which he had to determine. Whether he was right or not in the determination at which he ultimately arrived is not a question for this Court. I am of opinion that we ought to adhere to the interlocutor of the Lord Ordinary upon the ground upon which he has placed his judgment, which I take to be that the arbiter has not exceeded his jurisdiction, and therefore that this Court has no jurisdiction to interfere with his award.

LORD M'LAREN—If we had the same control over the decisions of arbiters, which we have over the verdicts of juries, I have a strong impression that this award should not stand. *Prima facie*, the sum awarded is extravagant, being, as Lord Kinnear has pointed out, altogether disproportioned to the rent which the tenant is paying, and, if one might be allowed to judge from one's experience in similar cases, beyond what is usually given as compensation to a tenant in the occupation of lands. But then we have no more control over the decisions of arbiters under the Lands Clauses Act, than we have over the award given in any private reference. The Legislature has given large powers to persons selected by the parties in determining the compensation to be given for the injurious affection of lands, where they are taken under compulsory powers; and while no doubt arbiters may sometimes award too much, yet, on the whole, the good sense of the gentlemen chosen has led, in the average, to fair and reasonable results. I cannot say that after reading the evidence which has been taken in this case, and the notes of the proceedings, the view which the case presents in the first aspect of it is materially changed. I have difficulty in seeing how in such a case the arbiter has been able to arrive at so large a sum of compensation; but then I agree with Lord Kinnear that it is impossible to discover in the notes of the arbiter's evidence if he has taken into account any ground of compensation, which would not be a legitimate ground in determining a claim of this kind. I confess that I have looked with some anxiety to see if there were any legal grounds upon which this matter could be reconsidered, but I have not been able to find any. It seems to me that the error, if it be an error, is simply an over-estimate of the sum due to the tenant under the different heads which enter into the arbiter's final award. Perhaps some explanation may be found in the fact that this referee seems to have twice changed his view upon the question of damage. When exception was taken to his original findings he has given effect to the views that were represented to him, and it may be that his original view has coloured his award. But I think it is important in these cases that the lines which separate the powers which the Courts of law have over arbitrators, should be strictly defined, and that we should not from any impression as to the justice of the award be drawn into extending the jurisdiction of the Court in these matters. If we did so we should be doing the very thing which it is our province to correct in reference to the awards of arbitrators.

On the whole I must say, with some reluctance, that I concur in the judgment which your Lordships propose.

LORD ADAM and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Ure—James Reid. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender—Asher—Vary Campbell—W. Thomson. Agents—W. & J. Burness, W.S.

Wednesday, July 17.

SECOND DIVISION.

SIM'S TRUSTEES *v.* SIM, &c.

Succession—Heritable and Moveable—Conversion.

A testator conveyed his whole estate, heritable and moveable, to trustees, and appointed the residue, after payment of debts and legacies, to be invested in their names. Out of the annual income or profits of the residue he directed the trustees to pay his widow an annuity of £250, and to apply the balance of the income for the maintenance of his children; and he specially empowered the trustees "to pay or apply a portion of the capital or principal of my said estates for behoof of any one or all of my said children during their respective minority, or . . . prior to the final division of my estates." Lastly, he directed that, upon his youngest child attaining majority (which was declared to be the period of vesting of the children's interests), the trustees should set apart a sum sufficient to meet the widow's annuity, and should then "divide the remaining portion of the residue of my estates equally among my said children, share and share alike," deducting from each child's share any advance which might have been made to account of the capital. Upon the widow's death the sum set apart to meet her annuity was to be similarly dealt with and divided. The deed contained no direction to sell, but gave the trustees powers of sale.

The testator died in 1885, leaving moveable estate of the value of nearly £10,000, and the heritable estate of Muirton, which had a gross rental of about £800. He was survived by his widow and four children, of whom the youngest attained majority in 1891. One of the children died intestate in 1893. At the date of his death the estate of Muirton was still in the hands of the trustees, who had continued to

hold it with the approval of the beneficiaries.

Held that the power of sale not being indispensable for the execution of the trust, and not having been exercised, the deceased child's interest in the estate of Muirton was heritable.

Alexander Sim died at Aberdeen on 28th May 1885, leaving a trust-disposition and settlement dated 12th February 1883, whereby he conveyed his whole estate, heritable and moveable, to trustees. After providing for the payment of debts and certain legacies, the testator appointed whatever residue there might be of his said means and estate after satisfying the foregoing purposes to be invested in name of the trustees, and he directed them, out of the annual income or profits thereof, to pay his widow an annuity of £250 (such annuity to cease on her death or re-marriage), and to pay and apply the balance of the income and profits for the maintenance and education of his children, in such manner and in such sums as they should think fit, with special power to the trustees "notwithstanding the period of vesting of my children's interest in my estates as after mentioned, to pay or apply a portion of the capital or principal of my said estates for behoof of any one or all of my said children during their respective minority, or to pay or apply same for behoof foresaid prior to the final division of my estates as after mentioned, should such payment or application seem to my trustees to be for the interest and benefit of any one or all of my said children, and such payment or advance shall be deducted from the share falling to the child who has obtained same upon the final division of my estates: (*Lastly*) Upon the youngest of my children reaching majority (which time is hereby declared to be the period of vesting of my said children's interest in my said estates), my trustees shall set apart a sum sufficient to meet the annual payment as aforesaid to my said spouse, should she be alive and unmarried at that date, and shall then divide the remaining portion of the residue of my estates equally among my said children, share and share alike, deducting from each such child's share any advance which may have been made to account of the capital as hereinbefore provided for, and should any of my said children have predeceased the term of division herein named leaving lawful issue, such issue shall succeed to the share to which their parents would have been entitled, but in the event of no such issue, then the share of such predeceased child shall form part of the residue of my estate, and upon the death or marriage of my said spouse the sum set apart as aforesaid to meet her annual allowance shall be dealt with and divided by my said trustees according to the manner herein prescribed regarding the other portion of my residuary estates: Declaring that my trustees shall have full power, warrant, and authority, notwithstanding the terms of vesting and division hereinbefore mentioned, to invest either before, at, or after the said term of vesting and division in their own names, or in the names of such other persons as my said trustees may select, the whole or such portion of the capital of each of said children's share, as to my trustees may seem sufficient and proper, in trust for behoof of such child and his or her heirs or otherwise, and that on such terms and conditions as to my said trustees may seem proper . . . with full power to my said trustees to enter into possession of my said estates, and to sell and realise same or any portion thereof by public roup or private bargain, and that at such times and at such prices as to them shall appear proper; with power to them to grant feus or long leases of the heritable estate or any portion thereof for such consideration as to my trustees shall appear proper; and with power to borrow money on the security of my estates or any part thereof, and to excamb any portion of my estates, on such terms and conditions as to my said trustees shall seem proper, and to grant the necessary deeds for these purposes; with power to my said trustees to lend out and invest the funds of my estate on such heritable or personal security and in the stocks or shares of public, private, or joint-stock companies of limited or unlimited liability, and also on debenture bonds of such companies as to them shall appear proper." . . .

At the date of his death Alexander Sim was possessed of moveable estate of the gross value of £9950, 4s. 6d., and heritable estate consisting of the estate of Muirton, of which the gross rental was then about £800. He was survived by his widow and four children, William Sim, Mrs Helen Sim or Cornwall, John Duncan Sim, and Alexander Sim.

The youngest of the truster's children, *i.e.*, Alexander Sim, came of age on 11th June 1891; but the trustees continued, nevertheless, with the approval of the beneficiaries, to hold and manage the estate of Muirton, and also to hold certain trust investments. Prior to 11th June 1891, the trustees made the following money payments to the beneficiaries on account of their shares—to William Sim, £1936, 6s. 11d.; to Mrs Cornwall, £612, 4s.; to John Duncan Sim, £835, 2s.; and to Alexander Sim, £23, 5s. 7d.

On 1st June 1892 the said Mrs Sim and her children granted to the trustees a discharge of certain of their intromissions with the trust estate under their management. The granters of said discharge, *inter alia*, agreed "that the trustees shall continue the management of the estate of Muirton, and account to us, the whole children of the testator, for our respective interests in the rents thereof after paying the said annuities" (*i.e.*, the annuities to Mrs Sim and another) "and expenses of management and any other outlays, and we give the trustees full discretion to act in the management of same as they shall think best."

John Duncan Sim died intestate and unmarried on 12th February 1893.

At the date of the death of John Duncan Sim his father's trustees still held the estate of Muirton. They also held for his behoof £1101, 4s. 11d., invested in securities moveable as to succession.

In these circumstances a question arose as to whether John Duncan Sim's interest at the date of his death in the estate of Muirton was moveable or heritable, and a special case was presented by (1) Alexander Sim's trustees, (2) John Duncan Sim's mother, his sister Mrs Cornwall, and his elder brother William Sim, and (3) John Duncan Sim's younger brother and heir-at-law, Alexander Sim, in order to obtain the opinion of the Court upon the following question of law—"Was the interest of the late John Duncan Sim, at the time of his death, in the estate of Muirton, moveable so far as his succession is concerned?"

Argued for the second parties—John Duncan Sim's interest in Muirton was moveable. It was plain from the trust-deed that the intention of the testator was that the whole of his estate should be divided equally among his children in money. There was a power of sale given to the trustees, and the whole tenor of the settlement showed that the succession was moveable.

Argued for the third party—Although there was a power of sale, it had never been exercised. It was not necessary for the execution of the trust that the heritable estate should be realised. There was therefore no conversion—*Anderson's Executrix* v. *Anderson's Trustees*, January 18, 1895, 22 R. 254; *Sheppard's Trustees* v. *Sheppard*, July 2, 1885, 12 R. 1193; *Auld* v. *Anderson*, December 8, 1876, 4 R. 211. Even if there had been conversion under the will, the actings of the beneficiaries had operated reconversion—*Grindlay* v. *Grindlay's Trustees*, November 9, 1853, 16 D. 27; *Hogg* v. *Hamilton*, June 7, 1877, 4 R. 848.

At advising—

LORD TRAYNER—The question relates to the succession which fell to the late John Duncan Sim under the provision of the trust-disposition and settlement of his father Alexander Sim—a succession, which, at the date of the father's death, consisted of both heritable and moveable estate. It was very ably argued to us by Mr Brown, on behalf of the second parties, that the trust-disposition and settlement of Alexander Sim was throughout indicative of an intention on his part that the whole of his estate should be massed together and divided among his children; that there was an entire absence of anything to show an intention that the heritable estate should be kept as heritable estate, and that the whole tenor of the settlement indicated that the truster meant and intended the beneficiaries under it to receive their respective benefits in money. I cannot, however, say that any such intention is necessarily to be inferred from the words of the settlement, although I do think it very probable that such a mode of dealing with his estate was within the expectation of the truster. That, however, would not operate conversion. Conversion may take place (1) by the truster's direction to his trustees to sell or realise his heritage, (2) by a power to sell being exercised by the trustees, or (3) where such sale or realisation is necessary to the execution of the trust purposes. None of these conditions are present here. There was no direction to the trustees to sell the heritable property; there was a power of sale, but it was not exercised; there has been no necessity up to the present time to sell the heritage for the fulfilment of any trust purpose. There is no such necessity now, for the heritage can be conveyed to the several beneficiaries according to their respective rights. I think, therefore, the question must be answered in the negative.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD RUTHERFURD CLARK was absent.

The Court answered the question in the negative.

Counsel for the First Parties—Hunter.
Counsel for the Second Parties—Brown.
Counsel for the Third Party—Abel.
Agents—Ronald & Ritchie, S.S.C.

Thursday, July 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MARSHALL *v.* CALLANDER AND TROSSACHS HYDROPATHIC COMPANY AND OTHERS.

Superior and Vassal — Obligation ad factum præstandum—Obligation to Re-erect Buildings in the Event of their Destruction by Fire — Transference of Feu after Obligation had become Prestable.

After an obligation imposed by a feu-contract, and constituting a condition of the grant, has become prestable, the vassal cannot relieve himself thereof by transferring the feu to another party.

A piece of ground was disponed by feu-contract under, *inter alia*, the condition that the vassal and his successors and assignees whomsoever should be bound to erect and maintain thereon buildings of the value of not less than £15,000, and to keep the same constantly insured to the extent of not less than that amount, and in the event of their destruction by fire, to rebuild the same or the part destroyed, so as to maintain the total value of £15,000. The vassal erected buildings on the feu of more than the stipulated value, and insured them for the stipulated amount. The buildings having been destroyed by fire, the insurance money was paid to the vassal, and the superior brought an action to compel him to re-erect buildings upon his feu. Before defences were lodged the vassal transferred the feu to another party.

Held (*aff.* judgment of Lord Kyllachy) that the original vassal could not relieve