GEIKIE, OR YOUNG, ET AL., ... APPELLANTS.
MORRIS ET AL., ... RESPONDENTS.

1859.
June 11th, 14th.

Multiple-poinding (*a*)—*Claimants after Decree.*—Upon a decree of preference in a multiple-poinding, parties seeking subsequently to intervene as new claimants in the suit may be put on terms, and subjected to the condition of paying a reasonable proportion of the prior costs; p. 353.

Discretionary Order.—The House will not readily interfere with an order made by the Court below in the exercise of an undoubted discretion upon a question of mere practice; p. 358.

ON 5th March 1856, Isabella Geikie, or Young, widow, James Lackie, George Lackie, James Geikie, and Charles Geikie presented a Note to the Second Division of the Court of Session, stating that in the process of multiple-poinding by the Judicial Factor on the estate of John Morgan, deceased, they were desirous of lodging a condescendence and claim.

The Note stated that they had never been served with process in the multiple-poinding; that they had had, in fact, no notice of its existence, and that they had only very recently been made aware of its dependence.

They were all persons in very humble life. They prayed permission to lodge a condescendence and claim.

On 6th March 1856, the Court appointed them to give in a Minute stating at "what time, and from whom, and in what circumstances, the disputed succession and proceedings under the multiple-poinding came to the knowledge of each of the said parties respectively; and what communication, if any, and at

(*a*) *i. e.* Interpleader.

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what time, took place between them, or any of them, and George Simpson, writer in Dundee, and Alexander Williamson, writer in Montrose, agents for the unsuccessful claimants in the multiple-poinding.

The Court on the same day ordered the Judicial Factor to state in a Minute the extent to which the disputed succession was made public by advertising, and in what parts of the country, and the period during which advertisements were repeated: also, whether he received any communication from any of the parties to the Note regarding the claim, and at what time.

The following Minute was lodged for the new claimants:

MINUTE for Isabella Geikie, or Young, widow, James Lackie, George Lackie, James Geikie, and Charles Geikie.

1. The said Isabella Geikie, or Young, first heard of the disputed succession about the middle of September 1855. She was not made aware of the nature of the proceedings farther than that some sort of process was going on in Court with reference to the succession of the late Mr. Morgan.

2. The said James Lackie first heard of the disputed succession in or about September 1855.

3. The said George Lackie first heard of the disputed succession about the middle of September last, 1855.

4. The said James Geikie first heard of the said disputed succession in July 1855.

5. The said Charles Geikie first heard of the said disputed succession in July 1855.

A Minute put in for the Judicial Factor on the estate stated the several notices by way of advertisement in the newspapers, calling on all parties claiming interest to come forward.

On the 11th March 1856 the Second Division of the Court of Session found that after all the procedure which had occurred (a decree of preference having been pronounced in favour of the Respondents on the 27th February 1856), the Appellants could only be allowed to compear on the condition of paying 1,533*l.*, being 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 had been pronounced.

On the 21st May 1856 the matter came again before the Second Division, on a Note for John Morris and others, whose claims had been sustained, containing a motion that their Lordships would, in respect of the default, refuse the prayer of the said Note for the Appellants, and find the persons for whom that Note was presented liable to the said John Morris and in the expenses occasioned by the said compearance. Their Lordships thereupon pronounced the following Interlocutor:—"21st May 1856. In respect of the failure on the part of Mrs. Isabella Geikie, or Young, and the other persons for whom the Note was presented, to pay the sum of 1,533*l.* mentioned in the Interlocutor of 11th March 1856, and to lodge the claim also therein mentioned—Refuse the desire of the said Note, and decern."

Hence this Appeal, which was prosecuted by the Appellants as *paupers*.

Mr. *Mundell* and Mr. *Hale* were heard for the Appellants.

The *Lord Advocate* (*a*) and Sir *Richard Bethell* for the Respondents.

The circumstances, arguments, and authorities, are fully discussed by the Law Lords in the following opinions.

(*a*) Mr. Inglis.

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The LORD CHANCELLOR (*a*):

My Lords, this question arises upon two Interlocutors pronounced by the Court of Session allowing the Appellants to lodge a claim in a proceeding of multiple-poinding, 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 multiple-poinding was raised by Mr. Donald 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 Court of the Second Division repelled the claims of Alexander and James Morgan, and found them liable in expenses, and on the 27th of February 1856 they pronounced an interlocutor in favour of the Respondents, sustaining "the claims of the claimants, John Morris, William Morris,

(*a*) Lord Chelmsford. His Lordship's judgment was in writing.

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 Coats Crescent, Edinburgh, to the whole of that part of the fund *in medio* which consists of moveable or personal property, and rank and prefer them accordingly, 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; and amongst others by Lord Stair in his Institutions (*a*), 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

(*a*) B. 4, t. 16, sect. 3.

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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 in Erskine's Institute (*a*), 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, but 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 in Mr. Bell's Commentaries (*b*).

(*a*) B. 4, t. 3, sect. 23. (*b*) 4th edition, vol. ii., p. 339.

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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 multiple-poinding, 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 competition of the creditors, and settlement of their rights alone. The whole is closed by a decree settling the order of division, decerning for payment."

I think all the authorities 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 multiple-poinding, he may have his action against the party who has received the money. And in each of those cases, either upon his action of reduction or in his action against the party who has had the money paid over to him, he must establish his title against him.

Upon a decree of preference, parties seeking subsequently to intervene as new claimants in the suit may be put on terms, and subjected to the condition of paying a reasonable proportion of the prior costs.

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

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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, parties can be admitted only upon conditions.

Your Lordships have been pressed with the expressions used by the Judges in the case of the *Magistrates of Dundee* against *Lindsay* (*a*). 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 multiple-poinding; 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 multiple-poinding, 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, although they claimed upon this totally different

(*a*) 19 Sec. Ser. 168.

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 Defendants lodged, amongst others, two pleas, "to the effect, first, that the action as libelled was incompetent, as there were 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 multiple-poinding." 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

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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 multiple-poinding, what would have been the course to be 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 relatives. 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 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 upon 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 multiple-poinding 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 pro-

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ceeding for the protection of the fund, in which alone they were interested, because the fund was in Court, and the claimants 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 6,000*l.*, 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 6,000*l.*, 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." These observations are not to be taken as general observations, applicable to all parties who come in at a late stage of the proceedings of multiple-poinding; but as applicable to the particular circumstances of the case of the Magistrates of Dundee, who, as I have already pointed out

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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 shares of the fund.

I perhaps ought to observe upon the case of *Johnston the Elder* (*a*). 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 aught 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 show 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 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

The House will not readily interfere with an order made by the Court below in the exercise of an undoubted discretion upon a question of mere practice.

(*a*) 10 Shaw & Dun. 195.

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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 Chancellor's opinion.

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

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proper discretion with respect to the terms. This is, therefore, in my opinion, sufficient to support the first Interlocutor, the Interlocutor 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 Brougham's opinion.

Lord Cranworth's opinion.

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 when it is like law. In dealing with questions of Scotch law, perhaps, a similar view may be the right one, not that we 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 is precisely that which would be pursued here. Let me suppose the case of an executor or an administrator having a fund in his hand, and filing a bill of interpleader, or a bill in the nature of a bill of interpleader (which is analogous to a suit of multiple-poinding), 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 calling upon the next of kin to come in, and establish their claim. 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 some person claiming through a first cousin, presents a petition praying that he may be let in with the others. 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, would be a right 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 show that the decree was wrong. That would be a course which he might pursue without any permission from the Court.

If, however, the fund were actually in the hands of the Court, the Court might say: "Though your only right is to file a bill of your own, yet as we have the fund here, and as we can, by a short cut, save litigation and expense by letting you in upon terms to state that which you would state in a more expensive way upon your own process, we will allow you to do so." I am far from meaning to say, that at any period before the actual distribution, the Court would not have a right, if they thought fit, to grant such permission.

Here the 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

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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 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.

HOLMES, ANTON, AND TURNBULL—RICHARDSON, LOCH, AND MCLAURIN.