Now, it appears from the defender's own evidence that on the 27th May he notified to the plasterer to proceed with his work. I do not think that I am misstating the evidence when I say that when that notice was given the defender did not know that the masons had completed their part of the bottoming. If the defender had inspected the work at that stage, or sent an assistant to do so, he would, if the masons' story is true, have discovered that 15 inches of the masons' part of the bottoming still required to be done, and if the plasterer's story is true he would have found that the whole of the bottoming, including the 3 inches which the plasterer should have supplied, had been filled in, but that the upper part of it was not conform to specification and must be immediately rejected, in which case he would not have granted certificates as he did.

Instead of doing this, however, he trusted to the experienced contractors whom he had employed, and without finding out how matters stood told the plasterer to proceed, with the fatal result that the scamped work was covered up with cement.

I have no doubt that in the great majority of cases an architect would be in perfect safety to trust the work of experienced contractors like Messrs Sutherland & Sons and Mr Hunter; and, moreover, we are told that it is a very unusual thing to find bottoming scamped in this way, or to find dry-rot proceeding from such a cause. But here the unforeseen occurred; on the evidence there is no doubt that dry-rot was generated by the bad bottoming, and there is also no doubt that the contractors, although their attention was drawn to the state of the bottoming (for they each say that they were surprised to see that the work was completed) afforded no protection to the pursuer. In these circumstances I think she was compelled as well as entitled to fall back upon the architect who had undertaken to supervise the work.

While this is my opinion on the facts of the present case, I do not wish to be understood as meaning that an architect is to be held responsible for all defective work which may be covered up during his absence. Not even a clerk of works could be expected to detect everything of that kind. My opinion proceeds on the ground that when one contractor had to follow another, and when the work done was about to be covered up so that it could not thereafter be inspected, the architect should, under the duty of supervision which he had undertaken, have ascertained either by personal inspection or through an assistant whether the bottoming had been done according to specification, and that in failing to do so he did not use reasonable care in the discharge of his duty.

The defender seems to have taken a great deal of trouble in connection with the construction of this villa, and it is therefore all the more to be regretted that he should be held liable for this mistake; but on the evidence I am unable to say that the Lord Ordinary's judgment is wrong.

The Court adhered, with additional expenses.

Counsel for Pursuer and Respondent — Ure, Q.C. — Clyde — Lyon - Mackenzie. Agents—W. & F. Haldane, W.S.

Counsel for Defender and Reclaimer—Johnston, Q.C.—Baxter. Agents—J. S. & J. L. Mack, S.S.C.

Wednesday, July 12.

FIRST DIVISION.

[Lord Pearson, Ordinary.

CORPORATION OF GLASGOW *v.* WYLLIE.

Police—Sewer—Assessment—Glasgow Corporation and Police Act 1895 (58 *and* 59 *Vict. cap.* cxliii.), *sec.* 26.

The Corporation of Glasgow entered into agreement with two other local authorities for the construction of a main sewer for the drainage of a district partly within the City of Glasgow and partly within the areas under the control of the other contracting parties. By this agreement, which received statutory authority under sec. 26 of the Glasgow Corporation and Police Act 1895, it was provided that the sewer should be constructed by the first party, who should bear the whole cost in the first instance. It was further provided that the gross valuation of all the parties should be ascertained annually, "and the amount necessary to provide in each year for the annual instalment of repayment of capital, or cost of the said main sewer . . . shall be allocated annually on each party in the proportion which their gross valuation in that year bears to the total valuation of said drainage district, . . . each party to raise their own respective proportions so determined according to their own method of assessment." The method of assessing for the purposes of the agreement was provided for the other parties by section 26 of the Act of 1895 but no method was specified as regards Glasgow.

The sewer was constructed in accordance with the terms of the agreement. An action was raised by the Corporation against the proprietor of lands and heritages adjoining a street through which part of the drain ran, for a sum which they alleged to be his proportion of the capital cost of construction of the sewer. The action was based upon section 329 of the Glasgow Police Act 1866, which provides that such proprietors, where no ordinary sewer previously existed in the street, "shall be bound to relieve the magistrates and council from the expense of constructing an ordinary public sewer" in proportion to their respective frontages.

This was the ordinary method of assessment in Glasgow.

The Court (*rev.* the judgment of Lord Pearson) *held* that the proposed assessment was not in accordance with the statutory provisions under which the sewer had been constructed, and *dismissed* the action.

Sections 328-30 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiv.) provide as follows:—"328 . . . The magistrates and council shall make provisions for draining in a suitable manner the portions of the turnpike road within the city and the public streets, and may with that object construct or continue in or under any of the said roads or streets one or more ordinary or special public sewers, and may from time to time alter, renew, or add to such sewers as to them shall seem proper, and may carry and continue the said sewers into or through any lands or heritages within the city, and may repair, maintain, and cleanse the said sewers." "329 . . . The proprietor or proprietors of lands and heritages adjoining any part of a turnpike road within the city, or public street in which no ordinary sewer previously existed, shall severally be bound to relieve the magistrates and council from the expense of constructing an ordinary public sewer for the drainage thereof, in proportion to the frontage thereto of their respective lands and heritages, and such amount may be recovered from them as damages, or may be levied from them by the magistrates and council in the same way as a special police assessment, so soon as, but not before, some building is erected on a land or heritage adjoining such road or street: provided that, where the interior sectional area of such sewers exceeds 7½ square feet, the magistrates and council shall contribute the extra expense of constructing the same out of the statute labour assessment." "330. The Master of Works shall make up and lay before the magistrates and council a statement of the expense incurred in constructing any such public sewer, and of the proportions due by the proprietor or several proprietors of lands and heritages, and such statement, in so far as approved of or as altered by the magistrates and council, shall be *prima facie* evidence of the amount of expense so incurred, and of the proportions thereof due by each proprietor."

In 1895 the Corporation of Glasgow, of the first part, entered into an agreement with the Commissioners of Partick of the second part, and the District Committee of the Upper District of Renfrewshire of the third part, for the construction and maintenance of a main sewer to provide for the drainage of certain lands within the areas of which the contracting parties were the local authorities, to be known as Whiteinch Burn Drainage District. This agreement was confirmed by section 26 of the Glasgow Corporation and Police Act 1895 (58 and 59 Vict. cap. cxliii.) The parties agreed that a main sewer should be constructed as after provided, the boundaries of the district being fixed according to certain plans, each party being entitled to cause branch sewers and connections to be led into the main drain.

By the fourth and fifth clauses it was provided:—"(*Fourth*) The first party shall construct the main sewer and pay the whole cost thereof in the first instance. (*Fifth*) The gross valuation of each party's area within said drainage district shall be ascertained annually, beginning at the first term of Whitsunday occurring after the completion of the main sewer, and the amount necessary to provide in each year (commencing as aforesaid) for the annual instalments of repayment of capital or cost of the said main sewer, and of interest at the average rate paid by the first party to the Corporation Loans Fund, not exceeding in each case a rate of 3¼ per cent. spread over a period of thirty-three and one-third years, shall be allocated on each party in the proportion which their gross valuation in that year bears to the total valuation of said drainage district as the same in the event of any dispute shall be determined by the Lord Advocate for Scotland for the time being, each party to raise their own respective proportions as determined, according to their own method of assessment, and in the case of the second and third parties, they shall pay the said proportions yearly at Whitsunday to the treasurer of the first party."

Section 26 of the Act of 1895 provided by subsections 2 and 3 the method of assessing in Partick and Renfrew for the purposes of the agreement, which was to be as if they proceeded under the Burgh Police Act 1892 and the Public Health Act of 1867 respectively.

The operations in respect of this agreement were carried out, and as part of them the sewer was laid in Crow Road, part of which forms the westmost boundary of Glasgow, the ground on the west side of the road being in Renfrewshire.

An action was raised by the Glasgow Corporation against Mr David Wyllie, architect, Glasgow, the proprietor of lands and heritages adjoining Crow Road, concluding for payment of £348. The defender owned one house and vacant ground having a frontage of 232 yards on Crow Road.

The pursuers averred that while the sewer was a main sewer for the drainage of the Whiteinch Drainage District it "is a public sewer in the meaning of the Glasgow Police Act 1866, for the drainage of Crow Road so far as that road is within the boundaries of the city of Glasgow. Explained further that said sewer was constructed by the pursuers in exercise of the powers contained in section of 328 of said Act of 1866, and not under the confirming Act of 1895, nor the Public Health Act of 1867. Explained and averred further that the defender urged upon the pursuers the construction of said sewer in order to develope his building ground."

They further averred that when Crow Road was taken over by them as a public street in 1891 there was no ordinary public sewer within the meaning of the Glasgow Police Act of 1895, there being only a drain for surface water, not sewage, in the defender's lands.

They pleaded—"(1) The defender being

the proprietor of lands and heritages adjoining a public street in which no ordinary public sewer previously existed, and the pursuers having constructed an ordinary public sewer for the drainage thereof, the defender is bound to relieve the pursuers from the expense of such construction in proportion to the frontage to that street of his lands and heritages. (2) The sum sued for being the defender's proportion of the expense of the construction of said public sewer, decree should be granted therefor, with expenses."

The defender averred that in 1891 there was in Crow Road a public sewer in the sense of the Act; that the statutory authority under which the pursuers constructed the sewer was not that of the Police Act 1866 but of the Public Health (Scotland) Act 1867 and the Act of 1895, as part of a joint scheme in which these local authorities were interested; that apart from these powers the pursuers had no right to construct a sewer for the accommodation of any lands beyond the city; and that the Public Health Act provided for the payment of the cost of such sewers out of the assessment levied under it. He further averred (Stat. 5)—"In terms of said agreement, the proportion of cost payable by the Corporation is to be ascertained by a comparison of the rental of the portion of the Whiteinch Burn Drainage District, which is within the city, with the portions of that district which are within Partick and Renfrewshire respectively. The cost so to be ascertained is the cost of the entire sewer from end to end, including the expense of the agreement and of any parliamentary proceedings necessary to give it statutory effect. The pursuers have not paid in full for any portion of the sewer."

The defender pleaded—"(2) The sewer in question not having been constructed in terms of the sections founded on, the defender should be assoilzied. (3) There having been a sewer in Crow Road prior to the construction of the sewer in question, the pursuers have no right to assess the defender as proposed. (4) The defender is not in any event chargeable in respect of vacant ground belonging to him *ex adverso* of said road."

The Lord Ordinary (PEARSON) on 4th January 1898 allowed the parties a proof before answer. The import of the proof so far as material sufficiently appears in his Lordship's opinion *infra*.

The Lord Ordinary on 23rd August pronounced the following interlocutor:—"Decerns against the defender for payment to the pursuers of the sum of £337, 7s. 5d. sterling, with interest thereon at the rate of 5 per centum per annum from 2nd July 1898 till payment: Finds the pursuers entitled to expenses: Allows an account," &c.

Opinion.—"The Corporation of Glasgow seek to charge the defender with a sum (as restricted) of £337, 7s. 5d. as his proportion of the cost of a sewer constructed by the Corporation in the year 1896.

"The sewer was laid in Crow Road, which at the part now in question forms the westmost boundary of Glasgow, the ground on the west side of the road being in Renfrewshire. Crow Road runs from the higher land southwards towards the Clyde. It is met at right angles by the Great Western Road, the point of intersection being known as Anniesland Cross. The defender's ground occupies the south-east angle, being bounded by the Great Western Road on the north and by the Crow Road on the west.

"The defender acquired his ground early in 1890 by feu from the proprietor of Scotstoun estate. The ground extends to four or five acres, and forms part of a larger area which was feued from Scotstoun by himself and another for building purposes, and on which several dwelling-houses have since been erected.

"In 1890 the only drain for the defender's ground was a 9-inch glazed fireclay pipe, originating in the opposite or north-west corner of Anniesland Cross, and running diagonally across Crow Road into the defender's ground. There it ran first southwards parallel to Crow Road, then took a bend to the east, and then southwards again towards the Clyde.

"This drain served for some of the earlier feus, and still serves one of the streets. But it was obviously inadequate for an extensive feuing ground. Accordingly, when in 1891 this area, including Crow Road, was annexed to Glasgow, the defender saw the desirability of having proper sewage accommodation for the development of his ground.

"In and after 1893 he pressed the authorities to construct a sewer, and ultimately he even threatened them with a claim of damages if they delayed unduly.

"The difficulty in the way of immediate action was this, that the drainage of the annexed district did not fall naturally into any of the existing sewers of the city, but had to be taken to the Clyde by a new line, passing through the territory (1) of the burgh of Partick and (2) of the county of Renfrew.

"Accordingly, Glasgow entered into a provisional agreement with Partick and the Upper Ward of Renfrewshire for the construction and maintenance of a main sewer for the drainage of certain lands within their respective territories 'to be known as Whiteinch Drainage District;' and this agreement was scheduled to and confirmed by the Glasgow Corporation Act 1895. The district comprised 128 acres in Glasgow, 254 in Renfrewshire, and 149 in Partick, and no drainage was to be introduced into the sewer from beyond the district except with the consent of all the parties.

"It was provided by the agreement that Glasgow should construct the sewer and pay the whole cost thereof in the first instance. Then follows a clause providing for the ascertainment of the annual instalments of repayment of capital and interest. The gross valuation of each party's area within the drainage district is to be ascertained annually, and the amount necessary to provide in each year for these annual instalments spread over a period of 33½

years, is to be allocated on each party in the proportion which their gross valuation in that year bears to the total valuation of the drainage district—'Each party to raise their own respective proportions according to their own method of assessment,' and Partick and Renfrewshire paying their proportions yearly at Whitsunday to the treasurer of the Glasgow Police Commissioners.

"The sewer was constructed in 1896 under contract with the Glasgow Police Commissioners. The sum paid to the contractor was £10,167, and other charges brought the total cost to a little over £11,000.

"The allocation of the annual instalments among the three public authorities interested is not matter of dispute. For the year ending Whitsunday 1898, being the first year in which the full annual charge had to be met, the proportions were—Renfrewshire (Upper District) £141, 0s. 6d., Partick £137, Glasgow, £52, 13s. These are exclusive of interest, which is allotted in the same proportions. According to the rule prescribed in the agreement these figures will vary annually with the varying valuations of the areas served by the sewer.

"Then comes the question how each of the three public authorities is to raise its quota. All that the agreement says is that they are to raise it 'according to their own method of assessment.' The clause (sec. 26) which confirms the agreement specifies distinctly the Acts under which Partick and Renfrewshire are to proceed. The Partick Commissioners are to proceed as if the sewer were constructed by them under the Burgh Police Act 1892, in which case it would have been paid for either out of one or more years' assessment under section 362, or by borrowing the sum under sections 236 and 374, to be repaid in 33⅓ years. The Renfrewshire District Committee are to proceed as if they had constructed it under the Public Health 1867 and amending Acts; in which case they could have borrowed the cost so as to be repayable by equal instalments within 30 years, or if borrowed from the Public Works Loan Commissioners, within 50 years (under the Public Health Amendment Act 1875). As these two authorities are liable to Glasgow only in an annual quota spread over 33⅓ years, it was doubtless the intention that they should proceed as if they had borrowed the money under their respective statutes, and were in course of repaying it.

"Glasgow however receives no indication of what her 'own method of assessment' is; and the parties differ widely as to how the Glasgow quota is to be raised.

"The Corporation found on their subsisting Police Act of 1866, sections 328–30, and on the invariable practice in Glasgow as to defraying the cost of public sewers. These sections lay the first cost on the Corporation, but they are to be 'relieved' of it (as to streets in which no ordinary public sewer previously existed) by the proprietors of lands and heritages adjoining the street in proportion to their frontage thereto. This rule they say they have all along followed in the construction of all ordinary public sewers in Glasgow, and they are charging the defender according to this rule, that is (in the words of the agreement) 'according to their own method of assessment.'

"To this the defender makes several answers, some going to exclude the charge altogether, and others founded on a criticism on the mode of calculation and allocation.

"1. The first line of defence, and in my mind the most formidable, is this:—The defender maintains that the Corporation are in error in appealing to their Police Act of 1866; that the sewer in question was not and could not have been constructed or assessed for under that Act, even so far as it lies within the City, and that the Public Health Act 1867, under which the Police Commissioners are the Local Authority, furnishes the true standard of liability.

"He points first to the definition of the term 'public sewer' in section 4 of the 1866 Act. Unless there be something in the subject or context repugnant to such construction, that expression 'shall mean a sewer for the drainage of a turnpike road or public street.' And in conformity with this restricted meaning section 328 (on which the pursuers found) enjoins the Corporation to make provision for draining in a suitable manner the turnpike roads within the City and the public streets, and empowers them 'with that object' to construct or continue under any of the said roads or streets one or more public sewers. It is urged that in that Act a public sewer is a sewer for carrying off the surface water of a road or street, and that in so far as this one does more, it is not a public sewer within the meaning of that statute, whatever else it may be. It is pointed out that the Act is consistent with this view when it lays the burden on the frontagers. Most properties in burghs adjoin a public street, and all public streets require to be drained of surface water; so that the burden, if so restricted, would be fairly distributed. But if a costly main sewer, admittedly larger than is needed for street drainage, in the limited sense, runs down one street in a drainage area, the frontagers to that street may well complain if they have to pay the whole cost of it, and to pay it not even by instalments but all at once.

"Further, the Corporation's claim against the frontagers under section 329 is a claim of relief, and it is impossible to ascertain how much of the cost the Corporation will have to bear until the lapse of 33⅓ years. The amount it will have to bear has no necessary relation at all to the amount it is now laying on the frontagers, which is calculated by taking out the items of the contract applicable to Glasgow territory, without regard even to the present valuations of the respective areas. The Corporation may therefore be asking the frontagers to 'relieve' them of a much larger payment than the Corporation will have to meet. Indeed, on the not unfair assumption that the respective valuations remain relatively the same as they are now, Glasgow will have drawn from its frontagers about £1000 more than the proportion of the total

cost which it will ultimately have to bear.

"All this points to an annual assessment for the Glasgow proportion, as in the case of the other two authorities, as being the fair way of dealing with the problem. And the defender refers to the Public Health Act 1867 as affording the true solution. By section 73 of that Act the local authority have power to construct within their district, and also (when necessary for outfall or distribution) beyond their district, such sewers as they may think necessary. For these, they may assess up to the statutory limit, or they may borrow under section 86, the money to be repayable within 30 years. The Corporation had power, therefore, to construct this very sewer from end to end under the Public Health Act, in which case the cost would have been defrayed by a general assessment spread over a series of years. That they combined with adjoining authorities in obtaining a statutory drainage district does not affect the question any more than if they had combined under section 87.

"This view is supported by the terms of the agreement. No doubt that was intended primarily to fix the obligations of the contracting parties *inter se*. But the thing which each party is to raise according to their own method of assessment is 'their own respective proportions so determined,' that is, determined from year to year. according to the respective valuations. In this view, even if the Glasgow Police Act, 1866, applies to the case, the Corporation ought to have resorted to the Public Health Act as the only statute which results in an annual levy.

"I have found the case as thus presented to be attended with difficulty; but on the whole I am not satisfied that what the Corporation propose to do in the way of charging for the Glasgow part of the sewer is beyond their power. It is true that the Glasgow part of the sewer would not in itself have been available for want of an outfall, and that the Glasgow Police Act 1866 afforded no solution of that difficulty. It may also be true that the difficulty might have been overcome under the Public Health Act 1867, which would have resulted in an annual charge on the general assessment. But the thing having been done under an agreement confirmed by statute, and Glasgow being simply left to apply her own rules as to assessment, I think the Corporation are warranted in saying 'we will treat this, so far as within the city, as if it were a new Glasgow public sewer.' But then it is said they cannot do this because it is not a 'public sewer' at all within the meaning of the Act of 1866, it being adapted to carry house sewage as well as street surface drainage. It is certainly remarkable that the term 'public sewer' should be defined in the Glasgow Police Act by reference to only one, and that not the most important of its uses, and further, that in section 328, which is the only section empowering the construction of public sewers, their object is again defined to be the draining of the roads and public streets. But the definitions of 'common sewer' and 'private sewer' show that a public sewer is to receive their contents as well as surface water, and therefore the public sewers referred to in the Act must be structures adapted to carry off all kinds of sewage. The terms of section 328 itself show that a public sewer is not confined to carrying off surface water, and thus affords a context repugnant to the narrower construction. It speaks of 'ordinary or special public sewers,' and section 339 shows that a special public sewer means one built to carry off the refuse of a trade or manufactory which would otherwise have caused a nuisance by entering an ordinary public sewer.

"Add to this, that the sewerage clauses of the Public Health Act have never been used in Glasgow, and that all public sewers (in the ordinary wide meaning of the term) have in fact been made and paid for under the Glasgow Police Acts. After all, the Public Health Act only dates from 1867; and the defender's contention would lead to this, that from that date Glasgow public sewers (in the wider sense) could not be constructed except under that Act, and that before it passed they could not have been constructed at all. Now, even the subsisting Glasgow Police Act dates from before 1867, and the Act of 1866 followed upon and made permanent a temporary Act passed in 1862 (24 and 25 Vict., cap. 204), which in sections 322–24 contained clauses identical with sections 328–30 of the Act of 1866, and which contained the same definitions of the various kinds of sewers. During all that period the cost of sewers such as this has been borne by the frontagers. Although it may not be the fairest method of providing for the cost of main or trunk sewers, it is the Glasgow method, and this I think is the true answer to the defender's complaint that the frontagers in Crow Road are suffering exceptional hardship.

"Moreover, section 329, which provides for the allocation upon frontagers, adds that where the interior sectional area of the sewer exceeds 7½ square feet, the Corporation shall contribute the extra expense of construction out of the Statute Labour Assessment. This limitation was, I presume, intended to prevent any undue charge on frontagers in respect of a sewer larger or more costly than would have met their requirements.

"I am conscious that this view does not remove all the difficulties urged by the defender. In particular, it furnishes no answer to the objection that under a clause of 'relief' the Corporation are levying a sum which may be much larger than they will ultimately have to pay. But in my opinion any other view is open to more serious objections. . . .

"On the whole matter I think the pursuers are entitled to prevail. They are willing to take the frontage at 232 yards instead of 240, which brings down the sum claimed to £337, 7s. 5d., and as this (though pleaded in Ans. 10) was only conceded at the proof, I think interest should run from that date as on an ascertained amount."

The defenders reclaimed, and argued, *inter alia*—The method of assessment indicated by the agreement clearly pointed to annual instalments by each party, and to the recovery of each annual payment by assessment. The pursuers, however, proposed to recover the Glasgow share for that part of the sewer within Glasgow by an assessment of the slump sum, which they had no authority to do. Thus under sec. 329 of the Act of 1866, by which they were entitled merely to "relief" of the expense of constructing, they were seeking to recover a larger sum than the Corporation might ultimately have to pay. The true method of assessment was to be found in the Public Health Act, in virtue of which and of the 1895 Act the sewer had been constructed.

Argued for respondents—The agreement stated how the other parties were to levy their assessment, and the defenders in making the agreement had in contemplation the usual method of assessment for frontagers adopted in Glasgow—that was to say, the method supplied by the Act of 1866. As regards the annual instalments for repayment, it was not intended that Glasgow should repay herself in that way for the capital expenditure, but that the other parties should repay her thus. Glasgow, on the other hand, had power to make this repayment by her ordinary method of assessment. According to the defender's theory, while the other parties obtained power to restrict the payment of their share to the districts benefited by the scheme, Glasgow must spread her share over the whole city. The defender had nothing to do with the agreement or with the sewer outside Glasgow, and could not found upon the terms of the agreement. The sewer could not have been and was not constructed under the terms of the Public Health Act, and accordingly the method of assessment contained in that Act was inapplicable.

At advising—

Lord President—The theory of the present action is that a certain sewer was constructed under the powers of the Glasgow Police Act 1866, and that the cost of that sewer is to be levied by assessment under the 330th section of that Act. If that theory be correct, the defender, who is a frontager of the street in which the sewer lies, is liable to pay once for all his share with the other frontagers of the cost of the sewer, treated as a capital sum. I am satisfied that the pursuers' theory is contrary to the facts and the law of the case. This sewer was in fact constructed not under the Glasgow Police Act 1866 but under the Glasgow Corporation and Police Act 1895, and the latter statute prescribes the sum for which assessment is to be levied in Glasgow, to the exclusion of the system laid down in the 330th section of the Act of 1866 on which this action is laid. The two systems are fundamentally different, and there is in my opinion no liability on the part of the present defender to pay the sum sued for in this action.

The facts of the case are simple and were practically undisputed at and after the proof.

Although anyone reading the pursuers' record would suppose that the sewer in dispute was a complete sewer wholly within Glasgow, this is not the fact. It is merely a part of a sewer. In 1895 it was found that a portion of Glasgow could best be drained along with a portion of Renfrew and a portion of Partick, one sewer being formed which, beginning in Glasgow, should pass through the other two territories and so gain an outfall into the Clyde. Accordingly the municipal authorities of those three districts entered into an agreement for the construction of this sewer, and this agreement was "confirmed and made binding on the parties thereto" by the Glasgow Corporation and Police Act 1895, of which Act it is made the second schedule. The sewer so authorised was constructed, and the present action relates to part of the cost of this sewer. Now, this scheduled agreement makes express provision on this matter.

By the fourth article of this scheduled agreement it is provided that Glasgow shall construct the sewer and pay the whole cost in the first instance. The fifth article deals with the way in which Glasgow is to be recouped by Partick and Renfrew for their shares of the expenditure, and the way in which the residue of the expenditure is to be raised by Glasgow from her own ratepayers. On this section, in my opinion, the whole question turns. The section is a little involved, but once it is examined its scheme is plain enough.

Glasgow, as we have seen, makes the whole sewer, *i.e.*, through Partick and Renfrew as well as through Glasgow, and pays the whole cost of the whole work in the first instance. The next question is, from what funds? Now, it is a curious thing that so completely have the pursuers' ideas about the case gone in a different direction it does not appear in the evidence where Glasgow got the money, and when asked about it their counsel could not supply us with this information. From the section itself, however, it is plain enough that they borrowed it on a loan repayable in 33⅓ years, and in the evidence of the treasurer of the Police Department it is expressly stated that the cost is payable by instalments extending over 33⅓ years. Accordingly, under the agreement Partick and Renfrew are to make good their contribution by annual payments, and the amount to be contributed in each year by each of the three communities is to be fixed by an annual comparison of the gross valuation of the three areas. During this period of 33⅓ years the burden might shift and fluctuate according as the valuations of each of the three went up or down. The section goes on to say that each party is to raise its own respective proportion so determined according to its own method of assessment.

On these somewhat general words there arises the question which method of assessment is thereby designated in the case of Glasgow? Before considering, however, the method of assessment, we must first

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