

The local magistrate found the alleged offence proven, and inflicted a fine, with the alternative of imprisonment. The pursuer appealed to the Circuit Court at Dumfries, on the ground that there was no relevant offence charged against her, and that therefore the Magistrate had no jurisdiction to entertain the complaint. The appeal was certified to the High Court by Lord Deas; but after a hearing there, dismissed, on the ground that that Court could not entertain the appeal for the reasons set forth. The pursuer then raised the present action of reduction in the Court of Session. There was also a conclusion for damages, but this was given up.

The Lord Ordinary decided in favour of the pursuer, reducing the complaint, conviction, and sentence, on the ground that no statutory offence whatever had been charged.

The defender reclaimed, and

For him the SOLICITOR-GENERAL and MAIR argued—(1) That the complaint sought to be reduced charged a relevant offence. (2) That even though not sufficiently relevant in its details, that was a matter which could be remedied by an appeal to the Circuit Court, as provided in the statute; and (3) That in any view the Act of Parliament provided, sec. 35, "that every action or prosecution against any Procurator-Fiscal, Superintendent, or other officer of police or constable, or other person, on account of anything done in execution of the recited Acts, and this Act, or any of them, shall be commenced within two months after a cause of action or prosecution shall have arisen, and not afterwards." That the complaint in question was something done in execution of the Act; and therefore that as the present action was not raised till after the expiry of the statutory period, it was now incompetent. The claimer relied on the authority of *Russell v. Laing*, 25th June 1845, 7 D. 919.

THOMS and BRAND, for the pursuer, were not called on to reply. Their contention on record was—(1) That no relevant offence having been charged, the Magistrate had no right or jurisdiction to entertain the complaint, or to pronounce the sentence therein complained of. (2) That the pursuer not having violated any of the terms or conditions of her certificate, the complaint, conviction, and sentence were bad in law, and therefore subject to reduction; and (3) That the alleged offence being no offence, either against the statute set forth in the complaint or against common law, the complaint, conviction, and sentence were illegal and groundless. Pursuer's authorities were *Ferguson v. Malcolm*, 14th Feb. 1850, 12 D. 732; *M'Donald v. Dobie*, 14th Jan. 1864, 2 M'Pherson, 437.

The Court were of opinion that the only jurisdiction which the Magistrate had was under the Public Houses Act, because the offence intended to be charged was a breach of that Act. The clause required three things—(1) That open house be not kept; (2) that no drinking be permitted between eleven P.M. and eight A.M.; and (3) that no liquor be sold within the same hours. The object here plainly was to prevent trade being carried on between these hours. The prohibition against keeping open house was simply a prohibition against carrying on business, and the other two enactments were plainly added with a view to prevent any evasion of this the leading prohibition; but the complaint merely said that the alleged offender kept her house open, which was a very different thing from "keeping open house;" and if the complaint had stopped there they

would have no difficulty in holding it irrelevant but it did not; for, confounding together the second and third prohibitions, which were quite distinct, it went on to say that the specific way in which the offence was committed was "by permitting," &c. (as above). The mere suffering persons to be in the house did not surely imply either that drinking was permitted or that liquor was sold. There was here such a plain disconformity with the terms of the certificate as could not be got over. The objection to the complaint was therefore good, and that being so, it followed as a matter of course that there was no jurisdiction; and that being so, it would be monstrous to hold that the pursuer, against whom no offence had been proved, had no means of wiping out the stain thus inflicted on her character. It was quite true that under the statute all review was excluded, but here the proceedings had not been conducted under the statute, and were therefore not protected by it. The same observation applied to the objection that the action had not been brought within the statutory period.

The interlocutor of the Lord Ordinary was therefore adhered to, with additional expenses.

Agent for Pursuer—W. Officer, S.S.C.

Agent for Defender—W. Kennedy, W.S.

Saturday, June 9.

FIRST DIVISION.

MACKENZIE v. INVERNESS AND ABERDEEN JUNCTION RAILWAY COMPANY.

Arbitration—Reduction of Decree-Arbitral—Lapse of Submission—Ultra Fines Submissi. A decree-arbitral in a submission under the Lands Clauses Act reduced, because—(1) the submission had expired, and (2) the arbiter had decided a matter not submitted to him, which was not separable from what was.

The Inverness and Ross-shire Railway Company, now represented by the defenders, required for the formation of their line of railway to intersect the lands of Brahan and others, part of the entailed estate of Seaforth, of which the late Honourable Mrs Mackenzie was, in 1861, heir of entail in possession, and also the lands of Kildun, a portion of which formed part of the said entailed estate, and another portion of which belonged to the pursuer, Mr Keith William Stewart Mackenzie, as fee-simple proprietor thereof.

In January 1861 the said railway company entered into a minute of agreement with Mrs Mackenzie and Mr Mansfield, C.A., her trustee, and the pursuer, whereby the parties thereto, *inter alia*, agreed "that all claims, except as hereinbefore reserved, of compensation to be paid by the said first party (the company) to the *proprietrix* of said lands, for the lands to be taken, &c., shall be fixed and determined by the said Peter Brown, Esq., as sole arbiter."

On 22d October 1862 the said arbiter issued his decree-arbitral, in which he found that the value of the land taken belonging to the said second parties (Mrs Mackenzie and the pursuer), or in which they are respectively interested, and the damage to the remainder of their lands, was £706, 11s. 6d., for which sum he decreed against the railway company.

The pursuer sought to reduce the minute of agreement, and also the decree-arbitral. The former, he contended, was invalid, because Mrs Mackenzie, being an heiress of entail under a strict

entail, was not entitled to dispose of any part of the estate except by a strict compliance with the Railway Acts and Lands Clauses Consolidation Act; and as these had not been complied with, the submission was null. The objections to the decree-arbitral were—(1) that when it was issued the submission had expired, by reason of the arbiter not having issued his award within three months, as required by section 35 of the Lands Clauses Consolidation Act; and (2) that the arbiter had awarded a slump sum as compensation for the lands, the value of which he was authorised to fix, and for the lands belonging to the pursuer in fee-simple, the value of which was not submitted to him.

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—

Edinburgh, 28th November 1865.—The Lord Ordinary having heard counsel for the parties, and considered the argument and whole proceedings: Finds (1) That the deed of agreement containing the submission sought to be reduced in this case, was entered into and executed on the 4th and 8th of January 1861, by the defenders, on the first part, and the pursuer for himself, and for the now deceased Mrs Stewart Mackenzie, and by Mr Thomas Mansfield, on the second part; (2) That by said submission it was agreed that all claims of compensation (except as therein reserved) to be paid by the defenders to the proprietrix of the lands of Brahan and others, in the county of Ross, for the lands to be taken for the purposes of the defenders' railway and relative works, and in respect of severance and all consequential damage, should be fixed and determined by Mr Brown of Linkwood as sole arbiter; (3) That the lands of Brahan and others, so far as the said Mrs Stewart Mackenzie was proprietrix thereof, were, when said submission was entered into, and have been ever since, held under the fetters of a strict entail; (4) That no claim of compensation to be paid by the defenders to the pursuer, as proprietor in fee-simple of any part of the lands of Kildun, is comprehended by said submission to Mr Brown; (5) That the decree-arbitral by Mr Brown now sought to be reduced, bearing to be the decree-arbitral under said submission, was not pronounced or issued till the 22d October 1862, nearly two years after the time when the submission itself was entered into and executed; and (6) That there having been no prorogation or renewal of said submission by the parties thereto, it had fallen, and the powers of the arbiter, Mr Brown, had come to an end before his said decree was pronounced and issued: Finds further, and separately, that by said decree-arbitral Mr Brown finds that there is due to the pursuer (although no claim for compensation as due to him was submitted), and the late Mrs Stewart Mackenzie, for their respective interests in said lands of Brahan and others, the aggregate sum of £706, 11s. 6d., without separating and distinguishing how much thereof is due to the pursuer, and how much to Mrs Stewart Mackenzie, or how much is due in respect of lands held under the entail, in which alone Mrs Stewart Mackenzie had any interest, and that portion of said lands called Kildun, held in fee-simple, in which the pursuer alone was interested; and also finds that said decree-arbitral was never adopted, homologated, or acquiesced in either by Mrs Stewart Mackenzie, who died in about a month after its date, or by the pursuer: Finds that in these circumstances the said submission is no longer subsisting, and that the said decree-arbitral is invalid and ineffectual, and reducible as concluded for by

the pursuer; Therefore to that effect and extent reduces, decerns, and declares, in terms of the conclusions of the summons, but *quoad ultra* (except as to expenses) assolisizes the defenders and decerns; Finds the pursuer entitled to expenses, allows him to lodge an account thereof, and remits it when lodged to the auditor to tax and to report.

R. MACFARLANE.

Note—No proof was asked or adduced by either party in this case, and by the joint note, No. 142 of process, they have renounced probation, subject to an admission of the genuineness of the letters and documents in process, and that certain works were made "in consequence of the formation of the railway." It is not said, however, and there is nothing to prove that these works were executed in consequence of, or in reliance upon, the decree-arbitral in dispute. They appear rather to relate to these matters contained in the agreement (which also contains the submission) not brought under reduction.

The specific findings set out in the interlocutor sufficiently indicate the grounds of judgment. They substantially resolve into these propositions: 1st, That the submission had fallen before the decree-arbitral in dispute was pronounced and issued; 2d, That even if it could be held that the submission had not so fallen, the arbiter having exceeded his powers, his decree is reducible; and 3d, That there are no circumstances relevant or sufficient to show that the decree-arbitral had been so adopted or homologated or acquiesced in as to bar the pursuer from now challenging it, and insisting for its reduction in the present action.

1. It cannot be doubted, and accordingly was not disputed at the debate, that as a general rule an heir in possession of an entailed estate is not entitled to sell or dispose of any part of it, except so far as permitted by the entail itself, or authorised by Act of Parliament. Neither was it disputed, and at any rate it is proved by the title-deeds in process that the heir in possession for the time of the entailed lands of Brahan and others, being those in question, had no authority under the entail itself to sell or dispose of any portion thereof to the defenders, and that such authority was to be found only in the Railways Acts, and especially the "Lands Clauses Consolidation Act (1845)." By the 6th and 7th sections of that Act, the defenders were entitled to purchase, and the late Mrs Stewart Mackenzie was empowered to sell, such portion of her entailed estate as was necessary for the defenders' railway; but in regard to the compensation to be given therefor, it is provided by the 9th section, in the case of lands to be taken from a party like Mrs Mackenzie under disability, and not having the power to sell, except under the Railway Acts, that unless the same shall have been determined "by the Sheriff, or by the verdict of a jury, or by arbitration, or by the valuation of a valuator appointed by the Sheriff," it shall not to be less than shall be determined by "two able practical valutors" appointed by the parties. The power of the Sheriff, or of a jury, or of a valuator or valutors, was not involved in the present instance. Nor can it be maintained, as the defenders have attempted to do, that the rights of parties have been settled under arbitration, unless the decree-arbitral under challenge can be shown to be of the statutory character and conform to the statutory provisions. What, then, are these provisions? By the 24th section of the Act, the mode of proceeding "when any question of disputed compensation by this or the Special Act, or any Act incorporated therewith,

authorised or required to be settled by arbitration, shall have arisen," is set out; and by the 36th section it is enacted that, if, "when the matter shall have been referred to arbitration, the arbiters, or their umpire, shall for three months have failed to make their or his award, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided." In the present instance the fact is undoubted that the arbiter failed to make his award within three months, and therefore it is clear that his award, or decree-arbitral, which was not issued or pronounced till nearly two years after the submission to him had been entered into, is invalid, in respect that the submission had long previously fallen.

2. Even if it could be held that the submission was subsisting at the time Mr Brown pronounced and issued his decree, that decree would, in the opinion of the Lord Ordinary, be invalid, in respect of the compensation awarded by it being found to be due to the pursuer for lands belonging to and held by him individually in fee-simple, as well as to the late Mrs Stewart Mackenzie, for lands belonging to and held by her under the fetters of a strict entail. It is manifest, on the face of the submission, that the arbiter had no power to award compensation to any party except Mrs Mackenzie, as proprietrix of the entailed lands of Brahan and others; but notwithstanding, the compensation awarded by him to the pursuer, as well as Mrs Mackenzie, is stated in one sum, and had relation to the lands belonging to and held by the pursuer in fee-simple, as well as the entailed lands belonging to Mrs Mackenzie. Nor is it possible to separate and distinguish how much of the compensation awarded applies to the one and the other portions of lands, and, of course, the statutory provisions touching the manner in which the compensation obtained from a railway company, in respect of entailed lands taken and injured by them, should be disposed of, are rendered unworkable. The result is that the arbiter must, in the opinion of the Lord Ordinary, be held to have exceeded his powers, and that his decree-arbitral is for that reason invalid.

3. Nor does the Lord Ordinary think that sufficient has been established to show that the submission was prorogated or renewed, or that, by adoption or homologation, or other acts and conduct, the pursuer has barred himself from now challenging the validity of Mr Brown's award; and in arriving at this conclusion, the Lord Ordinary has not overlooked the case which was cited to him, on the part of the defenders, of the Caledonian Railway Company *v.* Lockhart, March 1860, 3 Macqueen's Appeals, 808, where it was held by the House of Lords that parties are not by the Railway Acts prohibited from enlarging the time for an arbiter making his award. That there was any formal prorogation or renewal of the submission is not alleged; but it was maintained by the defenders, at the debate, that it must be held in law to have been prorogated or renewed by the actings of the parties. What the defenders precisely mean by this is not very clear from their statements and pleas on record. But the Lord Ordinary cannot find in the admission of parties, or in the correspondence and other writings in process, anything sufficient to warrant him in giving effect to the defenders' contention in any reasonable view that can be taken of it. (1) The correspondence, which appears to have passed before the submission was entered into, can obviously have no bearing on the present question. (2) What is called the supplementary agreement is equally ir-

relevant, as the pursuer does not in this action seek to reduce either the original or supplementary agreement. He has challenged the validity of the submission in the original agreement alone.

(3) In regard to the correspondence which passed subsequent to the lapse of three months after the date of the submission, or after the decree-arbitral was issued, the Lord Ordinary can see nothing to warrant him in holding either that the submission was prorogated or renewed, or that the decree-arbitral was adopted, homologated, or acquiesced in. On the contrary, he observes from the correspondence that objection was from an early period taken to the competency of the submission, the regularity of the proceedings under it, and the validity of the decree-arbitral, anything of the nature of approval being connected with proposals for a settlement which were never acceded to; and (4) The note by Mr Brown, the arbiter, No 22 of process, by which he attempts to separate and distinguish the compensation stated in aggregate in his decree-arbitral into two sums, one applicable to the entailed lands which belonged to Mrs Mackenzie, and the other to the unentailed lands belonging to the pursuer, is plainly of no effect, being dated so recently as the 8th of January 1864, after the present action had been served and called in Court, and, moreover, having been obtained by the defenders alone, without the knowledge or authority of the pursuer.

The cases of *Laing v. The Caledonian Railway Company*, 19th January 1850, 12 D. 481; *Anderson v. The Deeside Railway Company*, 3d June 1853, 15 D. 713; *The Glasgow and Barrhead Railway Company v. The Nitshill Coal Company*, 5th August 1850, 7 Bell's Appeals, 325; and *The North British Railway Company v. Renton*, 15th January 1864, 2 Macpherson, p. 442, were cited in the course of the debate. The Lord Ordinary does not find in these cases anything to controvert, but much, especially in the case of the *North British Railway Company v. Renton*, to confirm the views on which he has proceeded in deciding the present case.

Various points were noticed and discussed in the course of the debate, and particularly the competency of the mode in which the matter of insurance and the claims of the tenants are dealt with in the decree-arbitral; but as these matters are not distinctly raised in the record, and might require to be cleared up in proof in some respects, the Lord Ordinary has not founded his judgment upon them. And in regard to the conclusion by the pursuer for the expenses incurred by him in the submission proceedings, the Lord Ordinary has to remark that nothing was said at the debate in support of that conclusion; and at any rate the pursuer, by his own conduct in the course of the submission, has, in the opinion of the Lord Ordinary, forfeited all claim which he might otherwise have had to such expenses. R. M'F.

The defenders reclaimed.

LANCASTER, for them (SOLICITOR-GENERAL and CLARK with him), argued—This was not a statutory arbitration; but even though it was, it was competently renewed and prorogated by the acts of parties. The pursuer entered into the agreement, and dealt with the defenders all along on the footing that the whole lands were parts of the entailed estate, and he is therefore barred from now objecting to the decree-arbitral on the ground that it so deals with the whole lands. But the arbiter has since separated the sum awarded into two parts, in accordance with the facts as now stated by the pursuer.

BALFOUR, for the pursuer (GIFFORD with him), supported the Lord Ordinary's interlocutor.

At advising.

The LORD PRESIDENT—This is an action brought by Mr Stewart Mackenzie of Seaforth, heir of entail in possession of the estates of Seaforth, for the purpose of setting aside a certain minute of agreement and submission and decree-arbital relative to the consideration to be given by the railway company for certain lands acquired for the purposes of their undertaking. It appears that the parties, the railway company on the one hand, and Mrs Stewart Mackenzie, the heir in possession, and the present heir of entail acting for her, entered into an agreement in reference to the lands to be acquired by the railway company, and in that agreement there is a submission to Mr Peter Brown, in order to fix the compensation to be given. Certain claims were reserved, and the minute bears that all claims, except those hereinbefore reserved, for the compensation to be paid to the first party for the lands taken for the purposes of the said railway by the second party, shall be fixed and determined by the said Peter Brown, as sole arbiter. The deed of agreement and submission is signed by Mr Stewart Mackenzie, the present pursuer, for himself, and as specially authorised by the heiress of entail. The submission was entered into on January 1861. Certain proceedings took place before Mr Brown as arbiter, and there was a supplementary agreement in December of that year, in reference to certain accommodation works, but not having reference to the compensation to be paid for the works. Mr Brown, in October 1862, issued his award, whereby he fixed the value of the land that was to be taken and occupied by the railway company at £659, 15s. 9d., and the compensation for damages by the severance of lands, &c., at £46, 15s. 9d.—together, £706, 11s. 6d., and then the arbiter directs, in case the lands held by Mrs Stewart Mackenzie are under strict entail, that the said sum of £706, 11s. 6d. shall be consigned, in terms of the statute, and if not under the entail, it shall be paid over. Mr Mackenzie has brought a reduction of these proceedings on two leading grounds. In the first place, it is said that the submission was a statutory submission under the Lands Clauses Act, and as such expired at the termination of three months—namely, on 8th April 1861, and therefore that all that followed, on and after that date, was of no avail. He says, secondly, that this decree-arbital comprehended the compensation to be given, not only for the entailed lands, but also for certain fee-simple lands not included in the submission. The Lord Ordinary has sustained both of these pleas. In reference to the first of them, it was contended, in the first place, that this was not a statutory submission under the Lands Clauses Act, there having been no notices to take the land, and that, as it makes no reference to the Lands Clauses Act, it is not to be regarded as under the provisions of that Act, but as a submission of a different character, which parties might or might not have entered into. And further, it is contended that, even supposing it to be a submission under the Lands Clauses Act, it was perfectly competent for the parties, after the expiration of the three months, to renew or prorogate the submission, and that they have done so, and that, consequently, the judgment of the arbiter was unimpeachable on the ground of the expiry of the time. With regard to the second ground, it was said that the relative values of these lands, the fee-simple lands, and the entailed land, had

been considered subsequently by the arbiter, and that he had fixed it, and that a trifling sum only was due for the unentailed estate, and was easily separable, and might be separated, either by taking what the arbiter had done, or taking some other course to ascertain it. In regard to the first ground of challenge, there can be no doubt that, this being an entailed estate, there was a power under the statute to sell. The railway company were authorised to acquire, and by the Lands Clauses Act an heir of entail is enabled to sell. Perhaps it might be effectually contended that, if the notices had been served in terms of the statute on the entailed proprietor, that was tantamount to a sale, because it has been held that the principle of the statute is that if the lands are within the prescribed boundaries of the Railway Act, the statute is a tender of the lands to the railway company, and the notice to take is an acceptance of the tender. But in this case there were no statutory notices. The question comes to this—The statute prescribes that the price or compensation shall be ascertained in one or other of certain particular modes, of which submission is one, and that mode was resorted to in this case, but the submission failed. There can be no doubt that the period expired on the 18th April. Then, was it competent for the parties to prorogate or renew such a submission? In the case of Lockhart which was referred to, the question did not arise in the case of an entailed proprietor. It was proposed at a later stage of that case to plead that there was no power because the estate was an entailed one, but that plea was not admitted at the stage it was tendered, and the case was disposed of without that element. In the view I take of this case I think it is unnecessary to enter upon the question whether it is competent for an heir of entail to renew a submission, or whether other modes might be resorted to after the lapse of the three months, because, on the face of these proceedings, there is nothing to support the allegation that the submission was renewed. I think, therefore, that the time expired, and that, whether it was competent to renew it or not, it was not renewed. Then, on the second ground, I think there is an insuperable objection to this decree-arbital. It deals with the interests both of the heir of entail in possession, and of the fee-simple proprietor, while, as I read the submission, he had no power to do so. In the decree-arbital they are slumped together. It was attempted to make out that the arbiter did not deal with both, but I do not think that can be successful in this case, because the decree-arbital itself states that the compensation to be paid to the second parties in the lands "in which they are respectively interested" is £659, 15s. 9d. and £46, 15s. 9d. It appears to me quite clear that the two things were slumped together, and the arbiter having given forth his award in that form, he was *functus*. What he did afterwards on the application of the defenders was therefore wholly unavailing. We don't know what proportion belonged to the heir of entail, and what to the fee-simple proprietor, and it is wholly incompetent to mix up the two rights. That is a blot which is incurable by anything the arbiter can subsequently do; and, on these two grounds, I think the Lord Ordinary has arrived at a right conclusion.

Lord CURRIEHILL concurred.

Lord DEAS—I agree that an heir of entail, though having the statutory power to sell, cannot sell and fix the price like a fee-simple proprietor. He can only do so by one of the modes pointed out

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-arbital 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-arbital 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-arbital 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-arbital 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—William 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 from 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