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

from the village of Coldingham Shore to the *public* seashore at the point called Burnmouth Harbour, and on to St Abb's Head, and to the seashore at Petticurwick or Pettico Wick, and to the harbour there, in or near the direction indicated by a line coloured yellow on the plan, No. 9 of process, which line is marked by the letters H E G C.

FRASER and DUNCAN, for the defenders, objected to these issues, that they did not put in issue, but assumed that the seashore and harbour mentioned in them were public places.

GIFFORD, for the pursuers, consented to strike out the word "public" in each issue, and also to put in a minute consenting that the question as to the seashore and harbour being public places should be determined at the trial. He had offered to do so in the Outer House.

The Court allowed this to be done without expressing any opinion as to whether or not it was necessary.

Agent for Pursuers—Thomas White S.S.C.
Agents for Defenders—Jardine, Stodart, & Frasers, W.S.

SECOND DIVISION.

WITHAMS *v.* WHITE AND YOUNG.

Landlord and Tenant—Sequestration—Landlord's Hypothec—Rotation—Mismanagement. A landlord presented a petition of sequestration for rent, in respect he had contravened the third year rotation. Held that the contravention took place when the lease was not operative, and there being, therefore, no action under the lease, petition dismissed.

This was an advocation of a judgement of the Steward of Kirkcubright. A petition of sequestration for rent under the landlord's hypothec was presented by Mr and Mrs Maxwell Witham, of Kirkconnel, against Andrew White, writer in Cumnock, as trustee on the sequestrated estate of Alexander Young, lately farmer at Woodside, in the parish of Troqueer, and against the said Alexander Young for his interest. By letter Young agreed to conditions of let for fifteen years under certain modifications. A formal lease was afterwards entered into, dated 22d May 1862. The entry to the house, grass, and fallow, was at Whitsunday 1862, and to the land in crop at the year's separation. The farm was to be laboured on a five-course rotation. The rotation prescribed for the third year is the point on which the present case turns, and is as follows:—"The third year to be white crop sown out with at least two bushels of the best perennial ryegrass seed, and not less than six pounds of red clover and two pounds of white clover to the acre." The lease also contained a clause stipulating that if the tenant should mismanage or miscrop the farm he should be liable in a sum of £10 of additional rent per acre for each acre to which the mismanagement extended. Young entered in the third year of the rotation, and in accordance with the provisions of his lease and the usage of the district, he got possession between Candlemas and Whitsunday 1862. He sowed out "Timothy" grass seed along with the waygowing crop, and the petitioners say that this was a breach of the third-year rotation, which required him to sow out ryegrass and cloverseed. They accordingly say that he has brought himself under the obligation of the clause imposing additional rent. Young became bankrupt in May 1864, and the claim is applied to the two years of his occupation.

The respondent averred that he was allowed by the landlord to sow "Timothy" grass-seed, and the Steward-Substitute (Dunbar) allowed him a proof of his averment. The Steward (Hector) held that the formal lease must be the criterion of the obligations of parties, and as it contained no obligation on the respondent to sow out ryegrass seed with the waygoing crop of the preceding tenant, he had not incurred the penalty of additional rent. The Steward accordingly dismissed the petition.

The petitioners advocated.

GUTHRIE (with him JOHN MARSHALL) for them argued that the result of sowing "Timothy" grass seed instead of ryegrass and cloverseed was that by the failure of the former there was no hay crop and no pasture for the last year of the rotation. This proved that the respondent was guilty of mismanagement, and if guilty of mismanagement he had incurred the penalty of additional rent, because although the act libelled was done before Whitsunday—the date of the respondent's entry—he had got possession and had commenced operations under and in anticipation of the provisions of the lease.

WATSON and M'KIE for the respondents were not called upon.

The Court unanimously adhered to the judgment of the Steward, holding that although it was clearly proved that the respondent had committed a legal wrong, the act in which the wrong lay was performed at a time when the provisions of the lease were not operative between the parties. Whatever remedy the petitioners might have for the wrong which had been committed they had no action under the lease.

Lord COWAN remarked that if the Court could have held the respondent to be under the obligation of the clause imposing additional rent, it would have been a question for serious consideration, notwithstanding of the judgment in Robertson *v.* Clark, 4 D. 1317, whether additional pactional rent of the nature of that claimed in the present action was secured by the landlord's hypothec.

Agents for the Petitioners—Scott, Bruce, & Glover, W.S.

Agent for the Respondents—James Somerville, S.S.C.

Friday, June 15.

FIRST DIVISION.

MP.—BRITISH LINEN COMPANY *v.* MACKENZIE AND OTHERS.

Donation—Deposit-Receipt—Proof. A deposit-receipt having been delivered to a party by a person deceased who had previously indorsed it, *held* (1) that it was competent to prove by parole evidence *quo animo* it was delivered; and (2) that it had been proved that it was delivered with the intention of making a donation of the contents.

This multiplepoinding was raised in regard to a sum of £100 contained in a deposit-receipt granted by the British Linen Company to the late Peter Ross, Justice of Peace Officer, College Wynd, Edinburgh, on 16th March 1863. The sum was claimed by his executors-dative and next of kin on the ground that Ross had died intestate, and also by Mrs Margaret Bertram or Muir, 86 Sauchiehall Street, Glasgow, on the ground that the deposit-