record the issue is fairly joined. The pursuers' allegation is "that arrestments to found jurisdiction have been used by the pursuers, and have arrested funds in Scotland due to the defender, who is thus subject to the jurisdiction of the Scotch Courts." In answer the defender denies that averment, and explains that the goods the price of which has been arrested by the pursuer, did not belong to the defender but to the said Edward Dartnell, whose servant he says he is and has been since 1886. Thus the defender has distinctly stated what his defence is. Further, the pursuer was put on his inquiry, in my opinion, by the very terms of the memorandum of which he complains, for it is in the plural. The writer says—"We should have preferred exposing to the public your swindling practices." A man who is about to raise an action complaining of such a letter ought to take the trouble before raising it to find out from whom it is he is to recover the damages. Here the pursuer brings his action against an individual against whom he says there is jurisdiction in respect of debts due to him in Scotland. He has failed to establish that allegation.

The Court refused the reclaiming-note with expenses.

Counsel for the Pursuers (Reclaimers)—Gloag—A. S. D. Thomson. Agent—A. Rodan Hogg, Solicitor.

Counsel for the Defender (Respondent)—Rhind—Watt. Agent—William Officer, S.S.C.

Wednesday, October 23.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PENNEY (SAWERS' FACTOR) *v.* SAWERS AND OTHERS.

Process — Multiplepoinding — Claim — Expenses.

A truster directed his trustees to pay the residue of his estate in liferent to A, whom failing to B, whom failing to C, and on the death of the last liferenter to pay the fee to certain parties named. C emigrated to Australia some years prior to the death of the truster, and, on the understanding that he was dead, an action of multiplepoinding was raised on B's death to ascertain the party entitled to the fee.

After proof, but before a decree of ranking had been pronounced, a new claimant appeared, who averred that he was C, and claimed the liferent of the estate under the settlement, and the Court, in respect that the claimant had not been called as a defender, and had received no intimation of the dependence of the process, and that the expenses in the case had been incurred in determining the party entitled to the fee—an investigation from which the claimant derived no benefit—*allowed* the claim to be unconditionally received.

Morris v. *Geekie, in re Morgan* v. *Morris*, 18 D. 797, 818, *distinguished.*

The late Peter Sawers, bleacher, died on 27th November 1859, leaving a trust-disposition and settlement, in which he directed his trustees to convey the residue of the trust-estate to Henry Sawers in liferent, whom failing to the Rev. Peter Sawers in liferent, whom failing to Robert Gordon Sawers, a natural son of the testator, in liferent, and in a certain event, to certain parties *nominatim* in fee.

After the death of the testator Henry Sawers, who survived him about ten years, enjoyed the liferent of the trust-estate, and thereafter the Rev. Peter Sawers enjoyed the liferent of the estate, and died on the 19th June 1885. Robert Gordon Sawers had gone abroad some years before the testator's death, and at the date of the death of the Rev. Peter Sawers it was uncertain whether he was alive or dead.

An action of multiplepoinding was raised in name of the judicial factor who had been appointed on the trust-estate to ascertain the parties entitled respectively to the liferent and to the fee of the trust-estate.

After various procedure the competition was finally carried on between James Sawers, who averred that he was a grand-nephew of the testator, and claimed that he was entitled under the destination to the fee of the trust-estate, and John Sawers, who averred that he was the nearest lawful heir in general to the testator, and claimed as such the fee of the trust-estate.

After proof had been led, but before a decree of ranking had been pronounced, the Lord Ordinary was moved to allow a claim to be received for a party claiming to be Robert Gordon Sawers, the residuary legatee substituted to the Rev. Peter Sawers in the deed of settlement.

The claimant averred, *inter alia*, that he was a natural son of the testator, and was born on 12th April 1831; that after residing for about twenty-four years in various parts of Scotland and Ireland, he sailed in 1854 for Melbourne; and that he had resided in various parts of Australia from that date to the present time. He claimed the liferent of the trust-estate.

On 17th July 1889 the Lord Ordinary (M'Laren) pronounced the following interlocutors:—[*After preference of certain debts and a legacy*]—"Ranks and prefers the claimant James Sawers to the balance of the said fund in terms of his claim." "Allows the condescendence and claim for Robert Gordon Sawers to be received on payment by him of the expenses incurred by the claimant James Sawers between the closing of the record and the last allowance of proof," &c.

The claimant Robert Gordon Sawers reclaimed, and argued that he was entitled to enter the process upon less stringent terms than those imposed by the Lord Ordinary. The expenses alleged by the successful claimant to have been incurred between the periods fixed by the Lord

Ordinary were between £200 and £300, and it was a hardship to find the present claimant liable in any part of these expenses seeing they had been almost, if not entirely, incurred between parties claiming the fee, whereas he was a mere interposed liferenter. Any expense common to the liferenter and the fiar the claimant was ready to share. The fiar had to prove his case apart from the liferenter, and all the expense hitherto incurred was necessary to enable the party preferred to the fee by the Lord Ordinary to substantiate his claim. The present claimant was not to blame for his late appearance in the process; he was not called as a party, and he had no intimation of the dependence of the action, and from his residence in the remoter parts of Australia he had no means of knowing about these proceedings. No expense had been caused by his late appearance.

Argued for James Sawers—The present claim could only be admitted upon the payment by the claimant of his fair share of the expenses already incurred. The claimant had a copy of the testator's settlement, and he knew his rights under it. He was culpably negligent in not appearing sooner in the process, whereby a considerable portion of the expense might have been saved. The successful claimant of the fee had really been fighting the battle of the liferenter, and he was entitled to be recouped for his outlay. It was not fair for the present claimant to lie by and allow the fiars to incur all this expense, and then step in and enjoy all the profit. The case was ruled by the case of *Morgan* v. *Morris*, March 11, 1856, 18 D. 797, and the condition of the present claimant getting into the process ought to be his payment of one-half the expenses incurred.

At advising—

Lord President—The reclaimer Robert Gordon Sawers comes into this multiplepoinding somewhat late in the day, but he proposes to lodge a condescendence and claim with a view to establishing his right to the liferent of the fund *in medio;* and he has explained that the reason why he did not sooner make a claim upon the fund was that he had been kept in ignorance of the existence of the present process. The claimant was resident in the backwoods of Australia, and it does not appear that he ever received anything of the nature of a citation, nor were the advertisements of the action likely to meet his eyes, as these advertisements seem to have been confined to Scottish newspapers.

The Lord Ordinary has allowed this claim to be received, but only upon the condition that the claimant makes payment to the claimant James Sawers (the party whom the Lord Ordinary has found to be entitled to the fee of the fund *in medio*) of the expenses incurred by him "between the closing of the record and the last allowance of proof." Now, these expenses were incurred by James Sawers in preparing for a proof ordered by the Lord Ordinary, in which the said James Sawers as fiar, and certain other parties of the name of M'Gregor, who claimed a liferent of this fund through another party calling himself Robert Gordon Sawers, were engaged. The view which the Lord Ordinary took, I presume, when he allowed the present claim to be received only on condition of the payment of these expenses was, that if the present claimant had been in the process at the date when these expenses were incurred he would have been liable in a proportion of the outlay, seeing that by means of it a rival to his claim of liferent was extinguished. I have been trying to realise what the position of the present claimant would have been if he had been a party to this process at an earlier stage, and what expenses he might in consequence have been called upon to pay.

I observe that by his interlocutor of 25th May 1887 the Lord Ordinary "allows the claimants Mr and Mrs M'Gregor a proof of their averments, and the other claimants a conjunct probation." If Robert Gordon Sawers, the present claimant, had been at that date a party to the process, he would have been one of the parties entitled to a conjunct probation.

It was presumed that the judgment of the Lord Ordinary had proceeded upon the authority of the case of *Morris* v. *Geekie*, which was one of the branches of the case of *Morgan* v. *Morris*, 18 D. 797. It appears that this case has been somewhat misunderstood, although the rubric I think makes it quite clear, and it is in these terms—"A party deceased having left a number of inconsistent settlements a multiplepoinding was brought calling all the parties named in these settlements, and also all known relatives. No appearance was made for any party founding on the writs, and claims were lodged for relatives, all proceeding on the footing that the deceased had not been of a disponing mind at the date of executing the writings. Expensive litigation to determine the propinquity the parties went on, and when the parties at last determined to be the nearest moved for decree of preference, five years after the raising of the multiplepoinding, certain parties who had been called in the summons craved to be allowed to lodge a claim, founding on one of the settlements. *Held* that having so long allowed the litigation to proceed as concerning an intestate succession, they were not entitled to claim in it, having the remedy of a declaration if they thought fit."

In this part of the case no question was raised about expenses, and the party claiming thereafter raised an action of declarator, and succeeded in getting the estates. It may be thought that perhaps the Court dealt rather too tenderly with the claimant in that case in allowing him to raise his action of declarator without making it a condition that he made payment of some part of the expense which had been incurred. But the other branch of this case which has perhaps a more direct bearing on the present question is as follows:—"When parties who had not been called, and who had only recently heard of the succession, craved to be allowed to claim as next-of-kin

they were allowed to do so on repaying half the expenses incurred in resisting the claims of parties alleging propinquity to the deceased nearer than that alleged by the new claimants."

Now, it is to be observed that this judgment differs very materially from that which the Lord Ordinary has pronounced. There was in that case a good and sufficient reason why the claimants who sought late in the day to enter the process should be made to pay a half of the expense incurred. They were living on the spot, and were well aware of the dependence of the action, and they were accordingly in fault in not appearing at an earlier stage of the proceedings and making their claim.

In the present case, however, the circumstances are materially different from what they were in *Morris* v. *Geikie*. The claimant here was entirely ignorant of the dependence of this action, and no steps seem to have been taken in any way to communicate its existence to him, and accordingly in the circumstances I am prepared to admit his claim without imposing any condition as to expenses, all the more as it does not appear that his delay in making his claim has occasioned any additional expense. It may be that the claimant may derive some benefit from the proof which has been already led, and from the procedure which has already taken place in the case—that is his good fortune if it be so—but I am not disposed as a condition of his taking any such benefit to make him liable for any part of the expenses which have hitherto been incurred.

LORD SHAND—A party who seeks to enter a process of multiplepoinding at a late stage of the proceedings may, as a condition of his being allowed to claim, have to pay all or a proportion of the expenses incurred if it can be shown, 1st, that his late appearance was occasioned by his own fault, and has been the means of causing additional expense; and 2nd, if he has stood aside while other parties were fighting his battle, and then seeks to derive benefit from their labours. As to the first of these points, the claimant here says that he was quite in ignorance of the existence of this action of multiplepoinding, and that being resident in Australia, and not being called as a party to the action he was quite unaware of what was going on. Nor does it appear to me that his failure to appear at an earlier stage of the proceedings has been the means of causing any additional expense. That being so, the question comes to be, whether he is now deriving from the proceedings such a benefit that he is bound to pay a proportion of the outlay? I do not think that the parties opposing the admission of this claim have in any way satisfied us upon this matter. At all events in no circumstances should this claimant be made to pay all the expenses which have been incurred as the Lord Ordinary has determined.

There are here various claimants, and it appears to me that it would be hard to charge one who claims a liferent with the expenses incurred in a competition between two parties each claiming the fee. No doubt the circumstances of the present case are very special, but I am prepared to concur with your Lordship that as regards this claimant he is entitled to have his claim received without any payment of expenses as a condition thereof.

LORD ADAM concurred.

The Court allowed the claim of Robert Gordon Sawers to be received without any payment of expenses.

Counsel for R. G. Sawers—Martin. Agent—F. J. Martin, W.S.

Counsel for James Sawers—Gunn. Agents—Simpson & Lawson, W.S.

Counsel for John Sawers—Rhind. Agents—E. A. & F. Hunter & Co., W.S.

Saturday, February 23.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

DICKSON AND OTHERS (DICKSON'S TRUSTEES), PETITIONERS.

Trust — Investment — Consigned Money — Lands Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 67, 68, *and* 79.

Lands held by testamentary trustees under a declaration that they should have no power to sell them during the lifetime of testator's children were taken by a railway company under compulsory powers, and the price consigned in bank, "subject to the control and disposition of the Court of Session, to the intent that the same shall be applied, under the authority of the said Court, to some one or more of the purposes specified in the Lands Clauses Consolidation (Scotland) Act 1845 relative to parties under disability."

The Court, on the petition of the trustees, while the truster's children were alive, *authorised* the bank to pay over the consigned money to the trustees, to be invested by them in accordance with their powers under their trust-deed, without requiring them to apply it to some one or more of the purposes specified in the Act.

Peter Dickson, Isa Villa, Bridge of Allan, died on 31st January 1875, leaving a trust-disposition and settlement, under which he, *inter alia*, expressly declared that his trustees should not have the power during the lifetime of his children to sell any part of his heritable estate.

On 10th August 1888 the North British Railway, under compulsory powers, took a portion of the heritable property belonging to the trust, situated in the Gallowgate of Glasgow, the price thereof being fixed by valuation at £2700.

The trustees being unable, in consequence of the declaration above quoted, to give an