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 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 (JERVISWOODE) assoilzied 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 foresaids 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 foresaids, repels the pleas in law stated on behalf of the pursuers, assoilzies 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

diverging roads as only servitude roads. No right was given to the defender, and mere vicinity to the road did not give him right to use it. It was therefore unnecessary to show exclusive possession of a road which was given to the pursuers, and was the only access to their lands.

The LORD ADVOCATE and JOHNSTONE replied, that the road was also the only access to the steading behind the defender's house. It could not therefore be a new road; and even if it were, whether made on runrig land or not, the defender had a right to use it, seeing that the arbiter evidently intended to give him that right, and that the Court could not declare it the pursuers' property without proof of exclusive possession.

At advising—

The LORD PRESIDENT thought the Lord Ordinary's interlocutor was right. The pursuers asked the Court to interpret a decree-arbitral that had been pronounced a hundred years ago, and to insert words of exclusive use in the decree which it did not contain, yet showed no exclusive possession.

LORD DEAS concurred, and held that the terms of the eleventh finding implied that James Darg (the defender's author) was to have a right to use the road.

LORD ARDMILLAN concurred.

LORD KINLOCH held that the decree-arbitral, if soundly construed, gave neither property nor exclusive access to the pursuers. The arbiter evidently intended the houses that the road passed to have the use of it.

Agents for Pursuers—Gillespie & Paterson, W.S.
Agents for Defender—Hope & Mackay, W.S.

Wednesday, December 13.

CALEDONIAN RAILWAY CO. *v.* GREENOCK AND WEMYSS BAY RAILWAY CO.

Railway — Arbitration Clause. Held (diss. Lord Deas) that a clause in an agreement between two railway companies binding them to refer to arbitration all differences which might arise as to the meaning or effect of the agreement, or the mode of carrying it into operation, did not exclude an action by one of the companies for payment of certain sums, alleged to be one-fourth of the net revenue of the other, to which they were entitled under the agreement, the difference between the parties, so far as disclosed in the record, not turning on the construction of the agreement, but on the question whether in fact there had been any net revenue during the period in question.

By an agreement between the Caledonian Railway Company and the Greenock and Wemyss Bay Railway Company, sanctioned by the Act incorporating the latter company, it was provided that "all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration, in terms of the Railways Clauses Consolidation (Scotland) Act 1845, and the provisions with respect to the settlement of disputes by arbitration, contained in such Act, shall be held to be incorporated with this agreement, and be operative in the same manner as if they were *verbatim* inserted therein."

By the agreement the Caledonian Railway Company are entitled to one-fourth of the net revenue of the Greenock and Wemyss Bay Railway. They raised the present action concluding for payment of certain sums (amounting to between £2000 and £3000) as their share of the net revenue of the defenders' railway for the eight half-years ending 31st July 1870.

These sums were admittedly entered in the reports of the defenders as due to the pursuers. The defenders resisted payment on the ground that they had made up their accounts on erroneous information, that in fact the expenditure for the half-years in question had equalled or exceeded the gross revenue, and that consequently there was no net revenue at all to which the pursuers were entitled to a share.

They also pleaded that the action was excluded by the arbitration clause in the agreement.

The Lord Ordinary (ORMIDALE) sustained the plea, and dismissed the action:—

"*Note.*—The parties have agreed that all differences which might arise between them 'respecting the true meaning and effect of the agreement' libelled, 'or the mode of carrying the same into operation,' should be referred to arbitration. These terms are very comprehensive. Not only do all differences between the parties regarding the '*meaning*' of the agreement, but also regarding its 'effect,' and the mode of carrying it into operation, fall within its scope. Keeping this in view, and that the clause of arbitration also directly provides that the machinery of the Railways Clauses Act is to be applied for the purpose of working it out, the Lord Ordinary has been unable to see any good reason why that clause should not in the present instance be given effect to."

The pursuers reclaimed.

The LORD ADVOCATE, WATSON, and JOHNSTONE for them.

BALFOUR for the defenders.

At advising—

LORD PRESIDENT—The Lord Ordinary's interlocutor cannot be sustained. He has dismissed this action, which is an action by one railway company against another, concluding for payment of a large sum of money. The ground of defence is, that the action is excluded by a clause of arbitration in the agreement between the companies. If that defence be sound in law, the arbiter must have power to do everything in reference to this claim which this Court could do. Has the arbiter any right to entertain a claim for a sum of money, and is he to give decree for the amount? I think this must be answered in the negative. The clause of reference binds the parties to refer differences as to the true meaning or effect of the agreement, and mode of carrying the same into operation. But when one party demands a sum of money as due to them, and the other party says it is not due, because there are no funds in their hands from which it can be claimed, this raises a question which is not submitted to the arbiter, and, as far as we can see, it raises no question as to the meaning or effect of the agreement, or the mode of carrying it into operation. If such a question should arise in any subsequent procedure, the parties will be bound to enter into an arbitration, and the award of the arbiter will be given effect to, but that will not take the action out of Court.