ally in her mother's house at Crofton, Lochbroom, occasionally with her brother at Strathkia, parish of Dingwall (see in particular on this point evidence of Roderick Morrison, Mrs Catherine Cameron or Monro, and James Robertson, p. 4., pp. 6 and 7, and p. 12 of proof for Lochbroom) and sometimes away for half a year "on harvest and other work" (evidence of Mrs Cameron or Monro, p. 7 of proof for Lochbroom, letters F. G.) and at other times in Killin, parish of Contin (Alexander Robertson, p. 14 of proof for Lochbroom, and Margaret M'Lean, p. 10 of proof for Contin).

Such being the import of the proof, and it being impossible to discover with certainty where the parents of Roderick M'Kenzie had their home or permanent residence or settlement at the time of his birth, while, on the other hand, it is certain that he was born in the parish of Contin, the Lord Ordinary has been unable to arrive at any other conclusion than that the parish of Contin, as the parish in which Roderick M'Kenzie was born, ought in the circumstances to be held to have been the parish of his settlement, and consequently also the settlement of his widow and pupil children. The Lord Ordinary must own that it would require circumstances much more special and peculiar than the present case presents, to satisfy him that an individual's birth settlement should be held to have been constructively in a parish different from that in which he was actually born.

The Lord Ordinary may explain, that he thinks it must be assumed, and he accordingly has proceeded on the assumption, that Roderick M'Lean or M'Kenzie was the offspring of the marriage betwixt his mother Ann Robertson and John M'Kenzie; although at the same time he does not consider that it could have affected the judgment had it been proved that he was an illegitimate son of Ann Robertson. And he has also to explain, that the parties did not insist in any of the appeals which were taken in the course of the proof.

(Initd.) R. M'F.

Counsel for St Cuthbert's—Mr Gifford and Mr Marshall. Agent—Ebenezer Mill, S.S.C.

Counsel for Lochbroom—Mr Fraser and Mr Burnet. Agents—G. H. Cairns, W.S.

Counsel for Contin—Solicitor-General and Mr Watson. Agents—Adam & Sang, S.S.C.

Tuesday, May 14.

SECOND DIVISION.

PATRICK *v.* M'CALL.

Lease—Submission—Decree-Arbitral—Reduction.

Circumstances in which held that a decree-arbitral was conform to the matter remitted by the submission.

This is a question between Mr Patrick, proprietor of the estate of Benmore, in Argyleshire, and his tenant, Mr James M'Call. In the adjusted lease between landlord and tenant there was the following clause:—"The proprietor shall have power to resume any part or parts of the subjects hereby let, for the purpose of fencing or planting, forming roads, straightening marches, or for any other purpose that the proprietor may desire; the proprietor binding himself and his foresaids to fence any lands resumed for any of the above purposes, and being bound to make a reasonable allowance to the tenant for such land as he may resume, or for any injury and damage he may occasion through the foresaid operations, according as the same may be determined by two arbiters mutually chosen, or by an oversman in the event of their differing in opinion, and the plantation fences being always kept up at the expense of the proprietor."

In exercise of this right, the pursuer on different occasions resumed certain portions of ground; but differences having arisen between the parties, they entered upon a submission, which proceeded on the narrative of the said adjusted lease, and that the pursuer had on three occasions—viz., in September 1863, in October 1863, and in April 1864, the latter date being the date of the submission—resumed possession of certain fields, being part of the lands let to the defender. The submission was in the following terms:—"The said James Patrick on the one part, and the said James M'Call on the other part, have submitted and referred, and do hereby submit and refer, to Alexander Forbes Douglas, Esq., residing at Jerdonfield, and John Kennedy, Esq., of Kirkland, arbiters mutually chosen by the said parties, or, in case of difference of opinion between the said arbiters, to any oversman to be named by them, and which they are hereby empowered to do (such oversman to be named before any procedure shall take place under this submission), to ascertain and determine the amount of the allowance to which the said James M'Call is entitled, in terms of the said lease, for the fields so resumed as aforesaid, it being expressly understood and agreed that all other or further claims, questions, and differences between the said parties are hereby reserved entire." The said deed of submission was registered in the Books of Council and Session on the 8th January 1866.

The arbiters differed in opinion, and they devolved the submission upon an oversman, who pronounced the following award:—"The oversman finds, *First*, that at the dates of the landlord's intimations foresaid, the tenant, the said James M'Call, was in the profitable possession and occupation, as part of the farms let to him, of the ground, intimation to resume which was thereby made, and that it is admitted by the parties that the ground so sought to be resumed by the landlord, and agreed to be surrendered by the tenant, consisted of sixty-eight acres of low ground and certain portions of the hill; *Second*, that from the dates of the landlord's intimations foresaid, the tenant has been deprived of the profitable possession and occupation of the said low ground and portions of the hill; *Third*, that the lands, of the profitable possession and occupation of which the tenant has been deprived as aforesaid, are worth to the tenant £153, 12s. sterling per annum; *Fourth*, that the said James M'Call is entitled to an allowance at the rate of £153, 12s. sterling per annum, so long during the currency of the said lease as he has been or shall be deprived of the occupation and possession of the said lands so resumed by the landlord; and I find, ascertain, and determine that the said sum of £153, 12s. sterling per annum is the amount of the allowance to which the said James M'Call is entitled, in terms of the said lease, for the fields so resumed as aforesaid."

The pursuer then brought a reduction of this decree-arbitral, maintaining that it did not decide the matters submitted, and that it was unintelligible, in respect that while it found the defender entitled to an allowance for the lands resumed, from the dates at which they were respectively resumed, it afforded no means of ascertaining the amount of such allowance.

The Lord Ordinary (Jerviswoode) repelled the reasons of reduction, resting his judgment mainly on the ground that the oversman had not failed to exhaust the claims of parties.

The pursuer reclaimed.

Young and Adam for him, maintained that the award was ambiguous, and, moreover, was disconform to the submission.

Cook, in answer.

The Court—Lord Cowan delivering the leading opinion—held that although there were words used in the award that might on a very rigorous construction be held to raise questions of difficulty, it was upon the whole pretty evident what the oversman intended to do, and the general principle of construction being that where the common sense interpretation of terms led to a reasonable view within the scope of the submission, the Court were not to go in search or pursuit of difficulties. The oversman found the defender entitled to a slump sum as allowance for the land taken away from him, and that was precisely what he had to do under the submission.

The other Judges concurred.

The Lord Ordinary's interlocutor was formally recalled; but the defender was assoilzied.

Agents for Pursuer—Adam, Kirk, & Robertson, W.S.

Agent for Defender—William Kennedy, W.S.

Wednesday, May 15.

FIRST DIVISION.

BELL'S TRUSTEES *v.* EDINBURGH AND GLASGOW RAILWAY COMPANY.

Railway — Siding — Level Crossing — Agreement. Circumstances in which held that a Railway Company having, by agreement, given a level crossing, along with a sum of money, to a proprietor whose lands were intersected by a branch line, were entitled to make a siding near the level crossing, it being held proved, on the evidence, and after a remit to a man of skill, that the siding did not render the level crossing either unsafe or materially inconvenient.

This was an action of declarator, interdict, and damages at the instance of the trustees of the late Alexander Bell, of North Newton, against the Edinburgh and Glasgow Railway Company, the main conclusion being that the defenders had no right to make a siding on that portion of the Stirlingshire Midland Junction Railway where it passes through the pursuers' lands of Bellmount, lying within, or in the immediate neighbourhood of, the town of Falkirk, so as to obstruct, interrupt, or impair the rights and privileges connected with the crossings possessed by the pursuers and their tenants over the railway, in terms of a minute of agreement dated 16th September and 8th October 1851.

A variety of questions had been raised relating to claims on the part of the pursuers for accommodation works; but the most of these had been settled by the said agreement, whereby the pursuers discharged these claims, and the railway company agreed to pay a certain sum in lieu of building a bridge required by the pursuers. By the said agreement the railway company also undertook to allow the pursuers two foot crossings over the surface of the railway at certain points in the pursuers' lands. These crossings were made at parts where the line ran through a cutting, and the pursuers at each crossing placed, on each side of the cutting, wooden stairs leading down to and up from the line. Thereafter the railway company laid down a siding at these crossings in such a way as, according to the pursuers, to interfere with their right of crossing. The railway company removed the wooden steps and substituted therefor stone steps at a considerable distance further back. The pursuers alleged that this siding increased the danger involved in the crossing, and violated the agreement come to between the parties; and the question now in dispute was, whether this was the fact. After various steps of procedure in the case, some of the conclusions of this action being departed from, and judgment being given for the defenders to a partial extent, a remit was made to Mr Wylie, C.E., to examine and report whether the crossing had been rendered unsafe or materially inconvenient. Mr Wylie reported that the crossing had not been rendered unsafe or materially inconvenient by the formation of the siding, or by the manner in which it was used by the defenders. The pursuers objected to this report on the ground —(1) That the danger caused by the siding was considerable; (2) That the reporter was bound to suggest remedies therefor.

Gloag (A. Moncrieff with him) supported the objections.

Young and Blackburn, for the defenders, were not called on.

The Court unanimously (Lord Deas declining) repelled the objections, and dismissed the action.

Lord Curriehill said—that the case had undergone a full discussion formerly, and that then the Court had had no doubt that the pursuers' case had not been made out. He was not in the least shaken in his opinion by the present minute repetition of the argument. When the pursuers' land was taken for the purposes of the railway, he received ample compensation. The Sheriff, in conformity with the Act of Parliament, provided the proper accommodation for the severance of the pursuers' property, and that was a bridge. The pursuers, by contract, dispensed with that bridge, on getting a sum of money and a level crossing. The right to that level crossing remained intact. The railway company, on ground of their own, found it advisable to make a siding. They were legally entitled to make a siding. There was no agreement by convention to prevent that, and indeed the argument was not put that length. But it was said that they must make their siding so as not to interfere with the level crossing. He did not think it did interfere. Both the proof and the remit showed that. All level crossings were to some extent dangerous, and the person who used them took the right with the accompanying risks. It was established that if the ordinary care incumbent on persons to whom level crossings belonged were exercised, there was no injury to the right. What the pursuers wanted was immunity from practising that ordinary care. The objections ought therefore to be repelled, and the action dismissed.

Lord Ardmillan concurred.

The Lord President remarked that there was no foundation in Mr Wylie's report for the contention that any danger had been produced by the siding