

ment is quite conclusive. Here are parties seeking to be sisted as pursuers, and the moment they appeared they would be met by the question, Where is your arrestment? The want of an arrestment is not an absolute bar to jurisdiction. This is not a question of title; it is a question preliminary to appearing in Court at all. We may mend the record, but we cannot mend the arrestment.

The Court adhered.

Agents for Pursuer—Scarth & Scott, W.S.

Agents for Defender—Murdoch, Boyd, & Co., S.S.C.

Wednesday, December 13.

SPECIAL CASE—JAMES REID & OTHERS.

*Special Case—Pupil—Curator ad litem.* On the motion of counsel for two pupils, parties to a Special Case, the Court appointed a *curator ad litem* to them, the father of the pupils having an adverse interest.

Reference was made to the following Special Cases:—*Clinton*, Nov. 27, 1869, 8 Macph. 370, in which the Court appointed a *curator ad litem* to a minor, a party to the case; *Rankin*, March 5, 1870, 8 Macph. 878, in which, at the suggestion of the Court, a pupil was made a party, and the Court thereafter appointed a *curator ad litem*; *Hope and Ors.*, March 15, 1870, and *Walker's Trs.*, June 16, 1870, 8 Macph. 870, in both which cases the Court appointed a *curator ad litem* to a married woman, a party to the case.

Agents—Jardine, Stodart, & Frasers, W.S.

Wednesday, December 13.

BEGBIE'S TRUSTEES v. THOMSON.

*Road—Possession—Property.* In a division of runrig lands by decree-arbitral, the arbiter found and declared that there should be a road between the houses of A and B for an entry to the allocations of C, D, E, and F, all of them being parties to the arbitration. *Held* that C, D, E, and F could not establish a claim to the property of this road, or to exclude B from using it, without proving exclusive possession; and (by Lords Deas and Kinloch) that it was intended by the arbiter that D should have the use of the road,

Between the years 1769 and 1772 various deeds of submission, with relative deeds of accession, were entered into by a great number of persons, all heritors of lands lying runrig and rundale in the parishes of Dirleton and Gullane, or having interest in the commonties of these parishes. Mr Law of Elvingston, Sheriff of East-Lothian, was appointed arbiter, and was empowered so to divide the lands as to let each person's property lie together. In 1772 Mr Law issued an award, by which he found, *inter alia*, that James Darg, John Darg, James Thomson, Andrew Grier, and John Warrock were possessed of certain portions of land, and in lieu of these he assigned to them certain other portions. The new allocations of John Darg, Thomson, Grier, and Warrock lay alongside of one another, and were all bounded on the north by the drain of the north common, and on the south by the yeard dykes north of the town of Dirleton. The eleventh

finding was in the following terms:—"And I also find and declare that there shall be a road from the green of Dirleton between the houses belonging to the said James Darg on the east, and the houses or yeards belonging to Mr Nisbet of Dirleton on the west (for an entry to the new allocations above described, belonging to John Darg, Andrew Grier, James Thomson, and John Warrock), and that the said road shall land much about the middle of the south end of the said James Thomson's grounds, for which landing place the said Andrew Grier shall have a right of servitude to a ten feet broad road to his said allocation; and the said John Darg shall have the benefit of the said ten feet broad road through the west side of said Thomson's allocation, and through the south end of said Grier's allocation (for an entry to his property above mentioned), and that the said John Warrock shall be entitled to the benefit of the said ten feet broad road through the south end of the said Thomson's property, as a passage to and from his lands on the east side thereof."

The pursuers were now proprietors of the allocations of Thomson, Grier, and Warrock, and brought this action of declarator against the defender, who was now in right of James Darg's houses, to have it found that under the decree-arbitral they were (along with the proprietor of John Darg's allocation) proprietors of the road leading to these four allocations from the high road, and also that they were entitled to exclude the defender from the use of it. Both parties renounced probation.

The Lord Ordinary (JERVISWOOD) assolizied the defender in the following interlocutor:—

"*Edinburgh, 4th July 1871.*—The Lord Ordinary having heard counsel in the procedure roll and made avizandum, and considered the record and whole process, including the excerpts forming No. 59 of process, from submission and decree-arbitral relative to the runrig and rundale lands and commonties of Dirleton, and also including the joint minute, No. 60 of process, whereby both parties renounce probation, and admit that said excerpts are correct,—Finds that the pursuers have failed to establish that, under the terms of the titles produced by them in process, or under the terms of said decree-arbitral, they and their predecessors and authors had and have the sole and exclusive right and property along with the proprietor of the allocation of ground which at one time belonged to John Darg of Dirleton, of and in the road described in the summons, and to which the conclusions thereof relate, or that they and their foreshaids had and have any right to said road beyond a right of entry or access thereby to the several properties allocated to them by the said decree-arbitral: Therefore, and in respect of no proof of exclusive possession on the part of the pursuers or their foreshaids, repels the pleas in law stated on behalf of the pursuers, assolizies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to his expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report."

The pursuers reclaimed.

WATSON and J. M. LEES, for them, argued that the terms of the decree-arbitral showed the road was a new road; and, as the validity of the finding had never been questioned, that the land on which it was made must have been part of the runrig land. The road was for the four allottees, and the right given was evidently one of property, especially seeing that the learned arbiter described the