country, as hold that there is an absolute rule applicable to the present case. Former cases can have been decided only on grounds of expediency applicable to the individual cases. When the expediency which forms the ground of the rule ceases, the rule itself must cease. I may add that I am certain that cases have occurred since I first sat here showing that the rule was not regarded as absolute; and this is borne out by the opinions of the last law commissioners, experienced and eminent lawyers, to the effect that the Court were not limited by any fixed rule, but might act in the matter as seemed most expedient. That is precisely the view I take. The question is one of expediency, and we are therefore not precluded from sanctioning the investments now before us if we think they are good securities. The inexpediency of an inflexible general rule is easily illustrated. The father of a family may have invested his funds in such a way as his experience suggests as likely to be most beneficial to his family, and may by his testamentary settlement have divided his property on the footing of its continuing to yield a certain income. Now, if by a providential dispensation one of the family becomes a lunatic, and is placed under curatory, or is a minor under a tutor, or if the trustees decline to act and a judicial factor has to be appointed on the estate, surely it would be inexpedient to hold that the moment the testator dies the whole investments are to be changed, though the effect might be that the income would no longer be enough to support the widow or maintain and educate the children. Such a case shows that there can be no general rule.

As your Lordship has pointed out, investments in public funds are very inconvenient. They can only be held in an individual name, and they are thus open to be attacked by the *bona fide* creditors of the individual. Then, with reference to heritable security, it is well known that good heritable securities cannot be got. The great insurance companies almost monopolise them, and take all that come into the market, and would take more if there were any. Besides, heritable security is scarcely applicable to small sums. Moreover, there is always a risk of money invested on heritable securities being lost. There is a difficulty in ascertaining the validity of titles, and the value of property rises and falls, especially in the case of house property. The consequence is that a large amount of trust-funds and money held by judicial factors and curators is allowed to lie in the bank at 1 or 2 per cent., or sometimes at no interest at all.

I have therefore no difficulty in holding that there is no absolute rule restricting the investments to the three classes of security, and, without specifying what other securities may be in the same position, I am of opinion that the investments here are unobjectionable, and that there is no ground for ordaining the curator to call them up.

Lord Ardmillan—We are dealing with this particular case, in which the curator has expressed his opinion favourable to the securities. As I read the opinion of the Accountant of Court, he concurs with the curator that they are as sufficient as heritable security. Now, I am of opinion that there is a distinction between recognising a general rule that curators may invest in a certain class of securities, and laying down an inflexible rule that they may not invest in any other class of securities. I should hesitate very much to say that curators may at their own hand make investments in any but the three recognised kinds of security. But the general rule is not inflexible, and when we have the concurrence of the curator and the Accountant of Court as to the desirability of the security, the Court may, if they think right, sanction the investment. This is not the case of a curator investing in a perilous security for the sake of a high rate of interest; the investments are manifestly prudent, and on good security. In such a case as that we should not uphold a rule as inflexible. I guard myself against saying that we should cut down the general rule. I think there is a general rule, but that it is not so inflexible as to prevent the Court granting such an application as the present one on good grounds being adduced.

Lord Mure—I have been long of opinion that, looking to the state of the money market in this country, it would be necessary to enlarge the class of securities in which factorial and curatorial funds can be invested. This has already been done to a certain extent in the class of trust-funds by Act of Parliament. By the 13th section of the Pupils Protection Act there is no restriction imposed on the kind of security to be taken, but discretion is given to the Accountant of Court to say what kinds of security may be proper. The Accountant of Court has sanctioned the securities in the present case by reporting that they are unexceptionable, and I agree with your Lordships that the investments should not be disturbed. I should only wish to say that the investments in the present case are such as the most prudent and cautious investor could not be afraid to possess.

Counsel for Curator—Asher. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, February 29.

SECOND DIVISION.

[Sheriff of Perthshire.

SUTHERLAND *v.* THOMSON.

Property — Right-of-Way — Kirk-Road — Power to Erect Gates — Obstruction.

An admitted public footpath and kirk-road passed through certain fields, the tenant whereof, in course of cultivation, had occasion to pasture them. In order to prevent his stock from straying, he erected swing-gates across the footpath, where none had previously existed. — *Held*, (1) that the Sheriff had jurisdiction, as in a possessory question, to authorise or confirm these swing-gates, although they had not existed for the possessory period of seven years; (2) that the petitioner was entitled to maintain swing-gates across the footpath, subject to their being constructed so as not to offer an obstruction to the free passage of the public.

Observations per curiam on the rights of a

proprietor and of the public in the *solum* of a public footpath.

This case came up by appeal against an interlocutor of the Sheriff of Perthshire in a petition at the instance of the respondent Sutherland, a farmer residing at Peel farm, Tibbermuir, against the appellant Thomson, a farmer residing at Almondbank farm, both in Perthshire. The facts as set forth in the petition were as follows:—

A footpath runs from the Perth and Madderty road towards the parish church of Tibbermuir through a portion of Sutherland's farm, and along one side of a field under pasture grass. In the management of his farm the petitioner found it necessary to graze sheep and other stock on this field, and to confine the stock he had to erect two small swing-gates across the footpath at either end of the field. This he did with his landlord's consent, and in such a way, he alleged, as to prove no obstruction whatever to persons who had occasion to use the path. Further, it was stated that the gates had been more than once of late broken down, and again restored at considerable expense—the demolition occurring sometimes through the night, and at other times about or during the hours of divine service on Sundays. One Sunday in the middle of February 1874, a member of the petitioner's family observed a man taking down one of the gates, and ran after him, but was informed by the respondent, who happened to be close at hand, that there was no necessity to chase the party, as he (the respondent) took upon himself the entire responsibility of the interference. On a Sunday following, the respondent himself, when apparently on his way to church, deliberately broke down and destroyed the principal portions of a swing-gate which the petitioner had recently put up across the path in question, and rendered the gate quite useless for protecting the stock. In these circumstances the petitioner sought to interdict the respondent from interfering with any gate he might thereafter put up, and to have him found liable in £20, as damages resulting from his past actings.

The respondent averred that the footpath in question had from time immemorial been used as a public and church-road, without any gates or other obstructions thereon, and that the obstructions erected by the petitioner were of such a nature as practically to shut up the road.

The respondent pleaded—"(1) The road or footpath in question having been an open public thoroughfare and church-road from time immemorial, or at least for a period of forty years and upwards without any gates or other obstructions thereon, the petitioner has no right or title to make any erections or cause any obstruction on said road. (2) The defender, as one of the public and others using the said road, being obstructed in the wonted free and unobstructed use and enjoyment thereof, and their rights being invaded by the illegal and unwarrantable erections and obstructions of the pursuer, are entitled to remove the same."

After a proof the Sheriff-Substitute (BARCLAY), on 12th April 1875, pronounced the following interlocutor:—"Having heard parties' procurators, and made avizandum with the process, proofs, and debate, finds as facts—First, there is and has been for upwards of seven years a road through the farm of the pursuer, extending from one public highway to another public road, and which road has been chiefly used by the public in passing to and from the parish church of Tibbermuir, but also for other purposes, and during that period no interruptions have existed by gates or otherwise to such free passage; second, the pursuer, without warrant of law, erected two swing-gates, one at each extremity of said public road, which more or less interfered with the freedom of passage over said road; third, the defender, directly and indirectly, without warrant of law, was concerned in the demolition of the said swing-gates: Therefore, in law, finds the defender, as one of the public, and in use of the road, is entitled to a possessory judgment, and to have said road kept free from obstruction by gates or otherwise: But finds the defender was not justified without warrant of law in interfering with said gates, and having the same removed or demolished: Therefore assoilzies the defender from the conclusion of the action, reserving to the parties their rights of declarator, or for the regulation of the said road for the interests of all concerned."

The petitioner appealed to the Sheriff (ADAM) who pronounced the following interlocutor:—"*Edinburgh*, 16*th July* 1875. . . . Finds (1) that a public footpath runs through a part of the farm of Peel, in the occupation of the petitioner, and that the petitioner on more than one occasion, before the present proceedings were instituted, erected, with the consent of the proprietor, swing-gates across this footpath; (2) that these gates were broken down and removed, and that the respondent was concerned in and a party to the demolition and removal of the gates; (3) that these gates were necessary for the proper use of the petitioner's farm, and were so constructed as not to be unnecessarily obstructive to the public in the free use of the path; (4) that the gates now erected in place of the gates so removed or destroyed are in like manner necessary for the proper use of the petitioner's farm, and not unnecessarily obstructive to the public in the free use of the path: Finds, in point of law, that the petitioner was entitled to erect these gates across the footpath, and that the respondent was not entitled to remove or destroy the same.

"*Note.*—The road in question is a public right-of-way for foot-passengers passing through certain fields in the occupation of the petitioner.

"The petitioner, with the sanction of his landlord, erected two swing wicket gates across this footpath, one where it enters, and one where it leaves his fields.

"The petitioner does not dispute the right of the public, or of the respondent as one of the public, to the use of this footpath. His object in erecting the gates was not to obstruct the passage of the public, but in order that he might have the proper use and enjoyment of the fields let to him, and along the bottom of which the footpath passes.

"The swing-gates, when thus erected by the petitioner, were however more than once broken down and removed, and it is not disputed that on more than one occasion the respondent was a party to these proceedings.

"The respondent justifies these proceedings, and maintains that the footpath being a public footpath, it is illegal to erect across it any kind

of gate whatever, but that it must be left perfectly free and open. This view has been adopted by the Sheriff-Substitute, but the Sheriff does not concur in it. It appears to him that the footpath in question is subject to the law affecting servitude roads generally, and that it makes no difference in this respect that the right to use the footpath has been acquired by the public.

"In the case of a servitude road, where there is a proper dominant tenement, the proprietor of the servient tenement is entitled to put such gates across the road as are necessary for the use of the servient tenement, and cause as little inconvenience as may be to the use of the dominant tenement. The Sheriff thinks that the proprietor of the servient tenement is entitled to do the same in this case, and that the public are bound to submit to the like reasonable restraints on the free use of the footpath as the proprietors of a dominant tenement would be bound to submit to. It appears to the Sheriff that a footpath such as the present is in a different position from a public highway, across which no one is entitled to place gates.—*Wood*, 9 March 1809, F.C.; *Arbuthnot*, 29 Nov. 1870, 9 Macph. 198.

"If the Sheriff is right in holding that suitable gates may competently be placed across such footpaths as this, it is not material whether gates had ever before been placed across the footpath or not. The right to do so was *res meræ facultatis*, which the proprietor or tenant was entitled to exercise whenever it became convenient or necessary, and which right could not be lost by non-use.

"On 22d July 1874 Mr Ritchie, C.E., in obedience to a remit from the Sheriff-Substitute, reported that he was not able to suggest a gate which would enclose the field and prove less obstructive to the public in the free use of the path than a wicket-gate, properly constructed, of the description which had been objected to and interfered with in this case.

"Neither party objected to Mr Ritchie's report, and the Sheriff-Substitute approved thereof (29th July 1874), 'so far as the same refers to the construction of the swing-gates—the subject of the action;' and authorised the petitioner to renew the same at Mr Ritchie's sight and to his satisfaction; and the gates have accordingly been re-erected at the sight and to the satisfaction of Mr Ritchie.

"The Sheriff is of opinion that the respondent was not entitled to interfere with and destroy the gates previously erected by the petitioner, and that he is responsible for the expense and damage thereby occasioned. He is further of opinion that the petitioner is entitled to the interdict craved, to the effect of prohibiting the respondent from removing or injuring the existing gates."

The respondent appealed, and argued—The Sheriff had not any power to interfere where rights from time immemorial were concerned. The Inferior Court was bound to maintain the *status quo*, and the possessory jurisdiction as regarded the seven years was so far, but so far only, bestowed upon him. There were, indeed, certain things which might be done and yet not be incompatible with the *status quo*, and the maxim *de minimis non curat prætor* might be applied; but the right to put up an obstruction did not fall in that category. The rights of the public in the road here must be regarded as a separate right of property, not merely as a servitude. The right to the *solum* was in the Crown.

Argued for the petitioner—The appellant's argument was that the *solum* here, just like a public way, was in the Crown; but there were cases where by desuetude a right-of-way might be lost, which pointed to the right being merely a servitude in favour of the public. Again, the right was incorporeal. There was no feudal conveyance. The style of the summons did not conclude for a right of property, but that the public right-of-way existed over such a road. A kirk-road was much more analogous to a servitude road than to any other.

Authorities—*Harvey* v. *Rogers*, Jan. 17, 1829, 7 S. 287, and 3 W. and S. 257; *Hay* v. *Earl of Morton*, Dec. 5, 1861, 24 D. 116; Erskine, ii. 9, 12; Stair, ii. 7, 10; *Forbes* v. *Forbes*, Feb. 20, 1829, 7 S. 441; *Calder* v. *Learmonth*, Jan. 27, 1831, 9 S. 343; *Glasgow and Carlyle Road Trs.* v. *White*, Dec. 10, 1825, 4 S. 306; *Macdonald* v. *Watson*, Feb. 23, 1830, 8 S. 584; *Wood*, March 9, 1809, F.C.; *Kirkpatrick* v. *Fleming*, Nov. 26, 1856, 19 D. 91 (and Lord President at p. 94 there); *Thomson* v. *Murdoch*, May 21, 1862, 24 D. 975; *Galbraith* v. *Armour*, July 11, 1845, 4 Bell's Appeals; *White* v. *Earl of Morton's Trs.*, July 13, 1866, 4 Macph. (H. L.) 53; *Mackintosh* v. *Moir*, March 2, 1872, 10 Macph. 517; *Murray* v. *Arbuthnot*, Nov. 29, 1870, 9 Macph. 198.

At advising—

Lord Neaves—The question raised in this case is one of importance, and has been argued to us with great ability and great anxiety. It is said to be new, but principles have already been fixed in similar questions that go far to determine the proper decision of the case. The action originated in the Sheriff Court by a process of interdict by the respondent Sutherland against the appellant Thomson, praying that the appellant should be interdicted from removing or injuring certain swing-gates erected across a footpath traversing the petitioner's farm, and which the appellant had broken down and destroyed, but which had now been replaced by two gates across the footpath, for the protection of which the application was presented.

The material facts as to the erection of the former gates by the petitioner and their destruction by the appellant are admitted, and the question raised is mainly one of law as to the petitioner's right to erect such gates, or the appellant's right to pull them down.

If this were the case of a servitude road, it would seem to be attended with no difficulty. The case of *Wood* v. *Robertson*, quoted from the bar, seems to be conclusive on the point. The Sheriff there found that while the right-of-road existed, and could not lawfully be obstructed by the party through whose land it passed, yet "as no harm or obstruction can happen to the complainer or his tenants by swing-gates being put upon this road, provided they are not locked or fastened in any manner to prevent passengers from opening the same at all times," the Sheriff, "with that restriction, allows the gates complained of to be put up." This decision of the Sheriff was brought under review of this Court by advocation, and was affirmed with this variation, that

three gates should be allowed instead of four, as being sufficient for the petitioner's protection, and that therefore the fourth gate was unnecessary.

By this judgment several points were determined which deserve attention—(1) There was there a right-of-way passing through another man's property, which the proprietor was not entitled to obstruct, but as to which it was held to be no obstruction to put upon it a certain number of swing-gates that could be opened by passengers when they travelled along the road; (2) Those gates had not existed for any definite length of time, but had only been recently thought necessary, and the application made to the Sheriff was for interdict against the erection of these gates or any other on the road; (3) though in this way there was no room for a possessory judgment in favour of the gates, the Sheriff's jurisdiction was sustained, so as to authorise their erection and protect them when erected.

The present case, if it were on all fours the same as the case referred to, would of course be ruled by it as a precedent, but it has one point of difference, which raises the question now at issue, and which is one of nicety as well as of importance. The road in dispute in the case of *Wood* was a servitude road, while the road here in question is a public footpath. I admit that this is not a trifling or immaterial distinction, and that in some questions it might lead to a decision being pronounced in the case of a public road different from that which would be given in the case of a servitude road. But it does not follow that in all cases the distinction will have that effect. We must look to the substantial rights and equities of the parties in both cases before we determine that what was lawful and right as to a servitude road shall be unlawful and wrong as to a public road. The distinction between the two kinds of roads operates in more ways than one. (1) It makes a difference as to the parties entitled to use the road. As to a servitude road, none are entitled to use it except the individuals who are proprietors or occupants of the dominant tenement; while in reference to a public right-of-road all are entitled to use it, strangers and travellers of all kinds having occasion to take advantage of it as a means of passage. No question of that kind here exists. (2) The distinction between the two kinds of cases may give rise to a difference as to the parties in whom the right to the *solum* may be held to vest, and here there may be a distinction between different kinds of public roads. The subject in its largest aspect is treated of by Lord Stair, and there can be no doubt that as to proper highways the rights of the Crown are very high, and paramount probably to any others. The opinion of the Court in the case of *Wood* showed that they recognised the distinction now referred to, and abstained from deciding anything except the question before them, which related to a dispute regarding a servitude road, and in subsequent cases the distinction has been pointed out and practically observed. This therefore makes it impossible to found upon the case of *Wood* as a direct precedent, but still the question arises, whether in certain kinds of public roads the exercise of the right and its limits may not in a great degree be assimilated to those of servitude roads. A highway—what is called a king's highway—involves interests of great magnitude, requiring a corresponding degree of protection; but a public footpath, though technically of a different character, is often substantially very little or at all different from what a servitude path would be. If the public path is limited, as it often may be, and as it seems to be in this case, to dimensions and requirements not exceeding those that might characterise a servitude road, there seems no reason why the proprietor through whose lands it passes should be subjected to greater hardships, or the parties using the road to greater privileges, than would be fairly sufficient as to a similar servitude road.

The question as to the rights to the *solum* of a public road was discussed in the case of *Galbraith* v. *Armour*. In that case the House of Lords disclaimed any idea that the *solum* even of a public road belonged to any one but the original proprietor. The effect of that judgment is that the rights of the public or of the Crown in the *solum* is incorporeal rather than corporeal, and that individual members of the public have no right of property in the *solum*. They have a right that the *solum* shall be maintained intact and secure, to enable them to pass over it. They have no right to the mineral below the road, which remains in the proprietor of the conterminous lands, though he might be required to work the minerals in such a way as not to injure the right of way. It is true that some of the *dicta* in the House of Lords in *Galbraith* v. *Armour* have not been viewed with much favour in this Court, and in so far as they went beyond the necessity of the case they are not binding upon us. I am not disposed to define very strictly what may be the nature of the rights of the Crown in a public right-of-way, but I am of opinion that no person using the road has any right of interfering with the proprietor's use of it except for the purpose of maintaining intact the undoubted right of passing over it which he enjoys.

In the case of *Wood* the Court observed that the erection of gates on a public road was a practice which had prevailed in some parts of the country; but they added that such a practice "had never been tolerated by the Court." It may be that there has been no decision recognising the legality of the practice, but as little has there been any decision to the contrary. The question then comes to be whether there is any reasonable ground in the case of a public footpath for depriving the proprietor of the privilege of protecting his property from unnecessary injury by putting up gates which confessedly, in the case of servitude roads, have judicially been held to be no obstruction. In both cases the parties possessing the right are entitled to pass freely, and nothing more belongs to them. It is held that a gate which opens is no obstruction to a free passage, and it would be mere legal pedantry to hold that in this point what is sufficient in the one case is not sufficient in the other. A gate which opens is either an obstruction or it is not. If it is an obstruction, it ought not to be permitted in the case of servitude roads; if it is no obstruction, individual members of the public seem to have no interest, and consequently no right, to complain of it.

It has been suggested that in a case of servitude the servient tenement is entitled to the more indulgence in consequence of this being a burden which the dominant tenement can only impose and enforce in the mildest manner compatible with the enjoyment of its general right. But if considerations of this kind are to receive effect, it is also to be kept in view, that in the case of a public road the public itself has an interest that nothing shall be done that prevents the full enjoyment of property in general. It is for the interest of the public that all the land in the country should be made available so far as possible for the production of food; and any unnecessary impediment to its cultivation or use is a public evil. If a gate across a public footpath tends to facilitate cultivation of the adjoining land either by promoting it or making it less expensive, there is no reason why the public should complain of this nominal interference with their supposed rights. The very object of such a case is to save the necessity of elaborate and expensive enclosures. If the gates here were not allowed, additional fences in a lateral direction might be needed to a large extent.

A plea has been maintained by the appellants that it was incompetent for the Sheriff to enter on this question at all; that he can only judge of possession; and if there has not been a gate for seven years, he cannot interfere. But this is a plain mistake, and the case of *Wood* is an authority to that effect. It is true that in the Sheriff Court the substantive right to a public road can only be judged of according to possession. But the regulation of that possession, and the exercise of any incidental rights connected with it, do not require seven years to support them. In the same way, where the property is not in dispute, the rights resulting from that property may be exercised at any time, as these are *res meræ facultatis*, and if not inconsistent in themselves with the only right belonging to the other party, they may be exercised or neglected at the pleasure of the party to whom they belong. The right to put up gates is only a function of the permanent right of property, and if it does not injure the other parties they have no interest or *status* to prevent it. In several cases, accordingly, the Court have established the right of the proprietors of the *solum* of a public road to regulate its course, and put up gates that caused no obstruction.

It is true that the public has some rights of property in the road, and this may infer a certain right to the *solum* so far as necessary for the road, but it does not divest the proprietor of the ground otherwise. The minerals are his, if he can work them without injuring the road, and in the same way other operations must be competent to him if they be *innocuæ utilitates*. The practice of the country, of having gates on public roads where useful and harmless, is a testimony to the correctness of this view.

The party objecting to the gates urges that this is a church road. This rather weakens his case than strengthens it. A church road more nearly approaches a servitude road in its character than other public roads. It is a road for the parishioners to go to church, and if there is no obstacle to their going to church their rights are satisfied.

If the appellant could and did allege that the gate was obstructive or unnecessarily inconvenient, we should have been disposed to listen to that, as was done in *Wood's* case; but no such demand has been made.

I am therefore for dismissing the appeal and affirming the judgment of the Sheriff.

Lord Ormidale—After the full and lucid exposition of the law and the facts in the present case which your Lordship has given, and in which I entirely agree, there is not much to add. I should, however, wish briefly to state my views as to the nature of a right-of-way such as that in question before the Court. It seemed to me that during the course of the argument it was sought to fix upon a right-of-way to a kirk a character too much that of proprietorship. Really, there seemed to be involved three principal questions in this matter—*firstly*, whether the respondent in this appeal had any right at all to put gates upon this right-of-way; *secondly*, whether, supposing he had such a right, he was entitled to use it, seeing the path had formerly been without gates; and *thirdly*, whether, apart entirely from this, the gates as put up were improper, and were obstructions not sufficient to permit the public freely to pass.

All these questions truly resolve themselves into an inquiry as to the real natureof a public footpath, the property in it, the proprietary, and the public rights over it. There is in the case before us no grant, no conveyance of the land under which the public can have acquired a right *a cœlo usque ad centrum*. We are not here dealing with road trustees in whom full property may be vested. [*His Lordship referred to the case of* Galbraith *v.* Armour, *and to the opinions of Lords Campbell and Brougham there.*] The observations made in that case applied to all public roads, but were in particular applicable to public footpaths; and if the doctrine laid down be a sound one, it would appear that a public footpath is much more of the nature of a servitude than of a public road. In a subsequent case I find the same subject considered. [*His Lordship referrea to the case of* Marquis of Breadalbane *v.* M'Grigor, 7 *Bell's App.* 60.] If we find that the public had merely the right to pass over a certain path, it would surely be a strong view to maintain that the proprietor, for the necessary use of his lands, was not entitled to put up gates. Against this we have such authorities as *Harvey* v. *Rodger* (where the interlocutor, as finally pronounced, was very important), or as *Wood* and *Kirkpatrick*. All these bear upon the general right of the owner to put up gates, so as not however to destroy or to injure the rights of the public on the footpath.

But, my Lords, it has been argued that there had been here no gates for the seven preceding years, and the appellant urged that the respondent had no title to do anything to alter his *status quo* until he had by declarator established his right to do so. In this argument I am unable to find anything, for the case of *Wood* appears to me conclusive.

The only remaining question is, whether the gates erected were of a character such as Sutherland had a right to put up, and the answer to that is, that when Mr Ritchie, the engineer, reported upon them, no objection was taken to his

report; and further, there is the statement that Sutherland has been, and is now ready, to do anything to facilitate the passage which he may be required to do. I am therefore for refusing the appeal.

Lord Gifford—The questions raised in this case are important and interesting, and they have been very ably argued. It can perhaps hardly be said that these questions are directly and conclusively settled by any of the authorities referred to, but on principle I have little difficulty in coming to the conclusion that the judgment of the Sheriff-Principal is well founded, and that the appeal ought to be dismissed, subject to the right of the appellant to have the wickets or swing-gates across the footpath made as convenient as possible for the exercise of the admitted public right of footpath.

The first question raised was—Has the Sheriff jurisdiction as in a possessory question to authorise or confirm swing-gates or wickets across an admitted public right of footpath where such gates or wickets have not existed for the possessory period of the last seven years? Now, on this point I am of opinion that the Sheriff has jurisdiction in such a question as this. He can regulate *interim* possession; he can say and determine how and in what manner a right of footpath is to be enjoyed in the meantime—his judgment being always possessory and *ad interim*—leaving either party, if they think that the *interim* possession fixed by the Sheriff is inconsistent with their legal and permanent rights, to have these rights finally determined and fixed by the Supreme Court. It is a mistake to say that in such possessory questions the Sheriff has the mere ministerial duty to look to what was the state of possession and the manner of possession for the last seven years, and to continue that precise state of possession by an *interim* possessory judgment till the matter of right be fixed. No doubt this is often done when a competition of heritable rights arises when the Sheriff, who cannot decide in the competition, continues the party in possession who has been so for the last seven years; and this is in such cases the possessory judgment. But this by no means exhausts the Sheriff's jurisdiction in possessory questions. In cases where no question of heritable right arises—where the heritable right is admitted and undisputed—but where the parties are at issue as to the mode in which they may use and enjoy their respective rights, the Sheriff has undoubted jurisdiction to regulate *ad interim* the mode of possession, and this apart altogether from the usage during the last seven years. Thus, in questions of admitted common property, the Sheriff may fix *ad interim* how the co-proprietors are to possess or enjoy their admitted joint rights. In questions of common interest, as where houses are built in flats with a common entrance or common-stair, the Sheriff may fix questions of gates or doors, or modes in which alterations are to be made or repairs effected. And so in many other questions of like nature, when there is no dispute about the heritable right, but only differences as to its consequences or results, the Sheriff may *ad interim* regulate possession or exercise of use, either party having the right to resort to the Supreme Court for a permanent rule. Thus, the Sheriff is undoubtedly the proper judge in all questions as to the *interim* rights between landlords and tenants—in all questions of removing, ejection, maills and duties, intrusion, wrongous use of property, nuisance, and a variety of other actions, which often arise where no question of heritable right at all is raised, but which all relate to the use or enjoyment of heritable subjects.

In the present case there is no doubt at all that the Sheriff had jurisdiction to entertain and dispose of the present petition, for it is simply a petition to interdict the appellant from injuring or removing the swing-gates across the line of public footpath in question—that is, to interdict the appellant from destroying these swing-gates at his own hand, and by violence or force. It cannot be disputed that the Sheriff had power and jurisdiction to restrain violence or prevent personal conflict or breach of the peace. But it does not deprive the Sheriff of this jurisdiction merely because the appellant, against whom interdict was sought, pleads that the petitioner had no right to put up or to maintain the swing-gates or wickets in question, and urges that no such gates or wickets have existed during the last seven years. A judgment refusing the interdict sought would be virtually a judgment finding that the petitioner had no right to put up the swing-gates or wickets, and that the appellant was entitled *brevi manu* to remove them; but in a question of jurisdiction such a judgment would be quite as much an exercise of jurisdiction as a judgment finding that the swing-gates must remain or regulating their construction.

By a recent statute the jurisdiction of the Sheriff has been enlarged so as to enable him to try all questions relating to real or prædial servitudes. But even before that statute was passed the Sheriff was in use, and almost necessarily so, to regulate *ad interim* the possession and exercise of servitudes, whether of road, of pasturage, of aqueduct, or of any other description; and our books are filled with instances of such *interim* regulation. The case of *Wood*, 9th March 1809, F.C., and other cases quoted in the present discussion, are examples. Even in questions where the road is not a servitude road, but a public right-of-way, the Sheriff has undoubted jurisdiction to regulate *interim* possession. An instance occurs in another case cited in argument, *Kirkpatrick* v. *Murray*, 26th November 1856, where there was claimed a public right-of-way through Mr Murray's private park and policies of Cally, and where the Sheriff regulated *interim* possession by fixing that gates at either end, pending the action of declarator of right-of-way, should be unlocked, so as to give the public *ad interim* right of access.

There are other similar cases, and it would be extremely inconvenient if the local judge had not such jurisdiction, but if parties on mere questions of *interim* enjoyment or possession should be obliged to come to this Court. I am therefore of opinion that the Sheriff had jurisdiction to entertain, and rightly entertained, the question whether the swing or wicket-gates erected by the petitioner should or should not be maintained, and whether or not their construction should be altered or modified.

But the next and the more important question is—what may be called the merits of the action?

and these are—whether the Sheriff has decided rightly in holding that the petitioner is entitled to maintain swing-gates across the line of the public footpath in question, and in fixing or approving of the character and construction of these gates. Now, here also I am of opinion that the Sheriff-Principal has decided this point rightly, subject to the observation I have already made, that if the respondent demands it the construction of the swing-gates possibly might be somewhat improved or altered.

It seems to be quite fixed, and indeed was not seriously disputed by the counsel for the appellant, that in the case of a proper servitude right of footpath—that is, a right of footpath not in favour of the public, but in favour only of the proprietors and tenants of a particular property or estate—a prædial servitude of footpath as it is called—the proprietor of the servient tenement, that is, the lands subject to the footpath, may put up such swing-gates, stiles or turnstiles, as may be necessary for fencing his property, provided they do not materially interfere with the exercise or enjoyment of the right-of-way which the occupants of the dominant tenement can claim. This rests upon the equitable rule that a servitude must be rendered as little burdensome to the servient tenement as is consistent with its fair exercise.

It was contended, however, that this principle, which is in full force as to a servitude footpath, is inapplicable to a right of public footpath where the right-of-way is in the public and is not confined to the mere inhabitants of a dominant estate, and the distinction between the two was urged with great ability. No precise authority was quoted establishing that open or unlocked gates were permissible in the one case and not in the other, the nearest authority being the *dicta* in the case of *Wood* v. *Robertson*, 9th March 1809. But there the judges were only dealing with a servitude road, on which they decided that swing-gates were permissible, and while doubting whether such permission should be extended to public roads, the Court seem to have had in view, not a mere public right of footpath, but a public right of road for carriages and vehicles of all kinds, where the public were entitled to drive, day or night, free of all obstructions. I cannot hold, therefore, the *dicta* or doubts expressed in *Wood* v. *Robertson* as excluding the right of a proprietor to put swing-gates or stiles or wickets across a public right of footpath, and I am of opinion that the same principles of equity which give a proprietor a right to put such gates across a servitude footpath will apply at least in many cases, and in the present case, to a public right of footpath. There are many public footpaths extending for miles across open or pastoral country. Fences are required on such estates for the mere purposes of pasturage, and to prevent cattle and sheep from straying. It would be very hard in such cases to compel the proprietor to fence the line of footpath on both sides throughout its entire length—it may be for many miles—and we are familiar with such footpaths extending through a whole valley; and yet this would be the consequence of preventing him from putting, say at the entrance and exit of such footpath, swing-gates or wickets, which, while they would prevent animals from straying, would be no inconvenience to foot passengers using the footpath.

No doubt there is a broad and a well-known distinction between a servitude footpath and a public footpath, the use of the one being confined to the residents in, or the visitors to, a dominant tenement, the use of the other being open to the whole public wherever they reside or wherever they are going. But this difference does not affect the equitable principle which gives the proprietor the best use of his property subject to the right. In reality, a public right of footpath is really the same as a servitude right, excepting that the dominant tenement is the whole kingdom, and not a special subject or estate, and no good reason seems to exist why the equitable rights of use which the law secures to the proprietor of a servient tenement should not be given to the proprietor of an estate burdened with a public footpath, provided only its use as a public footpath is not interfered with. It seems to follow, from the judgment of the House of Lords in the case of *Galbraith* v. *Armour*, 11 July 1845, 4 Bell's App. Ca. 374, that the *solum* of the line of footpath is in the landlord of the ground and not in the Crown; the public have nothing but a mere right of free passage over or through the lands which the respondent in the appeal occupies, and which belong to the Earl of Kinnoull. I am therefore of opinion in the present case that the petitioner (respondent in this appeal) is entitled, in order to the enjoyment of his land for pasture, to put up such swing gates or wickets as, while they will prevent his cattle from straying, will not impede the public right-of-way.

It was urged for the appellant that the path in question was not only used for foot-passengers, but was occasionally traversed by horses or by riders on horseback. I am of opinion that this has not been sufficiently proved, or, at all events, not during the last seven years, and therefore I think that in this question of *interim* possession—and in this action we can do no more than settle *interim* possession—the alleged right of horse road or *actus* has been rightly laid out of view.

I have only to add, that if the appellant had thought it worth while to move for it, I should be inclined to give him, instead of a wicket or wickets, swing-gates fastened by a mere latch or catch (which may be self-acting) instead of the wickets which I understand at present exist. I sympathise with the remark urged by the appellant, that a wicket requiring to be turned by each single individual, and this scarcely permitting the passage of more than one at at a time, may be inconvenient when a whole congregation is at once dismissed, and the present footpath seems to be used by the congregation. A swing-gate which admits of being held open, or even temporarily fastened open, seems not unreasonable in such circumstances, and when it had allowed passage it could be closed on a latch, so as to serve the petitioner's legitimate purpose of preventing his cattle from straying. The gate could be so hung or so hinged as, if thought desirable, to swing shut of its own accord. This is really a matter of adjustment if moved for, and I see the present respondent expresses readiness to do whatever is expedient in this respect.

On the whole, and subject to this remark, I think the judgment of the Sheriff-Principal right.

The Court affirmed the judgment.

Counsel for Pursuer—Dean of Faculty (Watson)—Jameson. Agent—John Galletly, S.S.C.

Counsel for Defender — Balfour — Alison. Agents—Murray, Beith, & Murray, W.S.

Wednesday, March 1.

FIRST DIVISION.

[Lord Young.

STEUART *v.* LORD SEAFIELD.

Disposition—Relief, Clause of—Schoolmaster's Salary—School Rates—Education (Scotland) Act (35 *and* 36 *Vict. cap.* 62) 1872—*Road-Money—Banffshire Roads Act* 1866.

Two dispositions, dated in 1861 and 1867 respectively, contained similar obligations by the seller to relieve the purchaser of, *inter alia*, "schoolmaster's salary and road-money payable for the lands disponed."—*Held* (1) (*diss.* Lord Deas) that the clause did not import relief from school-rates imposed under the Education (Scotland) Act 1872; and (2) (*per* Lord Young, Ordinary, whose judgment on this point was acquiesced in) that it imported relief from assessments under the Banffshire Roads Act 1866, which abolished tolls, and made provision for the maintenance of roads and bridges by additional assessments.

This was an action at the instance of Andrew Steuart of Auchlunkart, Banffshire, against Lord Seafield, concluding (*a*) for payment (1) of certain road assessments imposed upon the pursuer under "The Banffshire Roads Act 1867," and (2) of certain school-rates imposed under "The Education (Scotland) Act 1872," both in respect of lands conveyed to him by the defender; and (*b*) for declarator that the defender was bound to free and relieve the pursuer and the said lands of these burdens in all time coming.

By two dispositions, dated respectively the 23d December 1861 and the 26th January 1867, the defender sold and disponed to the pursuer two different parcels of land, and in each deed he bound himself in precisely similar terms "to free and relieve him and his foresaids, and the lands and others hereby disponed, of all cess or land-tax, minister's stipend, schoolmaster's salary, and road-money payable for the lands and others hereby so disponed, from henceforth and in all time coming." For the first subjects the pursuer paid £3505, and for the second £981, 12s., and he averred that these prices "were above the market value of the lands at the time, in respect of the obligations of relief from public burdens."

After his entry to the lands the pursuer was relieved by the defender of assessments for schoolmaster's salary until "The Education Act 1872" came into operation, and of assessments under "The Banffshire Roads Act 1866," and previous statutes until 1870. After these dates the defender declined to give relief, and although he had paid the road assessment from the passing of the Act in 1866 till 1870, he denied that he had been under a legal obligation to do so.

The defender averred that the school-rates levied under the Education Act largely exceeded £80, which was the total amount payable to the schoolmasters, and that these rates were now applied to other purposes besides the payment of salary. The pursuer answered that school-rates under the Act of 1872 were of the like class, and applied to like purposes, with those exigible prior to that, which were all comprehended and known by the name of schoolmaster's salary.

With reference to the claim for road-money, the defender averred that the Banffshire Roads Act imposed a new burden on the land, inasmuch as it abolished tolls and made provision for the maintenance of roads and bridges by additional assessments.

The defender, *inter alia*, pleaded—"(1) The defender has undertaken no obligation to relieve the pursuer of the assessments under the Banffshire Roads Act, and is not liable to do so; (2) The defender has undertaken no obligation to relieve the pursuer of the school-rates which have been or may be imposed under the provisions of the 'Education (Scotland) Act, 1872,' and is not liable to do so; (3) Assuming that the defender is liable to relieve the pursuer of any part of the said school-rates, he is only liable in so far as the same can be shown to be applied in payment of schoolmaster's salary; and, *separatim*, he is not so liable to any greater extent than the pursuer's proportion of the salary allowed by the statutes in force at the date of the said dispositions."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 14*th July* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the record and productions—Finds and declares that, under and in virtue of the obligations of relief libelled, the defender is bound to free and relieve the pursuer and the lands libelled of all road-money paid, or which may hereafter become payable, for the said lands, under the Banffshire Roads Act 1866; and declares that money paid or payable under assessments duly imposed by virtue of the said Act, in respect of the ownership of said lands, shall be regarded as road-money within the meaning of said obligations of relief and of this decree: Decerns against the defender for payment of the several sums of road-money libelled, as already paid by the pursuer under the said Act, with interest as concluded for. With respect to the other conclusions of the action, viz., those relating to school-rates under the Education (Scotland) Act 1872, assoilzies the defender, and decerns: Finds no expenses due to either party.

"*Note.*—The improvidence of obligations to relieve of taxes has been so frequently exemplified that it is surprising they should be continued.

"With respect to the conclusions of the action relating to road-money, I am of opinion that money payable under assessments authorised by the Banffshire Roads Act 1866 is road-money within the meaning of the obligations of relief in both deeds libelled. The road-money payable under the Act is probably of larger amount than the road-money payable before the Act, by reason of the increased number or length of the roads to be maintained, and the abolition of tolls as a source of income; but it is the same tax, however, and from whatever cause the amount of it may be increased or diminished.

"With respect to the school-rate under the Education Act 1872, I am of opinion that it is