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.,

and at the end of the sale he observed the defender taking the horse away with him, and called his attention to the mistake, whereupon the defender in the presence of several witnesses made an unprovoked and violent verbal attack upon him "to the effect that the pursuer was 'a bloody liar,' and that the pursuer 'should have been in the hands of the police twenty times during the past five years.'" He averred further—"(Cond. 5) The said slanderous statements complained of were calculated to injure and have injured the pursuer seriously in his feelings, reputation, and business, and the defender is liable for damages and *solatium* to the pursuer in respect thereof."

The defender averred that the horse in question had been knocked down to him, and that the pursuer had come to him when he was removing the horse, and had used opprobrious language to him, calling him a thief or "next thing to a thief;" that he offered to settle the question by reference to the auctioneer or to the clerk's book; that the pursuer had thereafter called a policeman, and had asked him to take the defender in charge for theft, which the policeman had refused to do.

The defender denied that he had used the expressions complained of, and pleaded, *inter alia*—"(3) Even supposing that any loss had been sustained by the pursuer through any action or words of the defender, the pursuer, having caused same by his refusal to accept the reasonable terms offered by the defender, and by the use of violent and unjustifiable language, cannot recover damages in this action, and the same ought to be dismissed."

The Sheriff-Substitute (Lee) on 18th November 1897 allowed the parties a proof, the import of which so far as material is sufficiently indicated in the judgment of the Sheriff.

On 10th February 1898 the Sheriff-Substitute pronounced an interlocutor by which he found in fact that the defender in the presence of certain witnesses had made the statements specified above of and concerning the pursuer, and "that the words 'liar' and 'bloody liar' were used by the defender only as an emphatic form of contradiction of the pursuer's assertion as to the disputed ownership of a horse which the defender had reason to believe had been bought by him, and did not imply any general charge of untruthfulness against the pursuer; that the statement that the pursuer should have been in the hands of the police twenty times during the past five years was false and unjustifiable, and was calculated to injure the pursuer in his reputation and feelings; that in the circumstances the pursuer will be sufficiently compensated for loss and damage caused to him by receiving a sum of £1 sterling: Finds in law that the said latter statement of and concerning the pursuer was slanderous, and that the defender is liable in reparation to the pursuer in respect of the said statement."

The defender appealed to the Sheriff (Johnston), who on 11th November 1898 recalled the interlocutor of the Sheriff-Substitute and found that the defender had uttered the words quoted above or words to the same effect, that "said statements of and concerning the pursuer were false, but that they were uttered *in rixa* and after provocation: Finds therefore in law that said statements were not actionable, and assoilzies the defender from the conclusions of the summons."

Note.—"The occurrence out of which the action arises took place at a farm displenishing sale. Both parties in *bona fide* believed that a certain colt was knocked down to him at £5, 10s. The horse had in reality been knocked down to the pursuer, but the clerk to the roup, by a most incomprehensible if honest mistake, led the defender to believe that it was his, and on his instructions substituted in the roup roll the name of defender's principal, a Mr Callender. I find no reason to doubt that the clerk was the cause of the whole dispute, and that the defender honestly believed, and was allowed by the clerk to believe, though erroneously, that he had purchased the colt. When the colt with two other horses was being led away by defender and his man, the pursuer intervened and a quarrel arose, in course of which defender gave vent to some horse-couper's Billingsgate. But the only serious expression was used after defender had offered most reasonably to settle the question by going to the auctioneer or to the clerk's book, and pursuer had declined this offer, and after pursuer had given defender in charge to the police on what, even if the word 'theft' was not used, could only be in substance a charge of theft.

"I agree with one of the witnesses that there is not much to choose between the parties, and though the defender ought not to have used the words in question, I hold that they were used *in rixa* and after considerable provocation, and that they were therefore not actionable. Further, I do not believe in the pursuer having suffered either in character, feelings, or in pocket.

"I should have hesitated about giving expenses, but that the pursuer maintained on appeal his right to substantial or, as I should in this case term them, vindictive damages."

The pursuer appealed to the Court of Session.

Argued for appellant—There was no law to the effect that *rixa* was a good defence to an action of damages in respect of a slander. If a slanderous statement were made falsely it was presumably made maliciously—*Wilson* v. *Purvis*, November 1, 1890, 18 R. 72; *Ramsay* v. *M'Lay & Company*, November 18, 1890, 18 R. 130. Here there was clearly a malicious intention of injuring the pursuer. Even if it were held that the pursuer had suffered no damage, and he was only awarded a nominal sum, he would be entitled to expenses, this action being one for the vindication of character—*Bonnar* v. *Roden*, June 1, 1887, 14 R. 761.

Argued for respondent—The words had been uttered *in rixa* after great provoca-

tion. They were merely words of vulgar abuse and not slanderous — *Cockburn* v. *Reekie*, March 8, 1890, 17 R. 568.

Lord M'Laren—I come to the consideration of this case by first putting the question — What would have been the result of this case had it gone to a jury? It would be open to a jury, notwithstanding that the words charged were proved, to find a verdict for the defender, on the ground that in their opinion the words were not used in a calumnious or slanderous sense, but were merely a part of the abuse which two parties when quarrelling were heaping upon one another. Where a case originates in the Sheriff Court it does not admit of doubt that the Sheriff who hears the evidence, and those who are to review his judgment on appeal, are to consider the case in the same way as it would properly be considered by a jury upon the evidence.

Now the facts are very simple. It appears that the pursuer and defender were attending an auction sale. Each thought that a particular horse had been knocked down to him at £5, 10s. One would hardly have expected that a horse of that value would excite so keen a competition for ownership. But the parties were hot tempered. The pursuer, seeing the defender walking away with the horse, made insinuations. Witnesses differ as to the exact words used, but I can hardly doubt that the insinuation was that the defender was dishonestly endeavouring ts carry away his horse, because the pursuer followed up his words by going in search of a policeman and telling him to take the defender in charge. There can be no doubt that the policeman was sent for, and we have his evidence, which is to the effect that he found on inquiry that there was nothing but a dispute on matters civil, in which he declined to interfere. I refer to that circumstance because it throws considerable light on the conduct of the defender, when he, not being in a good humour, proceeded to make his retort. The Sheriff-Depute, altering the judgment of the Sheriff-Substitute, has found that the statements concerning the pursuer were false, but were uttered *in rixa* and after provocation. It is not quite clear what the words used by the defender were. On record it is stated—passing over the accusation of his being a liar—that the words were "the pursuer should have been in the hands of the police twenty times during the past five years." The defender admits having made an allusion about the police, but puts it rather that the pursuer had been so unfortunate in his proceedings in the civil court, that he ought to have a policeman to look after him. That sounds rather like a revised version of the words used; but supposing that the expression as put on record is proved, as I am inclined to think it is proved, then the first question that arises is whether we can sustain the Sheriff's finding that these words, which he says were false but does not say were calumnious, are justified by the fact that they were spoken *in rixa*. Now, giving the meaning appropriate to the words of the Sheriff's finding, I think it amounts to this—that it is in law a defence to a false accusation that it was spoken in heat when parties were quarelling. I am not prepared to affirm that proposition. 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. But then it is a very relevant consideration, when weighing the evidence, to consider that the words were spoken in heat for the purpose of finding out the true sense in which the words were used. Another consideration bearing on the same point—the sense in which the words were used—is whether the charge was definite or indefinite. Now, this is a jury question. I do not propose to elaborate it; but looking first at the circumstances that this was no definite charge of crime, but a vague statement that the pursuer should have been in the hands of the police twenty times within the last five years, that the words were spoken in anger, and that the defender himself had been either directly or constructively charged with theft, I should think it the most unlikely thing in the world that any of the bystanders understood the language of the defender as importing that the pursuer was known to the police—a person who had committed crime or had frequently been accused of crime. I think they would understand the expression as meaning nothing more than mere abuse intended by way of retaliation for the charge that had been made against the defender himself. That being so, it follows, in my opinion, that although the words were not true, still they were not calumnious, because they were not used in a defamatory sense, or with the intention of causing an injury to the pursuer in his character and feelings. The case appears to me to be of the same type as the case of *Cockburn* v. *Reekie*, which was cited to us by Mr Adamson, where the defender in the course of a quarrel said to the pursuer "I will put you in prison"; and the late Lord President, in commenting upon the evidence, said that the words were admittedly used, but that they would not bear the construction which was put upon them. He adds, "I think it is a most unreasonable and forced construction, because the only imputation with which parties were dealing was one of neglect of duty." Now, I think that in a dispute as to the ownership of a horse which had been knocked down at an auction sale, it would be unreasonable to think that vituperative language used by either party was intended to have or had anything to do with a criminal charge; and on that ground I am of opinion that the finding of the Sheriff should be recalled and the defender assoilzied. As regards the expenses in the Sheriff Court, which are part of the merits of the case, I am unable to see my way to propose that the defender should have these expenses, because I think he does not come into

Court with clean hands, and more than one witness said that he thought the pursuer was bound to take some steps to vindicate his character.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff dated 11th November 1898 under appeal: Find in fact that on 13th August 1897, at a waygoing sale at Bogindollo Farm, the defender uttered in presence of the persons enumerated in condescendence 3 the words set forth in that condescendence or words to the same effect of and concerning the pursuer: Find in fact that the said words were not used in a defamatory sense, and were not so understood by the persons in whose hearing they were uttered: Therefore assoilzie the defender from the conclusions of the action: Find no expenses due to or by either party in the Sheriff Court or in this Court, and decern."

Counsel for the Pursuer — Salvesen — Gunn. Agents—Mackay & Young, S.S.C.

Counsel for the Defender—N. J. Kennedy —Adamson. Agents—Archibald & Menzies, S.S.C.

Wednesday, June 28.

FIRST DIVISION.

STOCKS *v.* INLAND REVENUE.

Revenue—Income-Tax—Occupancy of Real Property—Value—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *secs.* 60 *and* 63, *Sched.* (*A*) *and* (*B*), *Rule X* (5), *and sec.* 66.

A public-house was assessed to income-tax under Schedule (A) at £40 by the Surveyor of Taxes, who was not the assessor under the Lands Valuation Act. The owner of the premises appealed to the Commissioners, and produced a lease dated more than seven years prior to the year for which he was assessed, the rent stipulated in which was £19, 10s. The *bona fides* of the lease was not disputed. The appellant led no other evidence, and did not require a valuation of the premises to be made by a man of skill.

The Commissioners decided that they were not bound to accept the lease as conclusive, and that "from their own local knowledge and experience, and according to the best of their judgment," £40 was a fair and moderate valuation.

In an appeal against the decision of the Commissioners, *held* that their valuation must be sustained, in respect that the lease, though a piece of evidence, was not *per se* conclusive, and (2) that the appellant having failed to produce any other evidence or to require a valuation, the Commissioners were entitled to make the assessment according to the best of their judgment.

This was an appeal by Archibald Stocks, vintner, Burntisland, against a decision of the Income-Tax Commissioners assessing the annual value of certain public-house premises in Burntisland of which he was the tenant and occupier.

The following facts were stated in the case as admitted:— "1. That Mrs Jane Stocks, Craigholm Crescent, Burntisland, the appellant's mother, is the liferentrix of said premises, and that the fee of the property belongs to her seven children, of whom the said Archibald Stocks is one. 2. That the said Archibald Stocks is tenant and occupant of said premises in virtue of a lease between him and his mother for seven years from Whitsunday 1898 at a yearly rent of £19, 10s.; that said lease contains the whole contract between the parties to it, and that no *grassum* or other consideration for goodwill or otherwise was paid in respect of said lease or of the appellant's tenancy thereunder, and that the rent therein stated was *bona fide* paid for the premises. The lease is dated 2nd May 1898, and was produced at the hearing of the appeal. 3. That some time prior to 1888 the premises were let at an annual rent of £18, and were afterwards divided into two subjects, one let as a licensed grocer's shop at a rent of £12, and the other as a dwelling-house at £8 per annum. This continued till 1887, when the premises became vacant. The appellant then became tenant of the premises at an annual rent of £19, 10s., and applied for and obtained a public-house licence for the premises in his own name and for his own behoof. He thereafter entered into a lease of the premises with the liferentrix dated 15th and 27th July 1889 for ten years from Whitsunday 1888 at said annual rent of £19, 10s. On the expiry of this lease, the present lease, being that referred to in statement No. 2, was entered into. Both leases are docqueted by the Commissioners in reference hereto and made part of this case. 4. That the Surveyor of Taxes for Fifeshire is not the Assessor for the burgh of Burntisland under the Lands Valuation Act. That at the Lands Valuation Appeal Court held at Burntisland in September 1898 the present appellant appealed against an assessment of £40, which had been placed on said premises by the Burgh Assessor, and the appeal was unanimously sustained, and the valuation reduced to £19, 10s., and the premises are entered in the burgh valuation roll at that figure."

The decision of the Commissioners was to the effect "(1) That under the said 60th and 66th sections of the said Act they were not bound to accept either lease in the circumstances stated as conclusive evidence of the annual value of the premises for income-tax purposes; and (2) that from their own local knowledge and experience, and according to the best of their judgment, the rent of £19, 10s. stated in the lease did not represent the full value of the premises if let in the open market, and that £40 was a fair and moderate valuation. They therefore refused the appeal."

At the hearing of the appeal before the