for supplying the same, and that their determination to provide additional school accommodation is as follows—(*a*) To erect at Stow, on a site to be given by Mrs Mitchell of Stow, and approved of by Sir Alexander Grant, a school capable of accommodating 200 pupils and teacher's dwelling-house; and (*b*) to dispose of the existing public school and teacher's dwelling-house." The Board of Education, in terms of section 28 of the Act, approved of the above opinion and determination, and authorised the School Board to act upon and carry the same into effect forthwith. Certainly that is quite in accordance with the provisions of the statute. There is a distinct resolution by the School Board, and a clear and distinct confirmation of that by the Board of Education. The statute says that when that has taken place the School Board must go on forthwith to carry that into execution. It has been suggested that after the confirmation of such a resolution circumstances might so alter as to render it inexpedient or improper to proceed in terms of that confirmed resolution. I can quite understand the possibility of that. It is needless to suppose cases; but undoubtedly such a case might arise, and if so, I apprehend it would be the duty of the School Board to reconsider the matter, and to submit the resolution that they might form upon such reconsideration to the Board of Education for their approval, by whom the same would be either confirmed or rejected. But is there any case of that kind here? Nothing in the least degree like it. What takes place after this confirmation of the School Board's resolution is this, that on the 9th day of April 1875 there is a meeting of the School Board, and the minute of meeting bears "that the Board having agreed to rent Mrs Mitchell's school for a time for temporary accommodation, with the view of having ultimately both schools merged into one, and having formerly intimated to the Board of Education their determination to erect a school to accommodate 200 pupils, they now further determine to enlarge the plans to provide accommodation for 226 pupils, which they find will be ample enough for the district, and instruct the clerk to report accordingly to the Board in Edinburgh, and request their consent to the same." Now, there is nothing in that which can be said to go back on the previous resolution; it is merely an extension of accommodation beyond that already resolved on and confirmed, which is intended to be provided by the School Board. But then this resolution was also submitted to the meeting and carried—"that Mrs Mitchell having rented her school to the Board, and there being in that and the parish school sufficient accommodation for all the children of the district, and looking to the high price of labour from the erecting of so many public schools, that the board delay in the meantime taking any further steps for the erection of new schools." It seems to me that this resolution is simply in the face of the statute, which says that after a resolution providing additional accommodation has been carried and confirmed by the Board of Education, the School Board shall go on without delay to carry it into execution, and this resolution is that they shall not do so. Was that a resolution they could expect the Board of Education to consider or to give effect to? The Board of Education were bound to reject, after consideration, such a resolution as that, because it was against the statute. It was a resolution in violation of the duty of the School Board as prescribed by the statute, and accordingly they are told repeatedly by the Board of Education that it was impossible to sanction the delay—that they cannot do so consistently with their duty. The rest of the correspondence, except in so far as it is a repetition of that, seems to me to have nothing to do with the question before us. Then the Board of Education, at last finding that the School Board adhered to their resolution for indefinite delay, issued a requisition upon them in terms of the statute. It is printed in the papers before us, and seems to me to be in the proper form under the statute. That requisition has not been attended to by the School Board, and it now falls upon us to order them to proceed in terms of the statute and carry out their resolution of 29th October 1874.

The other Judges concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Dean of Faculty (Watson)—Trayner. Agent—Donald Beith, W.S.

Counsel for the Respondents—Balfour—Keir. Agents—H. & A. Inglis, W.S.

Wednesday, February 23.

SECOND DIVISION.

[Lord Craighill.

CUTLAR *v.* REID AND OTHERS (M'LEOD'S TRUSTEE.)

Expenses—Tender by Defender.

An action was brought for £236. In their defences the defenders tendered £150 as in full of all claims. The Court decerned against the defenders for payment of £145 with interest, which raised the amount awarded by the Court very slightly above the tender:—*Held* that the technical rule as to expenses must be strictly addered to, and expenses found due to neither party.

Counsel for Pursuer—Moncrieff—J. A. Reid. Agents—Philip, Laing, & Munro, W.S.

Counsel for Defenders — M'Laren — Harper. Agent—J. Knox Crawford, S.S.C.

Wednesday, February 23.

FIRST DIVISION.

[Lord Rutherfurd Clark.

ACCOUNTANT OF COURT *v.* M'KINNON (GRAINGER'S CURATOR).

Curator—Investment.

Held that a *curator bonis* may invest his ward's money in loans, for security and payment of which assessments are authorised to be levied by Act of Parliament.

M'Kinnon was *curator bonis* to Grainger, who suffered under mental disease. On the curator presenting his annual account for year 1874-1875, the Accountant of Court reported as follows:—

"The Accountant has found it necessary to object to the following investments made by the *curator bonis*, viz., on mortgage by the commissioners under 'The Aberdeen County and Municipal Buildings Act 1866,' and 'The Sheriff Court-Houses Act 1860,' . . . £4500

"On mortgage by the trustees acting under 'The Aberdeenshire Roads Act 1865,' . . . 6500

"These are objected to, in respect that the securities are not heritable, and are thus of a class not hitherto sanctioned by the Court. But they have been passed temporarily on the personal responsibility of the *curator bonis*, who has been required to realise the amount of the said mortgages before the period for closing his next and final account."

Upon this the curator laid before the Accountant a detailed account of the nature and position of the investments objected to.

The £4500 was lent to the Aberdeen County and Municipal Buildings Commissioners as commissioners under "The Sheriff Court-Houses Act 1860."

It appeared that the total cost to the county of that half of the Court-House was £15,852, 14s. 8d., which had been reduced at this date by £4179, 7s. 6d.

The security was the assessment imposed in terms of the Act. The rate was not limited by the Act, and was imposed at the rate of one-sixth of a penny per pound, which yielded £923 per annum. The commissioners had resolved that the cost should be defrayed in thirty years, and had fixed the rate accordingly.

The £6500 was invested in a loan to the Aberdeen Road Trustees on the security of the assessments under "The Aberdeenshire Roads Act 1865." From the accounts of the Road Trustees, under their Act, for the year ended Whitsunday 1875, it appeared that the amount of money borrowed and then due for payment of the road debt was £28,600. This includes the loan of £6500 by the curator. The turnpike road debt amounted at the passing of the Act to £43,000, the whole of which sum was borrowed and the debt paid off. The borrowed money presently due amounted, as above stated, to £28,600, so that since 1866-67, the first year of the assessment under the new Act, the debt had been reduced by £14,400. By sections 46 and 83 of the Act the trustees were empowered to borrow money to pay off the debt specified in the schedules annexed to the Act, and to assign in security for payment of it the assessment authorised to be levied under the Act, and to grant mortgages for the sums borrowed. By section 47 the money so borrowed must be applied to the payment of the debt, and to no other purpose whatever. The annual assessment for payment of interest of the debt exceeded £3000 considerably. For the year ended Whitsunday 1875 it amounted to £3364, 15s. 4d. By section 82 the assessment was recoverable in the same way as the land tax and assessed taxes.

The Accountant accordingly reported to the Lord Ordinary as follows:—

"At audit of the curator's accounts for the year ending 30th September 1875, the Accountant has seen cause to object to certain investments made by the *curator bonis*, and has required him to realise the same before his next annual account falls due. Copy of the Accountant's report to that effect is hereto annexed.

"These investments are on mortgages granted by trustees under certain Acts of Parliament. The curator, in answer to the Accountant's report, submitted evidence which has satisfied him that the securities are in themselves unexceptionable; but as the Court has not hitherto sanctioned investments of funds under judicial management on securities of that class, the Accountant has felt it incumbent on him to object to them, and require them to be realised. By desire of the curator, the Accountant now reports the matter to the Lord Ordinary.

"The investment of funds under judicial management is not regulated by statute, and no special authority as regards investments is conferred by the Pupils Protection Act other than that specified in the 12th section thereof, which is somewhat general in its terms. But by the decisions of the Court the general rule has been held to be, that judicial factors appointed under the Pupils Protection Act can only invest the money of their wards in—

"1. Consols or other national funds.

"2. Heritable securities.

"3. Deposits, or operating accounts, with one of the chartered banks in Scotland.

"The Accountant would refer to Fraser's treatise, 'Guardian and Ward' (2d edition, p. 475), and the decisions in the cases there noted.

"The Lord Ordinary will observe that, though it may be very desirable that greater latitude should be given for the investment of funds under judicial management, it is essential for the guidance of factors and of the Accountant of Court that the power of investment shall be regulated by fixed and clearly defined rules. The securities taken by the factor in this case are of a class that is now numerous in Scotland; and if they are sanctioned by the Court, the probable effect may be that a large amount of funds now and in past years invested in consols, on heritable securities, or in bank at a low rate of interest, will be transferred to such trust-mortgages as have been taken in this factory, as the greater facilities of investing, and the higher rate of interest that can be obtained on the latter, will always form strong inducements for such transfer.

"The Accountant requests the instructions of the Lord Ordinary."

The Lord Ordinary reported the case to the Inner House.

Counsel appeared for the curator, and argued—There is no statutory enactment defining what are the securities which may form the subject of investment in such cases. The present practice seems based on the case of *Haldane*, and another in 1848. In both these cases money had been invested on personal security, and the Court ordered the uplifting of the sums and their re-investment in Government or heritable securities. But this was before the Pupils Protection Act, which placed *curators bonis*, &c., under the supervision of the Accountant of Court. Section 13 of the statute provides—"That the Accountant shall see that the factor's accounts of charge and

discharge, with the vouchers therof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate and of those interested therein, and shall consider the investment of the estate and the sufficiency thereof, &c. Here the Accountant quite approves of the investments submitted to him. A relaxation of the rigid rule has been made by all the recent legislation with regard to the administration of trust-funds, and a relaxation in this matter was recommended by the late law commission. There is an obvious distinction between those who are under the Accountant of Court and those who are not. Even heritable security, as in *Forsyth's* case, may prove insecure.

Authorities—*Haldane* v. *Lindsay*, Dec. 23, 1848, 11 D. 286; Pupils Protection Act, 12 and 13 Vict. c. 51, sec. 13; *A.B.*, June 29, 1854, 16 D. 1004; *Morrison*, Dec. 5, 1856, 19 D. 132; Trust Acts, 22 and 23 Vict. c. 35, sec. 32; 30 and 31 Vict. c. 97, sec. 5; 30 and 31 Vict. c. 132, secs. 1 and 2; Edinburgh City Act, 1 and 2 Vict. c. 55, sec. 77.

At advising—

Lord President—If there were any statutory rule, or any rule absolutely founded upon decisions of this Court, that money under factorial management can be invested only on heritable security or in Government stock, I am afraid we could not sanction the investments made by the *curator bonis* in the present case. But there is no such rule. There is no statutory rule at all; and while the Court have in former times been in the habit of limiting factorial investments to the two classes of securities I have mentioned, they have never laid down any rule that they will sanction no other kind of security. But even if the Court had done so, I should not have been willing to be bound by their decision; for although it may have been expedient at one time to lay down such a rule, it may be inexpedient at another time. We know that investments in Government stocks are not expedient investments for trust-funds, and that heritable securities cannot always be obtained, the demand for them exceeding the supply. Persons who are bound to invest only in heritable security are thus frequently compelled to leave large sums of money uninvested in bank. Now, in that state of the market for securities, it comes to be a very important question whether we should refuse to allow a curator to invest money upon a security which was demonstrated to be at least as good as a first-class heritable security, seeing that he can get the one kind of security but not the other. All considerations of expediency and convenience certainly point one way; and I confess I am but little disposed to resist an argument founded on them in a matter in which the Court are entitled to exercise their discretion.

Now, what are the facts actually before us? In the first place, the *curator bonis* has invested the sum of £4500 on the security of certain assessments leviable by the Aberdeen County and Municipal Buildings Commissioners, as commissioners under the Sheriff Court-Houses Act of 1860. This, which I understand to be a public statute, empowers the commissioners to levy an assessment by means of which the whole of the money borrowed by them will ultimately be paid off. The money originally borrowed was £15,852, but upwards of £400 has already been paid off by means of the assessment. The assessment is a very light one, viz., at the low rate of one-sixth of a penny per pound; but it yields an annual sum more than sufficient to pay the interest of the debt still outstanding, and will at length pay off the whole debt. Now, I cannot say that that is not equal to the very best heritable security that can be had. It is perfectly clear that the commissioners will do their duty, and as public trustees they may be compelled to do it. It is, however, needless to speculate on the means of preventing a failure in duty, as that is obviously not within the scope of probability. As regards this loan of £4500, I may say, therefore, that it seems to be as well secured as money can be, while it yields a return of four per cent., quite as much as heritable securities.

As regards the other investment, viz., of £6500, on the security of the assessments under the Aberdeenshire Road Act of 1865, it stands in a somewhat different position, as that is not a public but a local Act. But that does not affect the nature of the security. A considerable part of the sum originally borrowed has been paid off, the trustees are empowered to levy rates, and these rates are assigned in security of the debt. This investment, therefore, seems to me to be in exactly the same position as the other one to which I have adverted.

I purposely confine myself to saying that these are exceptionally good securities, which the curator was justified in taking; for it is very difficult to lay down any general rule or principle applicable to all time to come. All, therefore, that I can say is, that where by virtue of Act of Parliament such securities as those now in question are obtainable, they are as eligible as heritable securities, and may safely be taken by a *curator bonis*.

Lord Deas—This appears to me to be one of the most important general questions that have occurred for a long time. It is very plain that the limitation of the kinds of securities that may be taken by curators for lunatics or minors or by judicial factors must often be most inexpedient, and even in some cases absolutely ruinous to the parties concerned. Three kinds of security have been specified as sanctioned by the Court, viz., the public funds, heritable securities, and deposits in banks. Now, it appears to me that it is quite out of the question to hold that there is a general and absolute rule on the subject; and I concur in what I understood to be the opinion of your Lordship, that even if such a rule had been laid down in the opinions delivered from time to time by the Judges of this Court, we would not be bound by such opinions, there being no decision capable of fixing such an absolute rule. Further, there is no Act of Parliament on the subject; nor do I think there is even invariable practice. Such a rule as I have alluded to may have been fitted to the former, but it is not fitted to the present state of things. The amount of money in this country requiring to be invested has increased to a very extraordinary extent, and it necessarily follows that the number and kind of securities which are required must also have increased. As well might we hold as absolutely authoritative the decisions pronounced before this country became to any extent a mercantile

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