donian Co. had right to the one-fourth of the profits only when the remaining three-fourths were sufficient to meet the charge of the interest on the debt. If it is not sufficient for this purpose, they maintain that the rule common to all partnerships must be applied, viz., that the charge of the debt, as well as all other charges, must be deducted before there is any division of profit, or any claim for a share of profits, on either hand. The contract, as they contend, did not contemplate that the Caledonian Co. should be entitled to carry off a clear one-fourth, to the effect of leaving an amount of interest on debt unpaid out of the revenue of the Company, and apparently without means of paying it, except a declaration of bankruptcy and disposal of the whole concern. Or, if the creditors in this interest, who of course were not affected by private arrangements of the Companies *inter se*, should help themselves to their interest out of the revenue, the defenders say that they cannot be held bound to pay, or raise money, to make good to the Caledonian Co. a sum of profits which never was earned. They maintain that the contract cannot legitimately be construed so as to sanction this claim by the pursuers. The reverse of this is maintained by the pursuers, who contend that the words of the contract clearly import an allocation of one-fourth to the Caledonian Company, irrespectively of all consideration of the interest of the debt.

I am of opinion that the question thus raised is, in the sound sense of the agreement, a "difference arising between the parties respecting the true meaning or effect of the agreement;" and that it touches directly on "the mode of carrying the same into operation." The question is one of undoubted practical importance in reference to the working out of the agreement. It regards the obligation or non-obligation of the Wemyss Bay Co. to pay, year after year, to the Caledonian Railway Co. a sum which the revenue of the Company does not yield after satisfying the demands of its creditors. An obligation to this effect cannot but have a paralysing influence on the operations of the Company, if indeed it does not issue in necessary bankruptcy. This being so, I am of opinion that, on a sound construction of the agreement, the question must be held to be amongst those intended by the parties to be referred to arbitration under the 18th clause. It is a question directly bearing on the execution of the agreement, and is just such a question as might form a difference arising, in terms of the clause, "from time to time." It is a question which, whenever or however it may be decided, must be determined according to "the true meaning and effect of the agreement." I am of opinion that the question must go to the arbiters.

It is scarcely necessary to say that, in arriving at this conclusion, I take no judicial cognizance of the merits of the question to be referred; nor allow my mind to be in the least influenced by a consideration of how I would myself decide the question if it was before me for determination. Even if I had a clear opinion as to the validity of the claim of the Caledonian Co., this opinion, one way or other, would be no ground whatever for withdrawing the question from the tribunal chosen by the parties. The controversy whether the question is to go to the arbiters or not cannot be solved by the consideration whether the point at issue be a clear or an obscure one. If the question is one which, in the fair construction of the agreement, falls to be determined by the arbiters, I have no other course except to send it to the arbiters.

The practical conclusion at which I arrive is an affirmative of the question sent to us, and that the Court should find, "that the question raised in the defenders' second plea, in the circumstances disclosed on the record, and in the accounts produced by the defenders, falls to be settled by arbitration under the 18th article of the agreement libelled."

In accordance with this judgment their Lordships sisted procedure in the case until the question raised in the defenders' second plea should be submitted to arbitration.

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

Friday, June 28.

SPECIAL CASE—M'LENNAN & WAITE.

Poor—Settlement—Minor.

A girl, who was born in the parish of A in 1851, and whose father died in 1857, resided in family with her mother in the parish of B from 1859 till 1866. She then left her mother and resided in the parish of C till 1868, when she became a subject of parochial relief in that parish.

Held that she had acquired no settlement in the parish of B, but was chargeable upon A, the parish of her own birth.

The object of this case was to determine whether the parish of Contin or the parish of Dunse was liable for the support of a pauper in the following circumstances.

The pauper, Jane Elizabeth M'Gregor, was born in the parish of Contin on 15th July 1851, and was the daughter of the schoolmaster in that parish. In 1857 the father died, and in February 1858 Mrs M'Gregor, his widow, and her family, including the pauper, left Contin, and went to Glasgow, where they remained for about a year and a-half. In 1859 they left Glasgow and went to Dunse, where the pauper resided in family continuously with her mother until October 1866, when she removed to Kenmore. Mrs M'Gregor died in Dunse on 10th December 1867. During their residence in Dunse, neither the pauper nor her mother applied for or obtained parochial relief. After leaving Dunse in 1866, the pauper did not again reside there, but on 6th June 1868 she applied for and obtained parochial relief from the Inspector of the Poor of the parish of Kenmore. She continued to be relieved by the parish of Kenmore up to 1871, when the Inspectors of Poor of the parishes of Contin and Dunse jointly repaid the sum which had been so expended, and brought this action to determine which of the two parishes was ultimately liable. The question presented for the opinion and judgment of the Court was—

"Whether the parish of Contin or the parish of Dunse was the parish in which the pauper had her legal settlement on 6th June 1868, when she became chargeable?"

MILLER and BURNET, for the parish of Contin, argued that there was no reason why the attainment of puberty by the pauper should be held to prevent the settlement which the mother acquired in Dunse being acquired by her for her daughter.

The Courts had given to the mother the power of acquiring a settlement for children residing in family with her, and no line was drawn at minority, and there was no reason why the power should be held entirely to cease when children attained that age.—(*Crieff* v. *Fowlis Wester*, 4 D., 1538.) The mother is still the head of the family, and it is in virtue of her holding that position that the Court has allowed the widowed mother to acquire a settlement for her children. Then the pupil child co-operates in the attainment of the settlement, so why should a child lose the benefit of a residence, during which it has been in the course of acquiring a settlement for itself as a member of its mother's family merely because it arrives at a time of life when it can go out into the world and acquire a settlement entirely for itself.

Solicitor-General and Low, for the parish of Dunse, argued that a widowed mother has no power whatever to acquire a settlement for her children above the age of puberty, and that this was practically decided in the case of *Craig* v. *M'Donald*, July 18, 1863, 1 Macph., 1172. That to recognise any such power in the mother was inconsistent with the considerations which led the Court at the first to recognise derivative settlements. That these considerations were that it was neither expedient nor humane to separate children from their parents when they were, from their tender years, incapable of doing anything for themselves, but were entirely dependent upon their parents (*Barbour* v. *Adamson*, 3 M'Q. 376); and that it was obvious that minors, who in law were invested with almost full powers, were not persons to whom these considerations applied. That there was no power in the mother corresponding to the *patria potestas* in the father, whereby she could exercise any power over her children above puberty (*Craig* v. *M'Donald*); and that, as to the argument that the time which the pauper resided with her mother as a pupil could be added to the time which she resided with her as a minor, it was directly in the face of the decision in *Kirkwood* v. *Wylie*, Jan. 19, 1865, 3 Macph., 398, to maintain that any such addition could take place.

At advising—

Lord President—The question here seems to me to be practically settled in the case of *Craig* v. *M'Donald*. In that case it was decided that a person whose father is dead, and who has not a residential settlement, upon attaining puberty must go to his own settlement of birth. Now, in this case, when the pauper applied for relief to the Inspector of Kenmore in 1868, she was about sixteen years of age, having been born upon 15th July 1851. When she applied for relief she had a settlement in the parish of her own birth, unless she had a settlement elsewhere in her own right. But as she was only sixteen years of age, she could not have acquired any such settlement. As to the fact that the pauper resided in Dunse for five years, it must be remembered that part of that time was during the pupillarity of the pauper, and it is out of the question to say that a settlement can be acquired partly by the residence of a pupil in family with her parents, and partly by the residence of a minor in her own right. I am therefore of opinion that the parish of the pauper's birth, that is the parish of Contin, is the parish in which the pauper had a settlement when she became a subject of parochial relief.

Lord Kinloch—The pauper in the present case became chargeable in June 1868, when she was seventeen years of age, having been born in 1851.

Her father died in December 1857, when she was six years of age, possessed of a residential settlement in the parish of Contin. She went in 1859 with her mother to live in the parish of Dunse, where they resided together till October 1866. By this residence of seven years the residential settlement of the father was lost to both widow and child; and I think a residential settlement was acquired in Dunse for both. For I hold it to be settled by the case of *Crieff* v. *Fowlis Wester*, July 19, 1842, D. 4, 1538, that after a father's death the mother may acquire a residential settlement, both for herself and for all the children residing with her, and forming along with her the family of which she is the head. I do not consider the settlement so acquired by the children necessarily to cease when each attains puberty. For puberty is not *eo ipso* emancipation; nor will the mere arrival of puberty necessarily cause the child to cease to be a child of the house. So it would unquestionably hold if it was the father who was alive, and the children resided in family with him. I think it equally holds in the case of the surviving mother continuing to have her children living in family with her. Any other doctrine would involve a premature separation between mother and child, to which our peculiar system of poor law is peculiarly hostile.

If, then, the pauper had become chargeable in October 1866, when she had been seven years with her mother in the parish of Dunse, I should have had no doubt that her settlement was in Dunse, although at that time she was fifteen years of age, or three years past puberty. I think the pauper would have still been a child in her mother's house, and following her mother's settlement.

But in October 1866 the pauper left her mother's house, and went to reside in the parish of Kenmore; and in 1867 her mother died. As already said, she did not become chargeable till June 1868. The question is, Where was *then* her settlement?

I am of opinion that by that time she was in the condition of an emancipated child, past pupillarity. And I think in that case her settlement was no longer in her mother's place of settlement, but in her own parish of birth. I consider this result to flow directly from the decision in the case of *Craig* v. *Greig and Macdonald*, July 18, 1863, M. 1, 1172. In that case no decision was pronounced in regard to any settlement derived, or supposed to be derived, from the mother. The case was that of a boy of sixteen, whose father had been six years dead. This was clearly an emancipated child, beyond pupillarity. According to the old law, this would have given him a capacity to acquire a new settlement for himself; but the settlement derived from his father would have subsisted till such acquisition. But it was held by a majority of the whole Court that, under the law as now existing the effect of emancipation, combined with puberty, was, so soon as puberty arrived, to destroy the original settlement, and to place the party's settlement in the parish of his own birth. So I think it must be held in the present case.

I was one of the minority in the case of *Craig;* thinking the old law still to subsist, to the effect of retaining the father's settlement till the emancipated child acquired a settlement for himself, or, when the settlement was residential, till it was lost by non-residence. But I consider the case to be a binding authority, fixing the law from its

date. I do not consider the decision in that case to interfere with the condition of children, whether below or beyond puberty, who are unemancipated, and are residing in family, either with their father, or with their mother after the father's death. But, in regard to all emancipated children, I hold the case to settle that their arrival at puberty *eo ipso* discharges any settlement derived from a parent, and, in default of any other settlement, throws them on the parish of their birth. Applying this principle to the present case, I think the pauper's settlement in 1868, when she became chargeable, was not in her mother's place of settlement, but in the parish of her own birth; and, therefore, that the parish of Contin, in which she was admittedly born, must bear the burden of her maintenance.

LORD DEAS—I concur with your Lordship in the chair, and I accept Lord Kinloch's explanation.

LORD ARDMILLAN—A pupil cannot acquire a settlement in its own right, but goes with the family, and is a burden on the means of the surviving parent. But, if the father dies, the child is forisfamiliated, if it is of such an age that forisfamiliation is possible, and, when forisfamiliated, a child goes upon its own settlement. Now, here the pauper is above pupillarity, and the father is dead, so she has no settlement but her own, which, in this case, is the parish of her birth.

Agents for Contin—Adam & Sang, W.S.
Agents for Dunse—J. & J. Turnbull, W.S.

Friday, June 28.

SECOND DIVISION.

MACEWAN'S TRUSTEES, PETITIONERS.

Bankruptcy—Trustee's Discharge.

Procedure in application for discharge of representatives of a trustee who died during the dependence of the sequestration.

The estates of Barker & Co., commission merchants, Glasgow, were sequestrated on 31st March 1864. Andrew MacEwan was appointed trustee, and paid dividends to the creditors, by which the estate was nearly exhausted. The bankrupts were discharged. Thereafter, on 11th June 1860, Andrew MacEwan died. The amount of the estate in the hands of the petitioners, who are the representatives of Mr MacEwan, was £20, 1s. 5d. The Bankruptcy (Scotland) Act of 1856 made no provision as to the mode in which the representatives of a trustee dying undischarged after a final distribution of the sequestrated estates should apply for the deceased's intromissions, and therefore the representatives of Mr MacEwan presented this application.

MONCREIFF for the petitioners—*Brown's Trustees*, Nov. 17, 1864, 3 Macph. 56.

The Court, after remitting to the Accountant of Court to inquire if the statements were correct, pronounced this interlocutor:—

Edinburgh, 28th June 1872.—The Lords having resumed consideration of the petition, with the report of the Accountant in Bankruptcy, appoint the petitioners to lodge the unclaimed dividends in bank, in terms of the statute; and to transmit the Sederunt Book to the Accountant in Bankruptcy: Exoner and discharge the petitioners, as the trustees and representatives of the deceased Andrew MacEwan, and all others, his heirs, and representatives whomsoever, of his whole intromissions, acts and management, as trustee foresaid; and grant warrant to and authorise the Sheriff-clerk of the county of Lanark, or other costodier of the bond of caution, to deliver up the same to the petitioners, as trustees foresaid, upon delivery of a certified copy of this interlocutor; and farther, to ordain the expenses of this application to be paid out of the funds belonging to the said sequestrated estates; and decern; and remit to the Auditor to tax the expenses now found due, and to report.

Agent for Petitioners—James W. Moncreiff, W.S.

Saturday, June 29.

MUIR *v.* LAMB.

Appeal—Expenses—Withdrawal.

Where a party has appealed to the Court of Session against an interlocutor pronounced in the Sheriff-court, and moves for leave to withdraw the appeal after it has been received but before it is sent to the roll, the respondent must himself bear any expense that he has incurred in consequence of the appeal being taken.

Lamb having raised an action against Muir in the Sheriff-court of Glasgow, the latter appealed against an interlocutor appointing a proof for the 2d of July. Lamb's Glasgow agents informed their correspondents in Edinburgh of the appeal, and requested appearance to be entered. This was accordingly done. Before the fourteen days allowed to the appellant to print and box his appeal had elapsed, he lodged a note, on 29th June, craving for leave to withdraw his appeal.

J. M. LEES, for the respondent, moved that the interlocutor should contain a finding of expenses, to cover charges for correspondence, entering appearance, &c. It was settled in the case of a reclaiming note being allowed to be withdrawn that the interlocutor shall contain a finding of one guinea of expenses to cover expenses of correspondence; *Kirkwood* v. *Knox*, June 4, 1868; *Perceval*, May 27, 1868; *Macleod* v. *Inglis*, Nov. 30, 1870, 8 Scot. Law Rep., 156. And in the case of a reclaiming note there is no appearance to be entered. As a respondent is entitled to insist in an appeal, though the appellant wishes to withdraw it, he may have to consider whether or no he should do so. Precisely the same correspondence takes place whether an appellant withdraws his appeal with the Court's leave or abandons it, *de facto*, by failure to print; and in the latter case he is entitled to three guineas of expenses; A.S., March 10, 1870, iii. 5. In such a case the appeal does not appear in the Single Bills. But as that enactment might be intended to be of a penal character, the respondent only asked for the same finding as in the case of a reclaiming note being withdrawn by leave of the Court. Such a finding should be inserted, otherwise the respondent would have to bear charges that will be made against him, and which have necessarily been incurred through the appellant's actings.

CRICHTON, for the appellant, replied, that in the case of *Kirkwood* the reclaiming note had appeared in the Single Bills, whereas this appeal had not. There should be, therefore, no finding of expenses.