make up our minds what is the sum which Glasgow has got to raise by assessment? And I hold it to be clear that it is simply her proportion of the annual repayment of the loan, towards which repayment Partick and Renfrew contribute their annual quota. Glasgow's own proportion of that annual repayment is all that the Corporation has got to meet from its own resources, and it has no authority to assess for anything else.

Now, what is sued for in the present action is something totally different. The sum which the pursuers treat as Glasgow's share of the cost of the sewer is not a proportion of the total cost of the sewer from its upper end to its outfall calculated according to the valuation of the then contributory municipalities, which is what the statute prescribes; it is the cost of that part of the sewer which is locally situated within Glasgow. Secondly, it is the capital expenditure which is being levied, and not an annual payment in extinction of the loan, which is what the statute prescribes, and which is all that the Corporation of Glasgow has in fact to pay. The action is therefore fundamentally unsound.

This ground of decision is on a question previous to that which was also largely discussed, viz., what is the proper method of assessing for Glasgow's contribution. The argument of the pursuers is so completely invalidated by the error which I have pointed out that it does not afford useful aid to the determination of that question. The pursuers go the length of denying on record (in Cond. 7) that the sewer was constructed under the Act of 1895, and accordingly their theory is inconsistent with their inquiring what method of assessment is appropriate to raise the sum prescribed by the Act of 1895. Yet so far as the method of assessment was concerned that is the true question. As the present action does not raise it we do not decide it. Whether there is really any difficulty about it—whether the Public Health Act, the powers of which are in the pursuers, does not contain appropriate machinery—are questions not *hujus loci*. The theory of the Act of 1895 is that Glasgow possesses assessing powers for raising the annual sums which are required. But whatever they are, those powers can never alter the sum which alone they are authorised to raise.

I am for recalling the Lord Ordinary's interlocutor and dismissing the action. I may add that the Lord Ordinary's opinion contains a very fair statement of the case, and in my view the penultimate sentence of the first branch of that opinion gives away the interlocutor.

Lord Adam and Lord Kinnear concurred.

Lord M'Laren was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuers—Lees—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Defender — Salvesen — Cook. Agents—Simpson & Marwick, W.S.

Wednesday, July 12.

SECOND DIVISION.

URQUHART'S EXECUTORS *v.* ABBOTT.

Trust—Succession—Constitution of Trust—Absolute Conveyance or Conveyance in Trust.

A testator left a will and a codicil both of the same date. By the will he left and bequeathed to his wife "my whole estate, heritable and moveable, whom I appoint my sole executrix, under the obligation of her paying all my just and lawful debts, and bringing up and educating my children, and I appoint her the guardian and curator of my children, and I grant her full power of sale of said estate." He further appointed a solicitor whom he named "to be law-agent on the said estate." By the codicil he appointed two persons *nominatim* "to act along with my wife as executors and curators to my said children."

Held that these provisions constituted a trust in favour of the testator's wife and children in the three executors named, and did not entitle the widow to an absolute conveyance of the testator's estate subject to a mere personal obligation to maintain and educate the children.

Succession—Legitim—Exclusion of Legitim—Partial or Universal Settlement.

By his testamentary deeds a testator conveyed his estate to executors as trustees for payment of his whole estate to his wife, subject (1) to payment of his debts, and (2) to payment of the cost of upbringing and educating his children.

Held that the testator's children were entitled to legitim out of his moveable estate, and also to the expense of their upbringing and education out of the remainder of the whole trust-estate, but only in so far as the shares of legitim falling to the children were insufficient for their upbringing and education.

John Smith Urquhart, distiller, Elgin, died on 13th February 1898. He had been twice married, and was survived by five children by his first marriage, of whom two were minors and the others in pupilarity. He was also survived by his second wife Mrs Mary Simon or Urquhart, and by one child of his second marriage Olivia Urquhart, born in February 1896. There was no marriage-contract between Mr Urquhart and either of his wives.

On 29th November 1897 the said John Smith Urquhart executed two testamentary writings in the following terms:—"I, John Smith Urquhart, in the event of my death, do hereby leave and dispone to my wife Mrs Mary Simon or Urquhart, all and whole my whole estate, heritable and moveable, whom I appoint my sole executrix, under the obligation of her paying all my just and lawful debts, and bringing up

and educating my children, and I appoint her sole guardian and curator of my children, and I grant her full power of sale of said estate, and I appoint William Scott, solicitor, Elgin, to be law-agent on the said estate, he receiving the usual remuneration for his trouble." The second was as follows —"I appoint the Reverend Robert Cowan, Elgin, and Charles C. Doig, architect, Elgin, to act along with my wife as executors and curators to my said children."

The testator left both heritable and moveable estate. The moveable estate amounted to £3709, 13s. 6d, and the nett total estate, both heritable and moveable, to £6259, 13s. 6d.

Some time after the testator's death his widow married John Carson Abbott, with whom she went to live in Birmingham. Her child Olivia Urquhart lived with her. The testator's other children were boarded in Elgin, where they attended the Elgin Academy, a high class secondary school. Mrs Abbott did not desire the children of the testator's first marriage to live in family with her, but was willing to concur with their guardians in making all reasonable provision for their maintenance and education.

In these circumstances various points arose, for the settlement of which a special case was presented to the Court by (1) Mr Urquhart's executors appointed in his testamentary writings; (2) Mrs Abbott, with consent of her husband; and (3) Mr Urquhart's children and their curators and guardians.

The questions at law were, *inter alia*, the following:—"(1) On a just construction of the settlement and codicil of the said John Smith Urquhart, is the second party beneficially entitled to his whole estate, heritable and moveable, and entitled to have said estate conveyed to her, or has a trust been thereby constituted in the persons of the first parties? (10) Are the testator's children entitled to claim legitim out of his estate in addition to implement of the obligation imposed by his settlement on the second party with regard to the upbringing and education of the children?"

Argued for the third parties—*On the first question*—By the testator's settlement and codicil a continuing trust was constituted for payment of the testator's debts, and thereafter (1) for application of the free annual income of the testator's estate, in the first place, for the upbringing and education of the testator's children in a manner suitable to their station (which application was to continue as regards each child until he or she was actually self-supporting); and in the second place for payment to the second party of the balance of the income not expended upon the children; and (2) for payment of the capital of the testator's estate to the second party on the foregoing trust purposes being fulfilled. It *Ainslie* v. *Ainslie*, December 8, 1886, 14 R. 209, the word "executors" had been construed to mean "trustees." It was plain in the present case from the obligations laid upon the executors, from the power of sale granted to them, and from the appointment of a law-agent on the estate that a continuing trust was constituted by the deeds—*Macpherson* v. *Macpherson's Curator Bonis*, January 17, 1894, 21 R. 386. 2. *On the tenth question*—In any view, the testator's children were entitled when they were of age to claim legitim out of his moveable estate without prejudice to the obligations imposed by his settlement upon the second party by providing for their upbringing and education — *Howden* v. *Crichton*, May 18, 1821, 1 S. 14; *Nicolson's Assignee* v. *Macalister's Trustees*, March 2, 1841, 5 D. 675; *White* v. *Finlay*, November 15, 1861, 24 D. 38.

Argued for second party—On a sound construction of the settlement and codicil the second party was beneficially entitled to the whole estate, heritable and moveable, of the testator, and was entitled to have the estate handed over to her. The obligation imposed on her of bringing up and educating the children was a purely personal obligation. The children and their guardians had only a right to enforce performance by her of this personal obligation, and to apply for behoof of the children the funds which she might hand over to them from time to time for the upbringing and education of the children, and her obligation was limited to the period when the children respectively reached an age when they were able to maintain themselves. This was a small estate, and the intention of the testator was to give his widow a free hand in dealing with it, and not tie her down to have to invest the funds in trust investments. No trust was constituted, and the widow was entitled to deal with the funds as she chose. — *Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927; *Lamb* v. *Eames*, 1871, L.R., 6 Ch. App. 597. The case of *Macpherson*, *supra*, did not apply, as in that case there was unquestionably an absolute gift, while *Ainslie*, *supra*, was a typical case in which it was absolutely certain that the testator in appointing executors had meant to appoint trustees. 2. *On the tenth question*—It was settled that a provision under a partial settlement did not exclude legitim if the latter was not specifically excluded. But that was not the case where the settlement was universal. In such a case if benefit was taken from a provision, he who took the benefit was not also entitled to legitim. In short, the children were not entitled to legitim over and above the provisions in their favour in the settlement — *Macfarlane's Trustees* v. *Oliver*, July 20, 1882, 9 R. 1138; *Davidson's Trustees* v. *Davidson*, July 15, 1871, 9 Macph. 995. The case referred to on the other side did not help their case, In *Howden*, *supra*, the settlement was treated as a partial one; in *Nicolson*, *supra*, it was held that the legacy must be imputed towards legitim, and the case of *White*, *supra*, was entirely in favour of the contention of the second party.

LORD TRAYNER—Of the ten questions put to us for determination it turns out, on the argument addressed to us, that only two require to be answered, and these are the first and the last.

The first question is not unattended with

difficulty. The earlier words of the will under construction express an unqualified conveyance in favour of the second party of the whole estate, heritable and moveable, of the testator, burdened only with an obligation to pay the testator's debts and to bring up and educate his children. But taking the will and codicil together, I think it appears that the testator did intend to create a trust in the persons of the first parties. I am led to this conclusion by the fact (1) that Mr Cowan and Mr Doig were conjoined with the second party as executors, that is, as persons charged with the execution of the testator's will—a provision inconsistent with the idea of an absolute conveyance to the second party for her own use. If the second party was to receive under the will the whole estate of the testator, any conjunction of her with others to manage her own affairs (for that is what it would come to) was unnecessary. If, on the other hand, the testator's estate was to be administered for behoof of his widow, and (to some extent) for behoof of his children, then the appointment of Mr Cowan and Mr Doig to assist in that being done was natural enough. (2) The power of sale granted to the executor is a reasonable provision in the view of a trust, and a not very intelligible provision if the estate was conveyed to the second party as her absolute property: and (3) the appointment of a law-agent "on the said estate" is, like the granting of a power of sale, more in accordance with the idea of trust than absolute conveyance to the second party. These considerations all point to the view that the testator understood and intended that the estate would remain in the hands of the executors for some time, and for the fulfilment of certain purposes, in the execution of which "the estate" would require the assistance of a law-agent, and the executors might require to have and to exercise a power of sale. I think therefore that the second branch of the first question should be affirmed.

With regard to the tenth question, I entertain no doubt that the children of the testator are entitled to claim legitim. It is their legal right, and has not been in any way excluded or discharged. It has been suggested that the children must make their election between their legitim and the provisions of the will in their favour. But the will confers nothing on the children. It puts on the second party an obligation with regard to the children which would have fallen on her as a debt of the deceased had the children never been mentioned. The children have therefore nothing with regard to which they can exercise an election.

The children, however, can only claim from their father's estate what they would have claimed from him had he been alive, and that is, the amount necessary for their maintenance and upbringing beyond what they possess in their own right. Accordingly, if the children get their legitim they can only claim from their father's estate whatever may be necessary beyond their legitim for their maintenance until they are able to maintain themselves. How large their claim may be, and how long demandable, depend on circumstances that cannot now be determined or foreseen. These things will depend upon the health of the children, their capacity to earn a livelihood, &c. In this view, and to the effect I have explained, I think the tenth question should be answered in the affirmative.

Lord Moncreiff—The first question of law put to us is attended with considerable difficulty. The broad question raised is whether under Mr Urquhart's settlement and codicil a trust is constituted; or whether, as his widow the second party maintains, she is entitled to have the whole estate, heritable and moveable, handed over to her, subject only to the purely personal obligation of bringing up and educating the testator's six children, the youngest only of whom is the second party's child. On consideration of the two testamentary writings read together I am of opinion that the former is the true view. The settlement is most inaccurately worded, but even taken by itself I think it constituted a partial trust. The testator professes to dispose of, and I think has disposed of, his whole estate, heritable and moveable, which he conveys to his wife, whom he appoints his sole executrix. He does not, as in the case of *White* v. *Finlay*, 24 D. 38, merely bequeath to her the dead's part by appointing her universal legatory. But while he conveys his whole estate to his wife he does so "under the obligation of her paying all my just and lawful debts, and bringing up and educating my children." The second party maintains that these words merely import a personal obligation. It might be sufficient to answer that this cannot be so, because the payment of the testator's just and lawful debts, which must be paid out of his estate, are mentioned in connection with the bringing up and education of his children.

But the deed proceeds:—"I grant her full power of sale of said estate," including heritable estate, a power which would have been unnecessary had a trust not been intended, and "I appoint William Scott, solicitor, Elgin, to be law-agent on the said estate," that is, the whole estate, heritable and moveable, "he receiving the usual remuneration for his trouble." This appointment again seems to indicate a trust of considerable duration. Therefore, taking the settlement by itself I think its construction is fairly enough given in the third question put to us, namely, that it constitutes a family trust under which the widow should hold the estate in trust, first, for payment of debts; secondly, for the maintenance of the family, including the bringing up and education of the children; and thirdly, after those purposes have been fully satisfied, for payment to herself of what remains of the capital of the estate.

Next we have to consider the effect of the codicil, by which the testator appoints two gentlemen "to act along with my wife as executors and curators to my said chil-

dren." Does this simply mean that these gentlemen are to act as executors in the ordinary sense of the word for the purpose of ingathering the estate, paying debts, and thereafter making over the whole estate to the second party; or does it amount to the appointment of additional trustees who are to hold and assist in administering the trust funds when they have been ingathered? I think the latter is the true meaning. It was unnecessary to appoint additional executors merely for the purpose of ingathering the moveable estate and paying debts. Then they are to "act along with" the widow, and they are to be curators along with her to the children, an office which undoubtedly will be of considerable duration.

On the whole matter I think, in the first place, that the terms of the codicil strengthen the view that a trust was created by the settlement; and secondly, that the testator intended the so-called "executors" to act as trustees along with the second party for the purposes which I have indicated.

The only other question which it is necessary for us to answer is the tenth: "Are the testator's children entitled to claim legitim out of his estate in addition to implement of the obligation imposed by his settlement on the second party with regard to the upbringing and education of the children?" If by this it is meant to be asked whether the children are entitled to claim legitim, and in addition to throw the whole of the expense of their maintenance and education upon the rest of the estate, I should answer the question in the negative. But I am prepared to answer the question in the affirmative with this qualification, that, *primo loco*, legitim if claimed shall be applied or imputed towards the maintenance and education of the children. If in this way the legitim is exhausted, the children will be entitled thereafter to be maintained and educated at the expense of the trust.

The settlement is a total settlement, and deals with the whole estate, including the legitim fund, and although no provisions are made for the children beyond what may be required for their maintenance and education, those provisions will in the end probably considerably exceed the amount of the legitim fund. I am therefore of opinion that the children are not entitled both to claim legitim and throw the whole burden of their maintenance and education on the second party.

At the same time the settlement does not exclude the claim of legitim; and therefore I think that on the footing of equitable compensation a child who claims and receives legitim will be entitled, when the legitim has been exhausted in maintaining and educating him, to receive such additional advances as may be required for those purposes out of the trust-estate; *Macfarlane's Trustees* v. *Oliver*, 9 R. 1138.

I therefore arrive at the same result as Lord Trayner.

Lord Justice-Clerk—I have read Lord Trayner's opinion and concur therein.

Lord Young was absent.

The Court pronounced this interlocutor:—

"Answer the second alternative of the first question therein stated in the affirmative: answer the tenth question therein stated by declaring that the children of the said deceased John Smith Urquhart are entitled to legitim out of his moveable estate, and also to the expense of their upbringing and education out of the remainder of the whole trust-estate of the said deceased John Smith Urquhart, but only in so far as the shares of legitim falling to the said children are insufficient for their upbringing and education: Find it unnecessary to answer the other questions, and decern."

Counsel for First Parties—C. D. Murray. Agent—Alex. Mustard, S.S.C.

Counsel for Second Party—Guthrie, Q.C.—Chree. Agents—Mill & Bruce, S.S.C.

Counsel for Third Parties—Ure, Q.C.—M'Lennan. Agent—Alex. Mustard, S.S.C.

Wednesday, July 12.

FIRST DIVISION.

[Sheriff Court of Forfarshire.

CHRISTIE *v.* ROBERTSON.

Reparation—Slander—Defamatory Meaning—Rixa.

C, who had purchased a horse at an auction sale, on seeing it being led off by R, who was under the *bona fide* impression that the horse had been sold to him, charged R with attempting to steal the horse. In the course of the quarrel which ensued R was proved to have said of C that he was a "liar," a "bloody liar," and that "he should have been in the hands of the police twenty times during the past five years."

Held that the words were not defamatory in respect (1) that they were used *in rixa* as a retort to a charge of theft, and (2) contained no charge of a specific crime.

Per Lord M'Laren—"If a party under whatever amount of provocation makes a definite charge of crime, or a charge of dishonest conduct against another, giving such point in regard to time and circumstances as to lead those who were present to believe that the charge was seriously made, it is no defence that the words were spoken in heat."

An action was raised in the Sheriff Court of Forfarshire at the instance of James Christie, farmer, Forfar, against William Robertson, horse-dealer, Forfar, concluding for payment of £200 as damages in respect of slander said to have been uttered at a displenishing sale at Bogindollo farm on 13th August 1898.

The pursuer averred that at the sale he purchased a horse for the price of £5, 10s.,