your Lordships, in Bell's Commentaries (ii. 299). He says—"The pursuer of the action has little further interest than to see, that such citations have been given as may secure the efficacy of the decree, considered as a discharge to him to abide the orders of the Court respecting the intermediate disposal of the fund, and the ultimate payment of it, and to get the necessary expenses of the common action allowed as a deduction from his debt. By the first interlocutor, in a multiplepoinding, accordingly, the raiser of the action is declared liable only in single payment, and entitled to the expense of raising the action if well founded. The subsequent proceedings concern the amount of the fund and the competition of the creditors, and settlement of their rights; and in settling the amount of the fund the pursuer is entitled to discuss any claim of retention or of compensation which may be competent to him. The whole is closed by a decree settling the order of division, decerning for payment to the claimants, who shall be preferred, and discharging and exonerating the pursuer."

I think all the authorities that have been cited will satisfy your Lordships, that although, until

the decree of preference has been pronounced, a person who has a claim upon the fund has a right to intervene and assert that claim, yet when a decree of preference has once been pronounced, he can only proceed either by action of reduction, supposing the money still remains in Court; or if the money has been paid over by the pursuer in a process of multiplepoinding, he may have this action against the party who has received the money. And in each of those cases, either upon his action of reduction or his action against the party who has had the money paid over to him, he must establish his title against him.

Therefore, if a party proposes to come in after a decree of preference has been pronounced, and wishes to be allowed to lodge a claim and condescendence, it can only be indulged to him as a matter of favour—he cannot assert it as a matter of right; and the Court may impose upon him such reasonable conditions as they think proper, in order to place him in the favourable position of a certain ranked creditor.

When a decree of preference is pronounced, the fund ceases to be *in medio*, the conflicting claims have been decided in favour of one of the parties, and the stakeholder is bound to pay it to him. When a decree of preference has been pronounced, any person who thinks he has a preferable claim may challenge the decree, as I have said, by a proceeding for its reduction; or if the money has been paid over, he may proceed to claim repayment of the fund, on the ground of the decree being erroneous. But at that late stage, when a decree has been pronounced, parties can be admitted to that proceeding which resulted in the decree only upon conditions, and cannot insist upon it as a matter of right.

Your Lordships have been pressed with the expressions used by the Judges in the case of the *Magistrates of Dundee* v. *Lindsay*, 19 D. 168. The proceedings of the Magistrates of Dundee with respect to this very succession, and the determination of the Court upon them, will throw much light upon the present question. After the proceedings on behalf of the present respondents had resulted in a verdict, but before a decree of preference had been pronounced, the Incorporated Trades and the Magistrates of Dundee presented a petition, praying the Court to allow a condescendence and claim to be received. The Incorporated Trades of Dundee had been called as parties in the process of multiplepoinding, but they did not appear to lodge a claim. And then after the proceedings had gone on upon the footing of an intestacy, they attempted to intervene in the multiplepoinding, claiming under certain deeds, on the ground, that John Morgan did not die intestate, and that the deeds in their favour were valid and effectual. The Court thought, that though they claimed upon this totally different ground, they might originally have lodged a claim without a declarator; but that having had notice from the first, it was incompetent for them to do so at that advanced stage of the proceedings, and they repelled the claim. The Magistrates of Dundee, after the decree of preference in favour of the respondents, raised an action against the judicial factor, and the parties preferred, concluding for declarator, that by certain testamentary writings a valid bequest was made in favour of the pursuers. The defenders lodged, amongst others, two pleas to the effect, "*first*, that the action, as libelled, is incompetent, as there are no conclusions for reduction of the decree of preference; and, *secondly*, the pursuers were in no event entitled to insist in this action, except on the condition of paying to the defenders their expenses in the multiplepoinding." The Lord Justice Clerk upon the first question—as to the necessity for the reduction of the decree of preference—after expressing his opinion of the position of the parties, says—"In this view it is very plain, that a reduction of the decree of preference cannot be necessary in order to constitute the claim; and, indeed, would be quite inapplicable to the case to be tried, and inconsistent with the only object of calling the defenders. The pursuers state no grounds for reducing that decree, and have no case which would warrant that form of action. The decree sustains the claim of the defenders, as next of kin, and prefers them on that ground. The pursuers have not a word to state against that decree; they do not seek to establish in themselves the character established by the decree of preference; a reduction would be totally inapplicable to the case. They go against the defenders, because they are in the character of next of kin legally established in them by that very decree of preference. The effect of the action will not then impeach or invalidate that preference as next of kin." And, then, with regard to the phrase of the Magistrates of Dundee being liable to expenses upon the other plea which I have mentioned to your Lordships, the Lord Justice Clerk says—"Suppose the Trades had appeared in the multiplepoinding, what would have been the course to have taken at the outset? No one was acknowledged to be any relative at all; great doubt existed as to all the parties, even those who have prevailed had to prove a great deal, and they disproved altogether the relationship of those who claimed to be the nearest relations. It might turn out, that none of the parties were relations; and the case of M'Lean shews how claimants in such a case may successively be shewn to be impostors. In that state of things, would the Court have gone on to try the validity of this paper for the hospital of Dundee, as one purpose to be fulfilled by the party entitled to the intestate succession, when it did not appear, that there was any one entitled to the character of next of kin? Or were the present pursuers to be put to the expense and vexation of trying this question with all the parties who had come forward as the next of kin, when it might turn out, that one and all were mere

impostors? I have no notion, that the Court would have begun the multiplepoinding by adopting any such course. I think the proper and natural course was first to enter into the competition between the claimants for the character of next of kin, and then, when it was ascertained who was the next of kin, would arise in some form or other the question as to the validity of any particular bequest claimable from such party."

The ground upon which the Court refused to impose costs on the Magistrates of Dundee in that case was, that they were not in the slightest degree interested in the particular proceedings in the process of multiplepoinding which had then taken place. It was a matter of perfect indifference to them who was established to be the next of kin. It was not a proceeding for the protection of the fund in which alone they were interested, because the fund was in Court, and the claimaints were contesting the possession of that fund. And, therefore, the expressions of Lord Cowan, which were urged upon your Lordships at the bar by the counsel for the appellants, must be considered with reference to the subject matter. His Lordship says:—"But then comes the question of payment of the expenses as a condition of the action being proceeded with. A sum said to amount to about £6000, expended by the defenders in establishing their character of next of kin, is asked to be paid down by the pursuers before they are permitted to state the grounds of their claim. In so far as the demand was based on the necessity of a reduction, that has been disposed of. It is alleged, however, that, on grounds of equity, such payment ought to be enforced *in limine*, and, as I understand the defender's counsel, absolutely, whatever may be the result of the action. I know of no principle or rule of practice recognized by the decisions of this Court sanctioning the proposition which, in my opinion, might lead to the most inequitable results. Take it, that the pursuers are unsuccessful in asserting their right to this specific bequest, the defenders would not only go out of Court with absolvitor and their full expenses of this process, but be enriched to the extent of the £6000, although it is by the expenditure of that sum that they have fixed their right to the general succession as next of kin. I think, therefore, there would be little equity in that." Those observations are not to be taken as general observations, applicable to all parties who come in at a late stage of the proceedings of multiplepoinding, but as applicable to the particular circumstances of the case of the Magistrates of Dundee, who, as I have already pointed out to your Lordships, were not interested in the conflicting claims between the different parties claiming to be next of kin, and, as such, entitled to their share of the fund.

I perhaps ought to observe, upon the case of *Johnston* v. *Elder*, 10 S. 195. There is a very short report of the case, in which it appears, that the Court would not impose the expenses upon a party who came in after there had been a decree of preference. But that decree of preference was one of a peculiar character, and there probably may be a distinction between such a decree and an absolute decree. That decree of preference was a decree in favour of parties "for ought yet seen." Now, in the present case, the decree is not of that character,—it is an absolute decree; and I apprehend, that that is the only case which has been cited to shew, that where there has been a decree of preference the party has been admitted to lodge his claim and condescendence, or to assail the decree without having any expenses imposed upon him. That distinction may possibly exist; but, at all events, the note of that case is a very short one, and the circumstances are not at all stated.

Then, my Lords, this being the state of things, the appellants having no absolute right to appear, but being subject to conditions which may be imposed upon them by the Court, the question is, whether there has been, upon this particular occasion, any unreasonable exercise of the judgment of the Court which calls for interference and correction? Your Lordships would be very unwilling in a case of practice, and where it is difficult to refer to any certain standard, to interfere with the discretion of the Court, unless it clearly appeared, that it had exceeded the proper and reasonable bounds. It is difficult, however, to arrive at such a conclusion in the present case. Some of the parties knew of the proceedings more than seven months, others nearly six months, before they intervened. They did not claim to supplant the respondents, but to establish, that they stood in the same degree of relationship with them to the deceased. If they prove their case, they will entitle themselves to more than a moiety of the succession with the respondents. If admitted to the proceedings, they will obtain all the advantage of the past litigation, which has been conducted to a successful conclusion by the respondents at an expense which is enormous. Under these circumstances, there appears to be nothing unjust or unreasonable in requiring them, before they share the benefit, to bear an equal portion of the burden; and, therefore, I think there are no grounds to impeach the discretion of the Court of Session, and I recommend to your Lordships that the interlocutors be affirmed.

Lord Brougham.—My Lords, I have felt in this case somewhat of the embarrassment which was felt in the Court below, as stated by the Lord Justice Clerk. However, I think, upon the whole, that the Court had the power to impose terms before letting in the parties, under the circumstances of the case. As to how far those terms were reasonable or not, that is a mere question how far the discretion, which I cannot doubt the Court had in the matter, has been well exercised. And even if I had a doubt upon it, yet, agreeing as I do with my noble and learned

friend in the conclusion at which he has arrived, that the Court had discretion in the matter, I should think that your Lordships ought to be very slow indeed to overrule their decision merely upon a doubt (if you had a doubt) as to whether they had exercised a proper discretion with respect to the terms. It is therefore, in my opinion, sufficient to support the first interlocutor, that of 11th March 1856. The second interlocutor, of 21st May 1856, is merely a necessary conclusion from the non-performance of that which the first interlocutor required.

LORD CRANWORTH.—My Lords, I shall trouble your Lordships with very few observations, concurring as I do entirely in what has fallen from my noble and learned friend on the woolsack. In considering questions of law in this country, it has been a very familiar observation, that law is best when it is like equity, and equity best when it is like law. Now in dealing with questions of Scotch law, perhaps a similar view may be the right one; not that they are to be governed by the application of English principles; but adopting the analogy of what is commonly said with respect to English cases, I like Scotch law best when it resembles English, and English not the less when it resembles Scotch. Now looking at this case, to see what would be the analogous course in England, I think it is quite clear that the course which has been pursued in the Court of Session in Scotland is precisely that which would be pursued here. Let me suppose the case of an executor or an administrator having a fund in his hands, and filing a bill of interpleader, or a bill in the nature of a bill of interpleader, (which is analogous to a suit of multiplepoinding in Scotland,) in the Court of Chancery to have it ascertained who are entitled as next of kin to the residue of the fund. Several next of kin are made parties, advertisements are inserted in the newspapers (here there is a reason given why advertisements have not been inserted, I do not go into that detail) calling upon the next of kin to come in and establish their claim. Now, suppose there is a brother who claims in competition with first cousins, and it depends upon the question whether the brother is legitimate or not, and other questions of that sort, which all who claim as cousins have an interest in disputing, an issue is directed and tried, and the illegitimacy of the brother established, or rather his legitimacy is not established, and the first cousins are then let in, and a decree is made to distribute the property amongst them. After that decree has been made, some other first cousin, or person claiming through a first cousin, presents a petition praying that he may be let in with the others. Now I take it to be perfectly clear, that after there has been a decree for distribution amongst the supposed first cousins, there could be no person let in *ex debito justitiæ*. The only right he would have, as a matter of right, would be to file a bill in the nature of a bill of review, impeaching the decree which had been already made, upon the ground that there were certain matters which had not been brought under the cognizance of the Court, on account of which he claimed to shew that the decree was wrong. That would be a course which he might pursue without any permission of the Court. I am far from meaning to say, that if the fund actually was in the hands of the Court, the Court would not give him that short cut upon terms, and say, "Though your only right is to file a bill of your own, yet as we have the fund here, and we can save litigation and expense by letting you in by a short cut to state that which you would have to state in a more expensive way upon your own process, we will allow you to do so." I am far from saying, that at any period before the actual distribution of the fund the Court would not have a right, if they thought fit, to let the party in upon other terms.

Now that is what has been done here. Those parties do not come in until after the decree has been pronounced. The Court say, "We will give you all the assistance we can, as the fund has not been actually parted with, but it must be upon the reasonable terms of making you pay a proportion of the costs, which you would have been bound to pay, if you had been a party from the beginning." Whether the proportion of costs has been accurately calculated, is a matter which I think we must leave to the Court below to determine. They took the matter into consideration, and they thought that with reference to the number of persons claiming this new right, as compared with those who had claimed before, these would be fair terms, particularly, I suppose, considering that what was represented as the amount of the costs, really was far short of what the costs actually incurred had been; and, therefore, cutting the knot as well as they could, they said, "You shall pay half the amount of the taxed costs; and upon these terms you may come in." It appears to me clear, not only that the Court had a discretion in the matter, but that they could not properly have let these parties in, except upon some terms, and these terms appear to me extremely reasonable. I therefore concur with my noble and learned friends, in thinking, that the interlocutor of the Court below ought to be affirmed.

LORD BROUGHAM.—We can say nothing about costs, for the appellants appear *in formâ pauperis*.

Interlocutors affirmed.

J. B. Douglas, W.S., *Appellants' Agent*.—Webster and Renny, W.S., and Adam and Kirk, W.S., *Respondents' Agents*.