by the statute. The heir of entail could only enter into this submission as a statutory submission. Now, regarding this as a statutory submission, it failed by expiry of time unless it was prorogated or renewed. It might be a question whether an heir of entail can renew a submission, especially whether he can do so for an indefinite period; but it is unnecessary to go into that here, because I am clearly of opinion that there was no renewal or prorogation of this submission. It was neither prorogated nor renewed, supposing it to be capable of either the one or the other. The second ground is also of itself conclusive. The decree-arbitral bears in express terms to be final in regard to all matters involved in the submission, so that whether this be a common law submission or a statutory submission, the arbiter, after giving his decree, was *functus*, and could do no more. That only leaves the question whether the decree-arbitral was a good one on the face of it. It is not disputed that the lands included in the decree were partly entailed and partly held in fee-simple. But a slump sum is awarded for both. That is plainly inextricable, because it is impossible to say how much fell to be consigned under the entail, and how much was to be paid over. The decree is therefore ineffectual, and I need not say that this is an objection which cannot be wiped out by any personal exception taken against the pursuer, or in any other way. What particular reason Seaforth may have for taking these objections to the decree-arbitral we do not know, and we have nothing to do with it. All we can go on is that, in point of law, the decree-arbitral is inextricable, and cannot be given effect to.

Lord ARDMILLAN also concurred.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Agent for Pursuer—Colin Mackenzie, W.S.
Agents for Defenders—H. & A. Inglis, W.S.

PET.—DANIEL BLACK

Pupil—Custody of. A petition for the custody of a pupil, who was living with his stepmother, presented by his nearest cognate, and opposed by his tutor-at-law—*refused.*

This petition prayed for the custody of an orphan pupil boy, who was born on 6th December 1858. The boy's mother died on 13th August 1860, and his father, after having contracted a second marriage in 1861, died on 29th October 1865.

The petitioner was the pupil's maternal grandfather and his nearest cognate. The application was opposed by his nearest agnate—namely, his father's brother, who was entitled to be served as tutor-at-law to the pupil.

On the application of the petitioner, Mr A. W. Robertson, C.A., was on 1st March 1866, appointed factor *loco tutoris* to the pupil, who was entitled to an income of from £200 to £300 a year. But since the present petition was presented, and for the avowed purpose of defeating it, the respondent had applied to be served as tutor-at-law.

GIFFORD, for the petitioner, argued that the nearest cognate was entitled to the custody. He cited Ersk. I. 7. 6-7; Higgins *v.* Boyd, 7th June 1821, 1 S. 54; Gibson *v.* Dunnett, 10th July 1824, 3 S. 175; and Denny *v.* M'Nish, 16th Jan. 1863, 1 Macph. 268.

CLARK, for the respondent (THOMS with him), replied—The pupil's tutor-at-law is entitled to regulate the custody, if he be not the next heir. In this case, the pupil's next heir is his half-sister, and the respondent is taking steps to get himself served as tutor-at-law. The pupil is living at present with his step-mother, and has done so since the year 1861. She is a most suitable person to have the custody.

It was arranged that the case should be disposed of on the footing that the respondent was served as tutor-at-law.

LORD PRESIDENT—On this footing I have no doubt about the case. If it was a question in which the tutor-at-law had not interfered, I might require to consider it more fully. But he is here with the right to have the chief say in the matter, and all the circumstances concur in recommending the course he is taking.

Lord DEAS—I am very well pleased to take the case on the footing proposed. I think that in all cases, even where the tutor-at-law appears, the custody of a pupil is a matter for the discretion of this Court. In the present case a tie has been formed betwixt the boy and his step-mother which should not be broken; and if we had here a question of discretion as to whether the tutor-at-law or the step-mother should have the custody, I am not prepared to say that I would remove the child from the custody of the latter.

Lord ARDMILLAN—I agree that this matter is very much in the discretion of the Court, even where the tutor-at-law has served. In this case, the respondent's interposition to prevent the removal of the pupil from his step-mother's house is perfectly legitimate.

The petition was therefore refused, with expenses.

Agent for Petitioner—Alex. Gifford, S.S.C.
Agent for Respondent—Willian Miller, S.S.C.

Tuesday June 12.

FIRST DIVISION.

SCOTTS *v.* HOME DRUMMOND AND ANOTHER.

Road—Right of Way—Issue. Question as to the form of issue in a right of way case in which it was denied that one of the *termini* of the road was a public place.

Lord Barcaple reported the following issues, which had been proposed by the pursuers for the trial of the case:—

"I. Whether, for forty years and upwards prior to 1864, or form time immemorial, there existed a public road or right of way from the town of Coldingham, on the south, to the *public* seashore at Petticurwick or Pettico Wick, and to the harbour, or inlet called Pettico Wick Harbour, on the north, passing through the estate of Northfield, or part thereof, in or near the direction indicated by a line coloured red on the plan, No. 9 of process, and which line is marked by the letters A B C.

"II. Whether, for forty years and upwards prior to 1864, or from time immemorial, there existed a public right of way for foot passengers, from the village of Coldingham Shore to St Abb's Head, and onwards to the *public* seashore at Petticurwick or Pettico Wick, and to the harbour there, in or near the direction indicated by a line coloured blue on the plan, No. 9 of process, which line is marked by the letters D E F C.

"III. Whether, for forty years and upwards prior to 1864, or from time immemorial, there existed a public right of way for foot passengers