rests upon the evidence of the wife and her sister. Their evidence is competent, and if it is true then the defender has been proved guilty of adultery. The Lord Ordinary has given credence to these witnesses, and I can see in the proof no sufficient ground for doubting the accuracy of the conclusion at which he arrived.

The other cases of alleged adultery are proved only by one witness, and if these instances were the only ones relied on, I think the case would have been more difficult. We do not require, however, to consider these as substantive cases. The view I take of them is this, that, while the evidence of a single witness would not be sufficient to prove one isolated act of adultery, yet if a number of witnesses each speak to one act of an improper kind, such as going with prostitutes in a manner to excite suspicion, such evidence of single witnesses may be taken as tending to throw light upon such a case as that spoken to by the two witnesses. My opinion is, that taking the whole proof together, the act of adultery spoken to by the wife and her sister is proved, and that is sufficient for the decision of the case.

LORD YOUNG—I do not differ.

LORD TRAYNER — Two questions have been raised by the reclaimer under this reclaiming-note: the first—a question of law—has the Court jurisdiction to entertain and decide this case? the second—a question of fact—has the defender been guilty of the adultery alleged? The first question involves considerations of some nicety. Had I thought that on the evidence before us it could not be affirmed that the defender's domicile was a Scotch domicile—had it appeared on the contrary that the defender's domicile in Russia had not been abandoned but still subsisted—I would have sustained the plea of no jurisdiction, and that for the reasons stated by me in the case of *Low* to which the Lord Ordinary refers. Matrimonial domicile, as affording jurisdiction in cases of divorce, can scarcely now be maintained notwithstanding of the decision in the case of *Jack*. That decision was practically overruled by what took place in the House of Lords in the subsequent case of *Pitt*, and the whole current of recent judicial opinion is against the view that jurisdiction in divorce cases can be so founded. But, in my opinion, the defender has more than a matrimonial domicile in Scotland. The evidence adduced is sufficient to show that the defender abandoned his domicile in Russia, that he came to Scotland with the intention of making it his place of permanent residence, and that he has given effect to that intention by his constant residence there for the last ten or eleven years. No doubt the defender now says that he has not abandoned his domicile in Russia, and means now and has always meant to return there. I do not believe that statement. It is inconsistent with his words and actions during the past ten years, and it is now made by the defender only to aid him in supporting the plea which he has stated. I agree with the Lord Ordinary, therefore, in thinking that the defender having his domicile, and his only domicile, in Scotland, is subject to the jurisdiction of this Court.

On the question of fact also I concur in the opinion of the Lord Ordinary.

LORD YOUNG—I wish to say that I desire to abstain from expressing any opinion upon the question whether the Scottish Courts may not have jurisdiction to grant divorce in the case of married people in Scotland, although Scotland may not be the domicile of the spouses for all purposes.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—Trotter. Agent—George Jack, S.S.C.

Counsel for the Defender—Blackburn. Agent—William Green, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Low, Ordinary.

LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY *v.* MAIN.

Arbitration—Railway—Land Taken under Compulsory Powers — Compensation — Allowance for Prospective Profits.

In estimating the amount of compensation to be paid to a market gardener for land occupied by him, and taken by a railway company under compulsory powers, the arbiter awarded a considerable sum as compensation for loss of profits which, after hearing evidence, he considered the market gardener might reasonably have expected to make, by using the ground taken from him for the purpose of cultivating fruit and flowers in greenhouses of a particular kind, which he had intended to erect, but which had not been erected at the date of the notice to treat.

In an action by the company for reduction of the award, *held* (*aff.* judgment of Lord Low) that the arbiter had not acted *ultra vires* in awarding compensation on this ground, and therefore that his award was not subject to review by the Court.

Mr Thomas Main, market gardener, Milton, Dumbartonshire, was tenant from Mr Buchanan of Auchentorlie of a piece of ground extending to 10¼ acres, on a 19 years' lease from Whitsunday 1888, at a rent of £4 per acre. He occupied the ground for the purpose of market gardening, and had the liberty of erecting on it certain forcing houses. In 1892 the Lanarkshire and Dumbartonshire Railway Company, whose line, as authorised by their Act, intersected the

plot of ground leased by Mr Main, gave notice of their intention to take, and did take, for the purposes of the railway, two acres of the ground. The result of the intersection was to separate five acres on the south side of the railway from the remainder on the north side. The parties having failed to agree on the amount of compensation to be paid, a submission was entered into, and arbiters were appointed, and the arbiters not being able to agree as to an oversman, the Court appointed Sheriff Cheyne. He accepted the office and the submission was ultimately devolved upon him.

The claim lodged by the tenant in respect of his interest in the ground amounted to £19,500, being made in respect of (1) loss of profits which he would have made on the two acres of ground taken by the company during the fourteen remaining years of his lease; (2) the value of the stock in the ground taken; (3) the injurious affection of the rest of his garden; and (4) an allowance for severance damage. He stated that he had a scheme for developing his garden by erecting in it reversible glass horticultural houses, which he had invented and patented for the growing thereunder of fruit, flowers, and vegetables.

After a proof had been led for the parties, the oversman, on 9th November 1893, issued proposed findings. In a note appended to these findings the oversman thus stated the principles on which he proposed to deal with the question of compensation—"I have no doubt that the claimant must be dealt with on precisely the same principles as would be applied to the tenant of an agricultural farm, a strip in the centre of which was taken by a railway company, and he is therefore entitled to receive as compensation (1) the profits which, according to reasonable expectation, and after all contingencies are allowed for, he might have made out of the ground taken during the portion of his lease that was unexpired at the date of the notice to treat; (2) the value of the stock in the ground taken; (3) such allowance as the arbiter thinks reasonable in respect of injurious affection of the remainder of his garden; and (4) an allowance for severance damage."

In consequence of representations by the parties the oversman issued further proposed findings on 29th December 1893, and on 13th March 1894 third notes of proposed findings, and on 11th April 1894 he issued his final decree-arbitral, wherein he found and determined that the Company were liable to Main in the following amounts of compensation:—"(*First*) The sum of £2280 as the value at the date of the said notice to treat, 29th September 1892, of his (the claimant's) interest in the said two acres taken as aforesaid (including the value of the stock therein at the date of the said notice), and which sum of £2280 I find to be payable as on the 13th day of March 1893, being the date on which the said railway company took possession of the ground." He also awarded Main compensation, (*Second*) for injurious affection of the remainder of the subjects held in lease by him, and (*Third*) in respect of severance damage.

With regard to the award under the first head, it appeared from the notes appended to the various proposed findings issued by the oversman, that he was satisfied on the evidence that Main intended to utilise the ground for cultivating fruit and flowers in the manner alleged in his claim, and would soon have covered the ground with houses of the kind which he had patented but for the service of the notice to treat; that he considered the principle of reinstatement applicable to the case, provided ground contiguous to the claimant's holding could be obtained; that he was convinced by the proof that the claimant could obtain two acres contiguous to his holding and suitable for his business on lease at £6 per acre, and that this ground could be brought into the same state of preparedness for the claimant's business as the ground taken was at the date of the notice to treat in three years; and that he estimated the loss of profit which the claimant would have earned during these three years at the rate of £250 per acre a-year. He accordingly explained that his award of £2280 under the first head was made up of "(*a*) £1390 as the present value of three years' profits of two acres, at £250 per acre; (*b*) £450 to meet the increased rent which he will have to pay for the substituted ground, the probable diminution of profits from that ground in the last eleven years of the lease due partly to the proximity of the railway and road, and partly to the increased cost of erecting the houses owing to the fall of the ground and the general inconvenience attending the re-instatement; and (*c*) £440 as the value of the stock in the ground at the date of notice."

On 15th May 1894 the Lanarkshire and Dumbartonshire Railway Company raised an action against Mr Main, concluding for reduction of the above proposed findings and decree-arbitral.

The pursuers averred that the land at the date of their proposal to treat was only to a small extent used as a market garden; that the defender had only erected on it one small vinery and the forcing-houses which he had liberty to erect under his lease; that at this date none of his patent houses had been erected, nor had their practicability been in any way tested, though more than two years had elapsed since the patent; that to build these patent houses would cost a sum of £3000 per acre, and that the defender had no capital to carry out his scheme.

They pleaded, *inter alia*—"(1) The said proposed findings, further findings, third notes of proposed findings, and decree-arbitral, are *ultra vires*, irregular, and incompetent, and ought to be reduced, with expenses to the pursuers, in respect that (1) compensation has been awarded for loss of profits to be derived, not from the ground as it was leased to the defender, or as it existed at the date of the pursuers' notice to treat, but from buildings and houses which were not erected by the defender on the ground

leased by him at the date of the notice to treat by the pursuers, but were alleged by the defender as intended to be erected by him at some future time.

The defender averred that under his patent system he would have made very large profits from the ground, and that the compensation awarded was very moderate, and pleaded—"(2) The arbiter's proceedings challenged being regular and within his powers, this action is unfounded. (3) The oversman having considered and given all due effect to the contentions of the pursuers, his award is not subject to review, and the defender is entitled to absolvitor."

The Lord Ordinary on 30th November 1894 allowed the pursuers a proof of their averments that the oversman in fixing the amount of compensation had allowed the defender compensation for the prospective profits to be derived, not from the ground included in the notice to treat, but from houses and buildings which the defender alleged that he proposed to erect on the ground.

The oversman was examined as to the principles by which he had arrived at his determination, and explained the manner in which he had arrived at his award under the first head, his explanation agreeing with that already set forth above as given in the notes to his proposed findings.

The Lord Ordinary (Low) on 9th January 1895 sustained the defender's pleas-in-law, repelled the reasons of reduction, and assoilzied the defender from the conclusions of the summons.

"*Opinion.*—The defender is the tenant of a market garden at Milton, Dumbartonshire, which he holds under a lease for nineteen years from Whitsunday 1888. The pursuers, in the exercise of their statutory powers, took some two acres of the garden for the purpose of constructing their line of railway. The parties having failed to agree as to the amount of the compensation to be paid by the pursuers to the defender, appointed arbiters, and the arbiters not being able to agree as to an oversman, the Court appointed Sheriff Cheyne to be oversman. He accepted the office, and ultimately the submission was devolved upon him.

"The present action is brought for reduction of (1st) proposed findings issued by the oversman on 8th November 1893; (2nd) further findings, dated 29th December 1893; (3rd) third notes of findings, dated 18th March 1894; and (4th) decree-arbitral, dated 11th April 1894.

"The main ground upon which reduction is sought, as stated in the pursuers' pleas-in-law, is as follows:—'Compensation has been awarded for loss of profits to be derived, not from the ground as it was leased to the defender, or as it existed at the date of the pursuers' notice to treat, but from buildings and houses which were not erected by the defender on the ground leased by him at the date of the notice to treat by the pursuers, but were alleged by the defender as intended to be erected by him at some future time.'

"*Ex facie* of the decree-arbitral and the proposed findings of which reduction is sought, the arbiter has not gone beyond that which was submitted to him, because the first sum in the decree-arbitral is awarded 'as the value at the date of the said notice to treat of his (the defender's) interest in the said two acres taken as aforesaid.'

"Further, in the note appended to the proposed findings of the 8th November 1893, of which reduction is sought in the first place, the oversman states the principle which he has applied in fixing the amount of the compensation. He says that the defender 'is entitled to receive as compensation (1) the profits which, according to reasonable expectation, and after all contingencies are allowed for, he might have made out of the ground taken, during the portion of his lease that was unexpired at the date of the notice to treat.' No objection was taken, or, in my opinion, could be taken, to the principle there laid down.

"It is therefore clear that the oversman was under no error in regard to the question which was submitted to him, and that the sum which he has awarded is the value, in his opinion, of the defender's interest in the land taken, and of that only.

"Now, there is no doubt that the general rule is that it is not competent to inquire into the method by which the oversman has arrived at the amount awarded. The rule was stated thus by Lord Chancellor Chelmsford in the case of *The Duke of Buccleuch* v. *Metropolitan Board of Works*, 5 E. & I., App., p. 418—'The defendants were not at liberty to ask the umpire what were the elements which entered into his consideration in determining the *quantum* of compensation.'

"But then the case may occur in which, although *ex facie* of the award, the oversman has given compensation only in respect of the matter submitted to him, and has admittedly not intended to give compensation for anything else, he may yet, through error, have, as matter of fact, included in the amount awarded, compensation for some loss or injury which did not fall within the submission. Such a case was figured by Lord Chelmsford in the judgment to which I have referred in these words—'The defendants had an undoubted right to know from the oversman whether in his estimate of the compensation he took into consideration any matter not included in the reference, and therefore beyond his jurisdiction.'

"The case of *The Glasgow City and District Railway Company* v. *M'George, Cowan, & Galloway*, 13 R. 609, is an example of that rule. There an Act of Parliament allowed in certain cases compensation for structural damages only. The oversman gave an award which, *ex facie*, was only for structural damage. The railway company brought a reduction of the award on the ground that, as matter of fact, the oversman had included in the amount awarded loss sustained by deterioration in the marketable value of the property, as well as loss sustained by structural injury, and the First Division held that the averments were relevant, and allowed a proof.

"It therefore appeared to me that inquiry was not excluded by the terms of the decree-arbitral and notes, as to whether, as matter of fact, the oversman had allowed to the defender compensation for prospective profits to be derived, not from the ground taken, but from a business which the defender proposed to carry on in greenhouses which he alleged that he had intended to erect. I accordingly allowed the pursuers a proof of their averments to that effect, and they have examined the oversman.

"The facts appear to be as follows:—When the pursuers gave notice to treat for the ground in question, there were fourteen years of the lease still to run. The claim of the defender was based upon the allegation that he intended to use the ground, and had been in the course of preparing it for growing fruit according to a particular method of culture. That method was to put glass houses of a certain construction over the plants until the fruit had attained a certain stage of developement, when the glass would be removed and the fruit allowed to ripen in the open air. The oversman, in his examination, was not asked, and does not say, anything about the removal of the glass houses at a certain stage, but the pursuers in their condescendence state that that was the case.

"The oversman has admittedly taken into consideration, in fixing the amount of compensation, the profits which might have been derived from the land if it had been cultivated according to that method, and the pursuers contend that in doing so he exceeded his powers, because he necessarily took into account not only the profits which might have been derived from the ground, but also, and indeed chiefly, profits to be derived from the glass houses. That must have been the case, they argue, because the oversman admits that the profits which could be derived from the ground without the houses would be comparatively small, while the profits which he estimates that the defender might have made if the houses had been erected, are enormous.

"Now, the Court has nothing to do with the amount awarded, although it does appear to a very large, considering the extent and character of the ground taken. Further, the Court cannot consider whether the evidence justified the conclusions at which the oversman arrived, whether as regards facts or amounts. To do so would be to review the decision of the oversman.

"There are certain matters of fact upon which the oversman has been satisfied by the evidence. In the first place, he was satisfied that the purpose to which the defender intended to devote the ground leased by him, and for which he had been preparing the ground, was to grow fruit according to the method of culture which I have indicated. In the second place, he was satisfied that if the Railway Company had not stepped in, the ground taken by them would shortly have been cultivated according to that method. In the third place, he was satisfied that the profits which would have been derived from the ground would have been very largely increased.

"The question is, must the oversman be held to have awarded compensation not only for the loss of profits which the defender would have made out of the ground taken, but for loss of profits which he would have made out of the glass houses which he proposed to erect upon the ground? Now, of course, in one sense, that question must be answered in the affirmative, because the oversman has taken into consideration profits which could only have been earned by the aid of the glass houses. But, on the other hand, the view which the oversman took was this:—The profits which he took into consideration were profits to be derived from growing fruit trees upon the lands, and the glass houses were only to be used as covers to shelter the plants and force on the growth of the fruit, and were therefore nothing more than a means of increasing the crop which the ground would yield. The oversman says that he regarded the glass covers just as he would have regarded the application of manure—as a means of increasing the productiveness of the soil.

"I have pointed out that the condition of the argument is, that the oversman, who is final upon the matter, is satisfied that the defender took the ground for the purpose of cultivating it according to the method indicated, that he was preparing the ground to be so cultivated, that if the company had not taken the ground it would have immediately been so cultivated, and that the results would have been very profitable to the defender.

"In such circumstances I find myself unable to affirm that it was incompetent and *ultra vires* of the oversman to take the profits in question into consideration, unless it can be said that it is necessarily incompetent for an arbiter in any case to take into consideration a proposed use of lands to be held under lease, but to which they have not actually been put when they are taken by the company.

"That may be the general rule, but I do not think that it is a rule of universal application. On the contrary, I think that many cases may be imagined in which the application of any such hard and fast rule would lead to injustice.

"Suppose, for example, the case of waste lands being taken upon an improving lease, and a railway company taking them while the process of reclamation was in progress. The lands, when the company took them, might be of little value, but it might also be proved beyond doubt that if the tenant had been allowed to complete the reclamation, and to cultivate the lands during the remainder of the lease, he would have obtained very large returns from them. In such a case I do not see how the tenant could be fully and fairly compensated for his 'interest' in the lands, unless consideration was had of the use which would have been made of, and the profits which would have been derived

from, the lands during the remainder of the lease.

"I am therefore of opinion, although the question appears to me to be one of great difficulty, that the pursuers are not entitled to have the award set aside. I do not think that it can be set aside unless it can be affirmed that it was clearly and necessarily incompetent for the oversman to take into consideration to any extent the profits in question, because the Court cannot inquire as to the method by which the oversman has arrived at the amount awarded, nor consider whether he has adopted the best method, nor even whether he has adopted a reasonable method."

The pursuers reclaimed, and argued—The oversman had decided more than was submitted to him in the reference, and therefore his decision should be set aside. There was no peculiarity in this land entitling the defender to be awarded such an unreasonable amount, but the subjects out of which the profit was to be made—if there were to be such a profit—were the buildings to be erected by the defender, which as yet he had not erected. The oversman had acted *ultra vires* in taking them into his consideration, and the prospective damage which might accrue from loss of profit made on them was too remote to take into consideration—*Hamilton* v. *Northern Lighthouse Commissioners*, March 5, 1886, 13 R. 710. The principle that prospective damage, which might never exist, was not to be reckoned in estimating compensation was further exemplified in the cases of *Queen* v. *Poulter*, 1887, L.R., 20 Q.B.D. 132; and *in re Marylebone Improvement Act*, 1871, L.R., 12 Eq. 389. If the oversman were to take into account future profits at all, he should have estimated them at ordinary market garden rates, and not on this purely hypothetical scale depending on the erection of houses which might never be built.

Argued for the defender — The Court had no power to review the methods by which the oversman had arrived at his conclusion, or the amount of his award—*Adams* v. *Great North of Scotland Railway Company*, November 27, 1890, 18 R. (H. of L.) 1. He had not acted *ultra vires* by proceeding on the principle that compensation was to be given for future profits. In *Ripley* v. *Great Northern Railway Company*, 1875, L.R., 10 Ch. 435, compensation had been allowed in respect of profits to be derived from supplying water to mills, which were not built at the time, but were only in contemplation. The same principles were followed in *Queen* v. *Brown*, 1867, L.R., 2 Q.B. 630; and *Brown* v. *Mayor of Liverpool*, 33 L.J., Q.B. 15. It was the oversman's duty to go into the facts of the case, and to give weight to all the circumstances of it in awarding compensation—*Stebbing* v. *Metropolitan Board of Works*, L.R., 6 Q.B. 37. There was nothing *ex facie* illegal in the award here, and the pursuers were really only attacking the amount of it. The tenant had been prepared to make a legitimate use of his land, and the oversman had a perfect right to estimate any profit which he might legitimately make.

At advising—

LORD KINNEAR—The pursuers the Lanarkshire and Dumbartonshire Railway Company seek to reduce a decree-arbitral pronounced by the oversman in a reference between them and the defender for the purpose of determining the compensation to be paid for land taken for the formation of their railway. The subject of compensation is the tenant's interest in 2234 acres of ground occupied by the defender as a market garden under a lease for nineteen years from Whitsunday 1888, and extending in all to something over ten acres. The rent payable by the defender was £4 an acre, and the oversman has awarded £2280 as the value of the defender's interest in the two acres or thereby taken by the railway company, besides an allowance of £650 for injurious affection of the remainder of the ground, and of £1100, or alternatively of various lesser sums according as accommodation works shall or shall not be provided in respect of severance damage. In a note of the proposed findings which he issued to the parties, the oversman explains that his award is based on an estimate that the defender would have earned a profit of £250 an acre from the ground in question, if it had not been taken from him by the railway company. The value thus assigned to the tenant's interest is certainly out of all proportion to the amount of his rent; and the pursuers maintain that the oversman has reached a sum which they allege to be extravagant by taking into account grounds of damage which are not included within the reference to him. The ground of action is therefore an excess of jurisdiction which this Court has authority to redress. The decree-arbitral, on the face of it, does not appear to be open to objection, but the oversman has been examined as a witness for the purpose of showing that he assumed a jurisdiction over matters which were not submitted to him. Some parts of the evidence appear to be of doubtful competency, inasmuch as the examination seems to have been directed to the ascertainment, not only of the subject-matter over which the oversman exercised jurisdiction, but also of the elements which he took into consideration in determining the amount to be awarded. But in the result the examination of the oversman adds little that is material to the statements which he issued to the parties along with his proposed findings in explanation of his procedure and of the view which he took of the questions before him. It appears that the defender intended to make use of the land taken, for the cultivation of flowers and fruits, according to a particular method of his own by the aid of glasshouses and stoves; that at the time the railway company interfered he had brought the land into a state of preparation for this method of cultivation, but that the glass-houses had not been erected. And the oversman explains that if he were to get new ground in place of that taken from him, it would require three years to bring it into the same state of preparedness for the tenant's business as the ground taken was at the

date of the notice to treat. The oversman has therefore thought him entitled by way of compensation to the amount of profits which he would have earned from the ground taken during the three years succeeding the date of the notice. I think it clear that we have no jurisdiction to review the judgment of the oversman on the questions of fact involved in his determination. We must assume that he had sufficient evidence before him to justify his conclusion (1) that if the claimant's land had not been taken from him it would have been cultivated in the manner described; and (2) that if so cultivated he had a reasonable expectation of earning profits from that method of cultivation to the amount which the oversman has fixed. And accordingly the pursuers' objection is not that the compensation awarded is excessive, assuming that the oversman was entitled to take account of the particular method of cultivation intended by the claimant, but that he was not entitled to take that matter into account at all. Their position is very clearly stated in the first branch of their first plea-in-law, where they say the decree-arbitral is *ultra vires*, "in respect that compensation has been awarded for loss of profits to be derived, not from the ground as it was leased to the defender, or as it existed at the date of the pursuers' notice to treat, but from buildings and houses which were not erected by the defender on the ground leased by him at the date of the notice to treat by the pursuers, but were alleged by the defender as intended to be erected by him at some future time." The pursuers' argument is that, as matter of law, and apart altogether from all questions of fact or probability, the defender's interest must be valued on the footing that he would obtain no greater results from the ground than an ordinary market gardener could get from it, in the condition in which it was when the notice to treat was served. But it is a well-settled rule in the construction of the Lands Clauses Act that when lands have been taken in the exercise of powers of compulsory purchase, the owner or occupier, as the case may be, is entitled not only to the market value of his interest, but to full compensation for all the loss which he may sustain by being deprived of his land. There is no other way of ascertaining the loss thus occasioned than by estimating the profits which might have been made if the land had not been taken. The case of *Ripley* v. *The Great Northern Railway Company* is an authority in point. It is said that in the present case the defender's profits were purely hypothetical, that they depended on expenditure which had not been made, and that there was no sufficient experience to justify any estimate of their probability or amount. But prospective profits are in all cases dependent on contingencies that are uncertain, and if they are to be taken into account at all, the degree of uncertainty that should exclude them from computation must be a question for the arbiters. The question whether the expenditure necessary for cultivating according to a particular scheme would or would not have been incurred is just one of those contingencies upon which the expectation of future profits depends. The pursuers' argument must therefore be that, even if it were assumed that the arbiter was satisfied on reasonable grounds that the claimant's expectation of profits to a certain amount by a particular method of cultivation was, if not certain—for prospective profits cannot in any case be absolutely certain—at all events so highly probable that a reasonable man in the conduct of his own affairs would act upon it as for practical purposes a certainty, still they would not be entitled to take such profits into account in awarding compensation. But loss of profits which might reasonably have been anticipated seems to me a direct consequence of the loss of the land from which they might have been derived. If we sustain this action, therefore, we must either hold that a reasonable expectation of future profits is in no case to be taken into account, or else that in each particular case the question whether the claimant's expectation was reasonable or not is a question for the Court, and not for the exclusive jurisdiction of the arbiters or oversman. I am not prepared to adopt either of these views. I agree with the Lord Ordinary that the question whether the profits claimed by the defender in this case ought to have been taken into account or not was a question for the arbiter, because it depends not upon any considerations which are excluded from his jurisdiction, but upon an estimate of probabilities affecting a question which the parties have submitted to him, and to him alone. The alternative view which appears to have been maintained to the oversman, and was maintained in the course of the argument, that the claimant should have the profits which an ordinary market gardener would make out of the land by the ordinary methods of cultivation, appears to me to stand upon no tenable reason. If the claimant is entitled to have profits taken into account at all, it must be a profit which he satisfies the arbiter he would probably have earned according to the methods of cultivation which he designed to adopt; and there can be no authority for substituting for that some other profit which might have been earned by a less expensive and less lucrative method of cultivation, but which the claimant himself never intended to follow.

Upon the question whether the compensation awarded is or is not excessive, I do not express, and I have not formed, any opinion. The reasons which induced the oversman to award the amount which he has actually fixed are not fully before us. It is clear upon the proceedings that the arbiter heard evidence upon that question, and if he has erred he has not erred from want of consideration, because he appears to have reconsidered more than once the conclusions at which he originally arrived; and the notes which are before us make it evident that he directed a most attentive and careful judgment to the questions

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