

not required for the protection of the house, any number of people might be furnished with dwelling-houses within a building of this kind, and that would entirely defeat the purposes of the Revenue Statutes.

Now, when we turn to the statement on the face of this case, it becomes as clear as anything can be, that these two messengers who live in this one house which bears the plural name, are not there for the protection of the premises but for the general purposes of the business. That is said in so many words. The Standard Company rested their appeal on the fact that the messengers were servants absolutely necessary, for what? for their business, and not merely for the protection of their premises. Now, it seems to me that that puts the Standard Company entirely out of Court.

I am therefore clearly of opinion that these premises are assessable, and that we must reverse the decision of the Commissioners.

LORD ADAM—I am of the same opinion. The appellant referred to the words of sub-section 2 of section 13 of the Act 41 Vict. cap. 15. That sub-section gives exemption from premises being assessed as inhabited houses where such premises are solely occupied for the purposes of trade or business; and then it goes on to say that this exemption shall take effect although a servant or other person may dwell in such premises for their protection. In the matter of protection, I think it is impossible to apply the last clause of that section—"although a servant or other person may dwell in such house or tenement for the protection thereof"—to the words "other person" by themselves. I do not think the meaning of that clause is modified by section 24 of 44 and 45 Vict., because that is an interpretation clause, and merely reads into the clause the words "menial or domestic servant." It does not at all affect the application of the condition that the servant who is a menial or domestic servant shall also reside there for the protection of the house.

In the next place, I do not think it necessarily must be a servant or other person. There may be facts which would show that more than one was *de facto* residing in the premises for the purpose of protecting them. There is the case of Buckingham Palace which was taken as an illustration. There might be dozens of people put there necessarily for the protection of the premises. But then I think this case entirely fails upon the facts. As your Lordship has pointed out, it is perfectly obvious that the two messengers do not live in the house for the protection of the premises, and are not there solely for that purpose. No doubt, as Mr Dundas says, the greater the number the greater the protection, but there can be no doubt at all that these two messengers are kept there for the convenience of the company.

LORD M'LAREN—I concur, but I would wish to say that I reserve my opinion on the question of whether the provision, or

rather the exemption, applicable to the case of a servant or other person dwelling in the premises for their protection can ever be extended so as to include a plurality of persons in that position. I think the case contemplated is a case of usual occurrence, that there may be some person living in business premises during the night who can be there to open the door in case of fire or emergencies of any kind. I do not think that the case contemplated is that of complete protection of the premises against external risks, but merely that there may be some one there for protection in the sense I have mentioned, and as a means of communication between persons outside who may have cause to come to the building. However, that point is not raised here, because it is not stated that the messengers in the present case were there solely for the protection of the premises.

LORD KINNEAR—I agree with your Lordship. It is probably unnecessary to decide whether the residence of two or more persons in a building devoted solely to the purposes of trade or business would deprive that building of the exemption accorded to buildings of this class, provided it appeared that two or more persons were living in the building solely for protecting it, because I agree with your Lordship that it is clear enough on the face of this statement that the two messengers are not occupying premises solely for the protection of those premises. I think that is a sufficient ground of judgment.

The Court reversed the determination of the Commissioners and sustained the assessment.

Counsel for the Surveyor of Taxes--
Solicitor-General (Shaw, Q.C.)—Young.
Agent—Solicitor of Inland Revenue.

Counsel for Standard Life Assurance
Company—H. Johnston—D. Dundas.
Agents—Dundas & Wilson, C.S.

Thursday, May 31.

SECOND DIVISION.

[Sheriff of Ayrshire.

BARON DONINGTON *v.* MAIR AND
OTHERS.

Road—Public Right-of-Way for Foot-Passengers over Road—Obstructions—Gates.

The proprietor of a road over which there was a public right-of-way for foot-passengers, but for no other traffic, erected at each end two gates, one 9 feet wide and locked, the other a swing gate 2 feet 9 inches wide and unfastened. The road was unfenced, and the proprietor desired to prevent the trespass of animals and the use of the road for wheeled traffic. The swing-gates were sufficient for the passage of foot-passengers.

Held that the locked gates were no interference with the existence or enjoyment of the right-of-way, as at each gate there was provided for the exercise of that right a sufficient space which was not materially obstructed by the swing-gates—*diss.* Lord Rutherford Clark, who held that as the right of footpath existed over every part of the road, the proprietor was not entitled to withdraw any part of it from this use, and that the locked gates were an illegal interference with public right.

Sutherland v. Thomson, February 29, 1876, 3 R. 485, *considered.*

In December 1891 Hugh Smith, weaver, Newmilns, raised an action in the Court of Session against the Right Honourable Charles Frederick Abney Hastings, Baron Donington, Loudoun Castle, Galston, to have it found and declared that the road or way leading off, at, or near Hagg Bridge from the turnpike road between Newmilns and Galston by way of Hyndberry Bank to the public road near Woodhead farm stead-ing, was a public road or right-of-way, and that Lord Donington be ordained immediately to remove the locked gates, fences, and other obstructions which he had put upon said road, in order that the public might have free and uncontrolled access and admission thereto. Interdict from troubling or obstructing the public in the peaceable use and enjoyment of the road was also asked.

After some procedure a jury returned a verdict for the pursuer, and upon 23rd June 1893 the Lord Ordinary (Low) pronounced this interlocutor:—"The Lord Ordinary having heard counsel, applies the verdict of the jury: And in respect thereof, finds that there is a public road for foot-passengers along the road in question, and that the pursuer and all others are entitled to the free use of said road for foot-passengers: To that extent and effect decerns and declares in terms of the conclusions of the summons: Reserves for further consideration the conclusion of the summons for restoration of the said road to its original condition: *Quoad ultra* assoilzies the defender from the conclusions of the summons and decerns," &c.

Lord Donington afterwards moved the Lord Ordinary to restrict the width of the public right-of-way over the Hag Road to the width of a footpath of about 4 to 6 feet, but this motion was refused.

The Hag Road was unfenced, and upon 21st and 22nd September 1893 Lord Donington, with a view, as he afterwards averred, "to preventing the trespass of animals, and also carting, riding, and driving over the said road," erected at each of the said south and east ends of the said Hag or Lime Road three gate posts and two gates, one of the said gates at each end of the said road being 9 feet wide, and fastened and locked with a chain and padlock, and the other gate at each end being a swing gate 2 feet 9 inches wide.

Upon 23rd December 1893 certain persons forcibly removed one of the gate posts and both the gates at each of the ends of the road.

Lord Donington thereafter raised an action in the Sheriff Court at Kilmarnock against George Mair, factory worker, Newmilns, and others residing there, as the persons who had removed the gates, to have them ordained to replace the gateposts and gates they had taken down, or to grant warrant to the pursuer to re-erect them and to interdict the defenders from interfering with the gateposts and gates or any others that might be erected in the road by the pursuer "so long as the public road for foot-passengers along same is not affected."

The pursuer pleaded—"(2) The pursuer being proprietor of said Hag or Lime Road, subject only to a public road for foot-passengers along the same, is entitled to protection against the acts complained of, and to have the gate posts and gates restored to their former condition as craved in the conclusions of the petition. (3) The defenders having interfered with the property of the pursuer as libelled, the pursuer is entitled to be protected against such interference being repeated, and interdict should be granted as craved."

The defenders pleaded—"(2) The road in question having already been judicially declared to be a public right-of-way and the pursuer ordained to remove all gates or obstructions put by him on the same or any part thereof, the matter is *res judicata*, and the erection by the pursuer of said gates was illegal, and the petition should be dismissed. (3) It having been found in a case to which the pursuer was a party that the said road for its entire breadth had been a public roadway for time immemorial, and had never had gates or any obstructions thereon or any part thereof, the present action is incompetent and should be dismissed. (4) The pursuer not having obtained authority in the former action, and not being entitled to make any erection on or across said road at any point, the petition should be dismissed. (5) In any view, the pursuer is not entitled to decree as craved, or to make any erections that will in any way interfere with the public use or character of said road, and the defenders should be assoilzied with expenses. (6) *Separatim*—The pursuer having failed to obtain authority to put up gates or other erections in the course of the declaratory action in the Court of Session, the present application is incompetent, and should be dismissed."

Upon 14th February 1894 the Sheriff-Substitute (HALL) pronounced this interlocutor:—"Finds that by judgment of the Court of Session dated 23rd June 1893, it is *res judicata* that there is a public road for foot-passengers along the Hag or Lime Road in question: Finds that on 21st and 22nd September 1893 the pursuer erected at each end of the said road two gates, one 9 feet wide and locked, the other a swing-gate, 2 feet 9 inches wide and unfastened: Finds that on 23rd September 1893 the defenders, or some of them, took down and removed the said gates: Finds in law that the said gates having been an obstruction to the free use of the said road by

foot-passengers, the pursuer was not entitled to erect them, and is not now entitled to have them restored: Therefore sustains the defences, and assoilzies the defenders from the conclusions of the action, &c.

“*Note.*—Notwithstanding what the defenders maintained to the contrary, there can, it is thought, be no doubt that I have jurisdiction to entertain this action. The question raised belongs to a class which is peculiarly appropriate to the Sheriff-Court—*Sutherland v. Thomson*, February 29, 1876, 3 R. 485, and while I am of course bound by the judgment of the Court of Session, it is, I apprehend, within my competency to apply that judgment, according to my own view of its import, to a state of facts which has emerged since it was pronounced. The Hag or Lime Road is in a somewhat exceptional and even anomalous position. It is not a public footpath but a road, over which there is a right-of-way for foot-passengers but for no other kind of traffic. It is therefore beyond the scope of the rules applicable to public footpaths, as the right-of-way extends equally to the whole road and to every part of it. Accordingly, when in the Court of Session the present pursuer moved to have the right restricted to a footpath of the width of from 4 to 6 feet, the motion was peremptorily refused. But the effect of the erections, which the defenders are in this action called upon to restore was practically at two points of the road to limit the public right-of-way to the width of a somewhat narrow footpath. The pursuer states in his condescendence that his reason for doing so was to prevent carting, riding, and driving on the road. This may be a perfectly legitimate object, but in seeking to attain it he cannot be allowed to obstruct or impede the free use of the road by the public for the purpose for which a right-of-way over it has been established.

“As regards the swing-gates across the narrow opening left for the public, there is authority for holding in the case of a proper public footpath that such gates may be erected by the proprietor of the lands through which the footpath runs—*Sutherland v. Thomson*, *cit.* These gates might not therefore in themselves have been so objectionable if the pursuer had been entitled to restrict the right-of-way to the width of a footpath at each end of the road. In the actual state of matters they are involved in the same condemnation with the rest of the obstruction, which, viewed as a whole, was in my opinion clearly illegal.”

The pursuer appealed, and argued—The public had a right of walking over the whole of the Hag road, but the *solum* remained the property of the pursuer, and he was entitled to protect the grounds through which this road ran, so that the public right might be exercised in the manner least prejudicial to him; it was for the purpose of preventing the possibility of unauthorised traffic along this road that the larger gates had been put up—*Galbreath v. Armour*, July 11, 1845, 4 Bell's App's 374;

Wood v. Robertson, March 9, 1809, F.C.; *Rogers v. Harvey*, January 17, 1829, 7 S. 287; *Sutherland v. Thomson*, February 29, 1876, 3 R. 485. The larger gates were locked, but the unfastened swing-gates were sufficiently wide to allow passage to foot-passengers, so that it was only the very small space occupied by the width of the locked gates that the public could not pass over, but it was only such obstructions as prevented the public exercising their right that the Court would interfere with—*Hay v. Earl of Morton*, December 5, 1861, 24 D. 116; *Kirkpatrick v. Murray*, November 26, 1856, 19 D. 91. All that the proprietor had done was to prevent the public making a use of his lands to which the Court had not found them entitled—*Home Drummond v. Another*, June 3, 1868, 6 Macph. 896.

The respondent argued—The verdict of the jury had given a right to the public to walk over the whole breadth of the road; it was not merely the right of footpath as in the cases cited by the complainer. The complainer had, however, put locked gates over the greater breadth of the road at two parts of the road, and left only a narrow gate. If this was allowed, he might make such obstructions along the road as to limit the right of the defenders merely to a footpath. The complainer did not aver any danger from carriage traffic over the road, and he could protect his lands by fences along the sides of the road—*Pullin v. Deffel*, February 19, 1891, 64 L.T. Rep. 134; *The Queen v. The United Kingdom Electric Telegraph Company, Limited*, April 24, 1862, 31 L.J., Mags. Cases, 166; *Turner v. Ringwood Highway Board*, January 18, 1870, L.R., 9 Eq. Cases, 418.

At advising—

LORD JUSTICE-CLERK—The facts of this case are—1, That there is an old road wide enough for carts and carriages, between two public places, upon the estate of the pursuer; 2, that it has been judicially found that there is a public right-of-way over this road, but that such right is one of passage on foot only; 3, that the right is not one of footpath merely, but extends over the whole breadth of the old road.

In this state of facts the present dispute has arisen in consequence of the proprietor of the *solum* having erected gates at both ends of the road, consisting of a swing-gate 2 feet 9 inches wide, which is unfastened, and a gate closing the rest of the width of the road, which gate is locked. The public have resented this as an unwarrantable interference with their right of use of the road for walking, and have broken or pulled down the gates, and the pursuer has appealed to the jurisdiction of a court of law for a remedy.

The pursuer says that he cannot, without the gates, prevent the use of the road by horse and carriage or by cattle, and that he does not interfere with its use by persons on foot. The defenders maintain that their use of the road on foot is illegally obstructed, and that the pursuer has no right to erect gates.

It can hardly be questioned that if this were a case of right of footpath only, the presence of swing-gates, giving an opening of 3 feet when swung back could not be held to be an illegal obstruction. The peculiarity of this case is, that as the whole breadth of ground which formed a private road for vehicles has been held to be subject to a public right of passage on foot, the space covered by the locked gate is technically part of the ground over which the right to walk exists. Upon this ground the Sheriff-Substitute has held that the locked gates are not legal, and that the pursuer cannot demand that they be restored by those who have removed them. It is, I conceive, a well-established principle that at any place over which the public have a right to go, the owner of the *solum*, who is subject to this public right, cannot diminish it in however small a degree, and defend his action only by maintaining that what he has done does not practically interfere with the enjoyment of the public right. He is, as regards mere occupation, by an obstruction of any part of the *solum* over which there is a right to go, in the same position as if it were a public highway. If anything is put up that prevents free movement over the ground, it must be defended on other grounds than that there is plenty of space left for the traffic. This rule is well illustrated by the case of *The Queen v. The Telegraph Company*, referred to at the debate, in which those interested in maintaining a right of open road on a highway were held entitled to have the erection of telegraph posts stopped, although it could not be said that ample room was not left for use of the road after their erection. It is therefore, in my opinion, no answer to the defenders' contention to say that the wickets left by the pursuer are amply sufficient for the use of the road by foot-passengers. I think they are so, but in my opinion that is not a sufficient answer to the defenders' contention, and if that were the only answer I should reject it.

It is quite true that a servitude road or a mere public right-of-way over the property of a citizen is not in the same position as a highway. In the case of a highway, the right to prevent any erection on the highway is absolute; whereas in the case of servitude or right-of-way it is a question of circumstances whether the right of those who possess the servitude or of the public is to have it removed. But still anything which covers up and prevents the unobstructed use of the ground, subject to the right for its exercise, must be justified by the owner. He may do so by showing that what he is doing is required for the proper working of his estate, as by dividing fields or the like, and that it is an immaterial interference with the rights of the dominant tenement in the one case or of the public in the other. The case of stiles on a footway is an illustration of this. They are obstructions, but may be put up as not interfering materially with the right, and as being requisite for the reason-

able working of the owner's estate. This is well settled by decision.

The pursuer's contention in this case is that what he has done has been done to protect his property against illegal encroachments beyond the existing public right, which the leaving of the ends of the road open to free use by any traffic would give rise to, and that in doing so he has in no material way interfered with the enjoyment of the right existing over his property. If that be so, I think it is a good answer to the defenders' objection to what he has done. The questions are, Is this a true statement of the matter?—and if it is, Is it a competent answer to the defenders' objection? It appears to me that the statement is true. The pursuer is compelled to keep a road, wide enough for carriage traffic, free for the use of foot-passengers, while having the right to exclude animals, horsemen, and vehicles. If he is to fence himself against the latter, he can only do so by stopping their ingress to this road, which must be accessible to the foot-passengers.

The only remaining question is, has he the right to do so by the mode which he has adopted, and which is the ordinary and reasonable mode where it does not interfere with the rights of others? This question is not by any means an easy one. The Sheriff-Substitute has expressed himself as of the opinion that it is "clearly illegal." I do not feel able to express myself with such absolute confidence, but I have on consideration come to be of a different opinion. It appears to me that the rights of a proprietor, whose private estate is burdened with a servitude road, or a public right-of-way, are to have that right exercised in the way least burdensome to him, consistently with its free exercise, and that any reasonable protection to his estate from other causes tending to restrict or injure his enjoyment, must be conceded to him, even although in a technical sense it may, at a particular point, cause those enjoying the right acquired over his property to do in some minute and immaterial particular what they would otherwise not require to do. This is well illustrated in the case already referred to, viz., the placing of stiles across a footway which is subject to a servitude or a right-of-way, which it has always been recognised is the right of a proprietor, if in utilising his property he requires to erect a fence to divide his ground. No more distinct obstruction could be placed on a way than a stile to be clambered over, yet so distinctly was the right of placing stiles across footpaths recognised in early times, that in the case of *Wood* in the Faculty Collection, the party, who was objecting to a swing-gate, tried to get over the argument deducible from stiles having been sanctioned by the Court, by maintaining that they improved the footpath. This extraordinary contention was disregarded by the Court, and declared to be "palpably insufficient and contrary to common sense," since, as it was expressed, "all the world knew that stiles (*sic*) were

not an improvement of the footpath, but to a certain degree an obstruction of it."

It thus, as I hold, is established law, that a right to pass from one place to another over private property, is one which does not imply the power to prevent the proprietor from beneficial use and protection of his own property, because his mode of obtaining these things may require the right to be exercised at some particular point under some immaterial restriction, which in no true sense injures the enjoyment of the right. Applying this plainly equitable view to the present case, can it be said that there is any practical distinction between the placing of a stile for crossing an obstructing fence, and the arrangement in this case. In the case of the stile, the person using the right is entitled to walk along the ground of the proprietor from one place to another. Nevertheless, he may be required at one or more places on the road, to leave the ground and climb over a fence by steps provided. In this case, at points where fences are provided, he has for a distance of 2 or 3 inches to pass along one side of the road. The cases seem to me to be quite parallel—to be in the words of the judgment in *Wood's* case, "an interference not material." Lastly, I do not think that a different rule is to be applied in the case of a right of public footway over private property, to that which is applied in a case of servitude road. In both cases I hold that the proprietor is entitled to all enjoyment of his property consistent with his not obstructing the exercise of the right granted, and that in this case the proprietor is not to be held to obstruct the right by the course he has taken, which practically leaves the whole road available to the foot-passenger, and only requires him at the moment of entering or leaving the private property of the pursuer to do so in such a manner as does not injure him, but enables the pursuer to protect his property from illegal trespass by other classes of road traffic.

LORD RUTHERFURD CLARK—There is a road which runs through the property of the appellant called the Hag or Lime Road. By a judgment of this Court pronounced on 23rd June 1893 it was declared "that there is a public road for foot-passengers along the road in question, and that the pursuers and all others are entitled to the free use of said road for foot-passengers."

At a subsequent period the appellant moved the Judge before whom the case depended to restrict the width of the road to four feet six inches. The motion was refused.

In these circumstances the appellant maintains that he is entitled to erect a locked gate at either end of the road with a swing gate at the side of the width of two feet nine inches. He had erected such gates at his own hand, but they were removed by the respondents or some of them. He asks the authority of the Court to their being re-erected. He explains that the road is not fenced, and he says that

while the gates will be an advantage to him both in preventing the use of the road for wheeled traffic, and the trespass of animals, they will not in any way interfere with the use of it as a foot road.

The appellant relies on the case of *Sutherland*, in which it was held that the proprietor of lands through which a public footpath ran was entitled to put swing-gates across the footpath, provided that they were not of an obstructive character. I accept that decision as an accurate statement of the law. But the question remains whether it will justify the action of the appellant.

I do not understand the judgment to determine more than that an easily opened swing-gate is not an obstruction to a public footpath. It applied to public footpaths the rule which had been established in the case of *Wood* in regard to a servitude road. Swing-gates do not prevent the full use of the footpath. They interpose no doubt a certain obstacle to its use, but one which the passenger can easily and at once remove. They are a great benefit to the proprietor, and of no disadvantage to the public, and in view of the benefit, the Court thought that the trouble of opening might be thrown out of account.

The appellant cannot bring himself within the rule of this case unless he can show that the locked gates are not an obstruction. I do not think that he can. They cannot be opened by those who are using the road. They are intended to form, and do in fact form, a permanent obstruction at two places of the road. At these two places they reduce its width to 2 feet 9 inches, and absolutely prevent the rest of it from being used. They are, in my opinion, an obstruction, and cannot be justified on the principle of the case on which the appellant relies.

But he urges that the footpath is not obstructed, inasmuch as he leaves at each gate a sufficient space for the exercise of that right. If he had only to submit to a right of public footway through his property, it might be true that the Court would cause to be laid off a footpath of sufficient breadth and no more. But we have no such case before us. It is, I think, the just meaning of the judgment which I quoted that the right of footway exists over every part of the Hag or Lime Road. The public are "entitled to the free use of said road for foot-passengers." It seems to me that the appellant is not entitled to withdraw any part of the road from the use to which it is subject, or to narrow it at any part of its course. I do not mean to say that the appellant may not erect swing gates. I give no opinion on that point. I am dealing with the locked gates only, which I hold to be an illegal interference with the rights of the public.

I confess that I have come to this opinion with reluctance. The gates would probably be of much advantage to the appellant; and I doubt if the public would suffer by their erection. But I am bound to give my decision in accordance with what I believe to be the legal rights of the parties before us.

LORD TRAYNER—The road in question in this case is situated on the property of the complainer—the *solum* of the road is his. But along that road the respondent and other members of the public have a right-of-way as foot-passengers, but no other or higher right. The respondents' right, however, is one of passage over every part of the road—not merely over a defined footpath or part of it. In September last the complainer, in order, as he alleges, to prevent carting, riding, and driving over said road, erected at each end of the road (I quote from the finding of the Sheriff-Substitute) "two gates, one 9 feet wide and locked, the other a swing gate 2 feet 9 inches wide and unfastened." It was admitted at the bar that if the complainer was entitled to erect gates at the ends of the road at all, the swing-gate of 2 feet 9 inches wide was sufficient for the access or egress of anyone who desired to use the road. But the respondents dispute the complainer's right to erect gates at the ends of the road in question, and maintain that he is bound to leave it open and unfenced to its full breadth. The Sheriff-Substitute has sustained this contention on the part of the respondent, and in so doing has taken a view of the rights of parties in which I cannot concur.

Considered apart from strict law, in the meantime, the position taken up by the respondents is not one which can be regarded with favour. The gates complained of are, I suppose, an inch or 2 inches wide, and therefore it is only for that space at each end of the road that any obstruction is presented. Access to and egress from the road is duly provided, and after access has been obtained there is nothing to hinder the use of the road over its whole breadth. The purpose of the complainer's action is to prevent the road being used in a manner in which no one but himself has right to use it. The right of the respondents is practically left intact, and they are not subjected to any inconvenience in the exercise of their right. I cannot regard the respondents as acting otherwise than *in emulationem*.

But I think the complainer is within his legal right in putting up the gates in question. Such a right seems to me to have been recognised in the case of *Wood*, March 9, 1809, F.C. (which was the case of a servitude road), and in the cases of *Rogers*, 7 S. 287; *Kirkpatrick*, 19 D. 91; and *Sutherland*, 3 R. 485, which were cases of public footpaths, the right to use which had been acquired by the public, as in the present case, by prescription. The differences in detail between the three cases last cited and the present, do not appear to me to affect the principle on which the cases were decided. I am therefore for recalling the judgment appealed against.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, granted warrant to the pursuer to re-erect the gates which had been removed, with similar fastenings, and

interdicted the defenders from interfering with them.

Counsel for Appellant—H. Johnston—Maconochie. Agents—J. & F. Anderson, W.S.

Counsel for Respondents—C. Thomson—J. Reid. Agents—Macpherson & Mackay, W.S.

Friday, June 1.

SECOND DIVISION.

PLAYFAIR'S TRUSTEES v. PLAYFAIR.

Succession—Heritable or Moveable—Conversion.

A testator whose estate consisted of moveable property to the value of £30,000 and heritage valued at about £56,000 directed his trustees to hold the residue for behoof of the whole children he might leave, share and share alike, to pay or expend for behoof of such children the interest of their shares until they attained twenty-five years of age, or in case of daughters until they were married; and on the children attaining that age, or being married if daughters, "to make payment to them of their respective shares." He declared that the shares should not become vested until the period of payment, and there was a clause in favour of survivors. The trustor also gave his trustees a full and unlimited power to sell his heritable property. The deed contained no direction to sell. The trustees never exercised the power to sell.

The testator died leaving nine children. Two sons died before reaching the age of twenty-five. One of his daughters died unmarried and intestate after having attained that age. She was thus entitled to one-seventh of the residue.

Held that the whole of her share was moveable *quoad* succession, and belonged to her heirs *in mobilibus*—*Advocate-General v. Blackburn's Trustees*, November 27, 1847, 10 D. 166, followed.

By *mortis causa* trust-disposition dated 2nd September 1859, Patrick Playfair conveyed his whole estate, heritable and moveable, to trustees. After making provision for his widow he directed his trustees "to hold and apply the whole residue and remainder of my whole means and estate for behoof of my whole children whom I may leave, equally among them, share and share alike, and to pay or expend for behoof of such children respectively the interest or annual proceeds of their shares, or such part thereof as my trustees shall think necessary for their board, education, and maintenance respectively, accumulating the remainder until they shall spec-