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 æmulationem*.

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 truster 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 respec-

tively attain the age of twenty-five years complete if sons, and until they shall respectively attain that age or be married whichever of these events shall first happen if daughters; and on my children respectively attaining said age of twenty-five years if sons, or attaining that age or being married if daughters, I direct my said trustees to make payment to them of their respective shares, . . . Declaring that the shares of such of my children as are sons shall not become vested in them until they shall respectively attain the said age of twenty-five years, and the shares of such of my children as are daughters shall not become vested in them till they attain that age or are married, whichever of these events shall first happen; and I provide that in the event of any child or children predeceasing me, or surviving me and dying before the term of payment and vesting of their shares without leaving lawful issue, then the shares of such deceasing child or children shall accrue to and be divided equally between and among my surviving children and the lawful issue of such as may have died leaving issue equally among them *per stirpes:* But in the event of the deceasing child or children leaving lawful issue, such issue shall in every such case receive (if more than one equally among them share and share alike) the share or shares which would have fallen to their deceased parent or parents had he, she, or they survived." The deed also contained a clause in the following terms. "And I hereby commit to my trustees herein named or to be nominated as aforesaid, or assumed as after mentioned, full power to enter into possession of my whole means and estate, heritable and moveable, real and personal, hereinbefore conveyed and to sue for, recover, receive, and discharge the same, and the rents, interest, fruits, and profits thereof; to compound, transact, and agree to refer to arbitration any questions or differences which may arise in the course of their management of the said trust-estate; and with power to my trustees to lend the means and estate hereby conveyed, or the proceeds thereof, and the whole funds which shall from time to time form part of my trust-estate, on good and sufficient heritable security, or to invest the same in public funds or other undoubted stock (but not in any railway company or joint-stock or other banking company); to change and vary the said securities and investments from time to time, and to take other securities and investments of the same description as they shall think necessary, and to reduce the rate of interest on such securities to the current rate. And I grant full and unlimited power to my trustees from time to time, as they shall think proper, to sell and dispose of all or any part or parts of my estate and effects, heritable and moveable, real and personal, hereby conveyed, and all other estate and effects, heritable and moveable, which may at any time form part of my trust-estate by public roup or private bargain at such price or prices, and with or without advertisement as they shall think proper." The deed contained no direction to sell.

Mr Playfair died on 21st November 1879. The trust-estate at the time of his death included both moveable and heritable property, the latter consisting of the estate of Ardmillan, and a house in Glasgow. The trustees never exercised the power of selling any portion of the heritable property.

Nine children of Mr Playfair survived their father. Two sons died before reaching the age of twenty-five. Miss Anna Mary Playfair, one of the testator's daughters, died unmarried and intestate on 15th February 1892, after attaining the age of twenty-five on 26th June 1883. She was thus entitled to one-seventh of the residue. At her death the value of the moveable property belonging to the trust-estate was about £30,000, and the heritable property was valued at about £56,000.

Walter Playfair, the immediate younger brother of Miss Anna Mary Playfair, claimed as her heir-at-law the whole of her share of the residue, in so far as it consisted of heritable property, while her six brothers and sisters, being her heirs *in mobilibus*, contended that conversion had taken place so as to make the whole share moveable in a question of succession, and that it should accordingly be paid over to them.

For the decision of the point a special case was presented to the Court by (1) Mr Playfair's trustees; (2) Walter Playfair, as heir-at-law of Miss Anna Mary Playfair; and (3) the heirs *in mobilibus* of Miss Anna Mary Playfair.

The questions at law were as follows—"(1) Are the first parties, as Mr Playfair's trustees, bound to convey or pay over the share of the trust-estate falling to the late Miss Anna Mary Playfair, so far as it consists of heritable property, to the second party, as the heir-at-law of the said Miss Playfair? or (2) Are the said trustees bound to pay over the whole share of the said Miss Anna Mary Playfair in the said trust-estate to the third parties, who are her heirs *in mobilibus?*"

Argued for the third parties—The terms of the deed showed that the intention of the testator was that a sale of the heritage should take place. There was contained in the deed a power to sell, and it did not matter that there was no express direction to sell in the deed if it contained provisions showing that it was the intention of the testator that the power of sale should be exercised by the trustees before dividing the estate. The case was ruled by that of *Advocate-General* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166. That decision had never been overruled, and the opinion of Lord Fullerton who delivered the leading judgment, had been quoted with approval by Lord-Chancellor Westbury in *Buchanan* v. *Angus*, May 15, 1862, 4 Macq. 380. Other authorities — *Fotheringham's Trustees* v. *Paterson*, July 2, 1873, 11 Macph. 848; *Baird* v. *Watson*, December 8, 1880, 8 R. 233; *Brown's Trustee's* v. *Brown*, December 4, 1890, 18 R. 185.

Argued for the second party—There was only a power of sale contained in the deed. That did not operate conversion. The exercise of the discretionary power of sale conferred on the trustees was not indispensable to the trust, and not having been exercised there was no conversion—*Sheppard's Trustee* v. *Sheppard*, July 2, 1885, 12 R. 1193; *Aitken* v. *Munro*, July 6, 1883, 10 R. 1097; *Buchanan* v. *Angus*, *supra*.

At advising—

LORD RUTHERFURD CLARK—[*After stating the facts*]—The question which is before us is whether the share of Miss Anna Mary Playfair, in so far as it consists of the heritable property, passes to her heir-at-law, or whether the whole share belongs to her heirs *in mobilibus*—in other words, whether there has been conversion.

The general law is settled by the case of *Buchanan* v. *Angus*. The rule is that a direction to sell operates conversion, but that a power to sell does not, unless it is exercised, or unless the exercise of it is "indispensably necessary to the due execution of the trust." In the latter case the power is equivalent to a direction to sell. But however clear the law may be, the cases show that the just application of it is not an easy matter.

We have seen that the whole residue is held for the children in equal shares, and that the share of each child is to be paid at a different time.

Of course I do not attach importance to the fact that the trustees are directed to pay and not to convey. The phrase in itself is not material, as the case of *Buchanan* shows. But we must be satisfied that the trustees may lawfully convey a share of the heritable estate to a child in part payment of his share, and that the child is bound to receive it. These are convertible propositions. For beneficiaries are bound to submit to what the trustees may do in execution of the powers committed to them.

The second party says that the trustees might execute the trust without a sale, and in this way. When the period arrived for the payment of the first share they could dispone the heritage *pro indiviso* to themselves and the child in the proportion of six-sevenths and one-seventh. They could convey to the next child one-sixth of their own share, one-fifth of the remainder to the third child, and so on, as the several periods of payment arrived, till the whole was exhausted. There is no warrant in the trust-deed for giving to each child successively a separate part of the heritable estate on a separate title, and it is plain that equality could not be obtained in that way. The only possible mode of equal division is by the creation of successive *pro indiviso* estates.

It is not likely that the trustees would act in this manner, which I think could hardly fail to be very detrimental to the beneficiaries. It is sufficient for the second party to show that it would be lawful for them to do so. For in that case they would be acting in conformity with the powers conferred on them by the truster, and a sale would not be necessary for the execution of the trust.

We must consider the effect of the creation of the several *pro indiviso* estates. The child in whose favour the first conveyance is granted becomes the joint-proprietor along with the trustees of the whole heritable property, and being joint-owners only, the trustees would cease to have the exclusive management of the largest portion of the trust-estate. They could neither sell nor let without the consent of the other joint-owner, while he on his part could when he pleased force a division or a sale. The trust-management would cease and be superseded by the management of the joint-owners. The evil would obviously become greater as each child received his *pro indiviso* share, and indeed when a second conveyance was granted the trustees would be in a minority in a council of co-owners.

I do not think that the truster contemplated the possibility of such a state of things. He could not have meant that a stranger should be introduced into the management of a large portion of his trust-estate, and I do not think that he gave any power to that effect. It may be said that the joint-owner would be one of his own children; but that would be true only so long as the *pro indiviso* share was not sold. But whether a child or a stranger be owner, the creation of the joint-estate is so entirely subversive of the trust-management which the truster has set up, that I cannot hold it to be within the power of the trustees. No doubt there are cases in which the trustees may convey to all the beneficiaries *pro indiviso*. But in doing so they are denuded of the trust, and their management ceases.

Again, it appears to me that a child could not be compelled to take his share as joint owner with the trustees. When he reaches the specified age he is entitled to require the trustees to pay him his share. In my opinion he is entitled to demand that his share shall be separated from the trust-estate and put under his own absolute control. It may well be that a conveyance to all the beneficiaries satisfies a direction to pay in equal shares. The trust is brought to an end and they are joint proprietors, not with the trustees, but with one another. Here the direction is to pay one child an equal share, leaving the rest of the estate to be held for the others. I can put no other construction on such a direction than that the share is to be separated from the trust-estate. The word "share" has here I think its natural meaning, and denotes something that is shorn off.

The share of each child is to be paid when he attains twenty-five, or in the case of daughters, when they marry. If all the children had lived there might have been nine "payments" to make, and it is certain that there must be several—each at a different time. I do not see in what manner this direction could be accomplished otherwise than by paying the shares in money, or in other words, the exercise

of the power of sale is indispensable to the execution of the trust.

The present case seems to be substantially the same as that of the *Lord Advocate* v. *Blackburn's Trustees*, in which Lord Fullerton held that the trust could not be executed without a sale, and therefore that there was conversion. I have not observed nor have I been informed that in any subsequent case his decision has been questioned. It was fully under the notice of the House of Lords in *Buchanan* v. *Angus* when the decision of the Court of Session was reversed. Lord Fullerton's judgment was quoted with approval as correctly expressing the law, and it was not said that he had applied it erroneously. I think that we must follow it.

The LORD JUSTICE-CLERK and LORD KYLLACHY concurred.

LORD YOUNG and LORD TRAYNER were absent.

The Court answered the first question in the negative, and the second question in the affirmative.

Counsel for First and Third Parties — Jameson — Grahame. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Party — Rankine — Napier. Agents — W. & F. C. MacIvor, S.S.C.

Friday, May 25.

FIRST DIVISION.

FRASER'S TRUSTEES *v.* FRASER AND OTHERS.

Succession—Trust-Disposition and Settlement—Option to Take Over Premises at Specified Price — Value Enhanced by Meliorations after Date of Settlement—Implied Revocation—Recompense—Mora.

By his trust-disposition and settlement dated in 1868, with relative codicil dated in 1871, a testator provided that his trustees should after his death carry on his business in partnership with his eldest son, that they should, when they thought proper, assume his second and third sons as partners, and that his said sons should have the option of taking over the business premises at a price specified. In 1872 the business premises were entirely destroyed by fire, and in 1873 the testator died. Prior to his death he had approved of plans, and had partially carried a scheme for the reconstruction of the business premises. After his death his trustees expended a large sum out of the testator's general estate in completing the scheme of reconstruction. The new premises were of considerably greater value than the old. The second son was assumed in 1884 and the third in 1891. Upon the latter's assumption the three eldest sons intimated that they desired to take over the premises in exercise of the option conferred upon them by the settlement.

Held (1) that the said sons had not lost the right to take over the premises by delay in exercising it; (2) that they were entitled to take them over at the price specified in the settlement; and (3) that they were under no obligation to compensate the general estate for the meliorations effected on the premises at its expense.

Hugh Fraser died on 12th February 1873, leaving a trust-disposition and settlement and codicil, dated respectively 24th November 1868 and 20th January 1871. He was survived by eight children, five sons and three daughters; with the exception of the eldest all the sons were under age.

At the date of his death the testator carried on business as a warehouseman in property belonging to him in Buchanan and Argyle Streets, Glasgow. This property had been acquired by the testator in April 1867 at the price of £26,000, and at the time of the purchase he had borrowed £20,000 on the security of the subjects. This loan still subsisted at the date of his death, and had not been discharged when this case was presented. Shortly after the acquisition of the property the testator enhanced its value by taking down a back building and erecting a new building in its place at a cost of about £3500. Early in 1872 the property was entirely destroyed by fire. The testator recovered £11,550, 13s. 6d. from insurance companies, and he gave security to the bondholders that he would rebuild the premises. Shortly after the date of the fire the testator had plans of a new building prepared, and having approved of them, he began to reinstate the premises, and at the date of his death on 12th February 1873 the work of re-erection had proceeded to a considerable extent (but not to such an extent as to render the buildings then inhabitable), and contracts had been concluded with tradesmen for the re-erection of the whole buildings conform to the said plans. The offer for the mason and joiner work was merely to execute the work at stipulated schedule rates, and the testator and the trustees might, as in a question with these contractors, have restricted the work to any extent they thought proper, the contractors being entitled merely to payment at scheduled rates for work actually done. The acceptance of the offer for the subordinate contracts contained a special proviso that the testator should be entitled at any time to "make alterations, and to increase, lessen, or omit any part of the work as he might think proper." The reconstruction was on a much more expensive scale than the original construction.

When the testator died work to the value of £5987, 4s. 3d. had been done on the new buildings, and had been paid for to the amount of £3987, 4s. 3d. by the testator. The trustees resolved to complete the buildings according to the plans which had been approved of, and were in course of