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.

The action is in itself perfectly competent, and I apprehend that, even if there had been disclosed on the face of this record a difference as to the meaning or effect of the agreement and the mode of carrying it into operation, it would not have been the proper course to dismiss the action. In the well known case of *Merry* v. *Cunninghame*, 15 July 1859 and 7 June 1860, about a mining lease, almost the entire dispute between the parties was one which required to be settled by arbitration. The Court sisted process till the award of the arbiter should be presented. This is a far stronger case for keeping the action in Court. As I have said, it does not appear to me that any question has arisen, or will arise, which the arbiter would have jurisdiction to decide.

Lord Deas differed. His Lordship considered that the question between the parties, being one of figures, was one eminently suited for arbitration, and fairly came under the category of differences as to the "effect of the agreement, or the mode of carrying the same into operation," and that the powers of the arbiter would enable him to give decree for the balance due.

Lord Ardmillan concurred with the Lord President.

Lord Kinloch—I think that the Lord Ordinary has failed to remember that there may be a limited submission as well as a submission of all differences and disputes. This is a case of the former character. The action upon its face does not raise a question of the kind which is to be submitted to arbitration. It might have been otherwise. Though the conclusions are for a money payment, the grounds might have involved the reading of the contract. But for aught that appears, no one question, such as those referred, may occur. In this respect matters may change in the progress of the case. Questions may still arise fit for the decision of the arbiter, and yet they may not exhaust the cause. I agree with your Lordship that the proper course is not to dismiss the action, but to sustain it, reserving the effect of the arbitration clause if any question should arise under it.

The Court recalled the interlocutor of the Lord Ordinary, reserving the effect of the arbitration clause founded on by the defenders if any question should arise fit for the decision of the arbiter.

It was arranged that the action should be kept in the Inner-House, and that the defenders should lodge the accounts relied on by them, showing the gross revenue and expenditure during the years referred to in the record.

Agents for Pursuers—Hope & Mackay, W.S.
Agents for Defenders—M'Ewan & Carment, W.S.

Wednesday, December 13.

SECOND DIVISION.

CUMMING *v.* ORCHARD.

Process—Sheriff-Court Act 1853, § 15—*Dismissal of Action.* The enrolment of a cause in the roll book of the Sheriff-Court is a sufficient procedure to prevent the action standing dismissed under the above section.

This was an action of forthcoming in the Sheriff-Court of Inverness. A proof was ordered by interlocutor on 28th June. On 13th July the case was enrolled in the roll book by the pursuer's agent, and was dropped. The next procedure was the following interlocutor by the Sheriff-Substitute (Blair):—

"*Inverness*, 19*th October* 1871.—The Sheriff-Substitute having heard the defender's agent on his motion for revival of the action, finds that no sufficient reason has been stated for reviving it, and that no offer is made to pay expenses.

"*Note.*—The only motion by the defender's agent was a motion for revival, and this memorandum is placed on the minutes at his urgent request, with the view of recording his application and the grounds on which the Court refused it."

The defender appealed.

Strachan for him.

Rhind for respondent.

At advising—

Lord Justice-Clerk—I am of opinion that this appeal is competent, and that we ought to refer the case back to the Sheriff-Substitute. I think there has been a mistake throughout respecting the 15th section. The action never did expire. There was sufficient procedure to save it. The whole question is, whether an enrolment is such procedure in the cause as will satisfy the requirements of this statute. I presume the enrolment is *bona fide*. I say nothing as to its effect if it were a mere pretence.

The words of the section are these—"Where in any cause neither of the parties thereto shall during the period of three consecutive months have taken any procedure therein." An ordinary enrolment is unquestionably procedure, for thereby the case is brought before the Court. The matter is brought under the consideration and cognisance of the Judge. The party who enrols is bound to follow out his motion; and, if the case be dropped, will be held liable in expenses. This case never did get into the dormant or purgatorial state to which the provisions of the statute refer. In the present state of matters, therefore, I think that the interlocutor of the Sheriff-Substitute is wrong.

Lord Cowan—I concur. The case depends upon the competency of the Sheriff in exercising the statutory power conferred on him by the 15th section of the Sheriff-Court Act of 1853. He has held that three months had elapsed since any procedure had taken place, and that the cause could only be revived by an interlocutor pronounced, or cause shown. If it appear that there had been sufficient procedure to keep the cause alive, the interlocutor must be beyond the statutory discretion of the Sheriff-Substitute. Therefore the appeal is quite competent. The question then is, Whether there was a *bona fide* procedure? There is evidence before us that there was procedure. The case appeared in the roll of causes before the Sheriff. We must presume that the parties appeared, as there is no evidence that they were absent. The case comes near to the case of *Stewart* v. *Grant*, in which the Lord Justice-Clerk said—"I cannot doubt that the appearance of a cause in the roll book of the Court on a day within the three months till the expiry of which the process is a going process, and a marking upon the margin that avizandum has been made on that day, is a step in the cause." Though there is no marking by the Sheriff, we have one by the Sheriff-clerk. We are only acting on the principle established in *Stewart* v. *Grant* if we sustain this appeal.