were put to him upon the one side or the other that the gentlemen of the bar had seen that he was not a man to be examined and cross-examined with any benefit about a matter of this kind; and the little that we have of his evidence, I think, goes to confirm that. He says no doubt "they were very good pipes, and excellently put together, all the bends correctly, and I was quite satisfied." Is it possible to suppose that all the bends were correct? Where are they now? What became of them? Then he says, "The pipes were not above six inches above the solid anywhere, and two or three inches in other places." Can anybody believe that? It is proved that terraces a great many feet in height were made under the floors of this building, and the pipes had to get down through that; and the rest of the witnesses prove that they were several feet down. In short, it is perfectly plain to my mind that no reliance whatever can be placed upon the evidence of the inspector. Well, with the exception of this gentleman, who is no longer possessed of ordinary reason, there is not a single witness brought by the defender who was engaged in the work of laying these drains. One man, Mackenzie, says a great deal about it, and one would think he had been engaged in the work; but when he is asked the question he says expressly that he was not. The contractor himself was very little engaged in the work. His excuse is that he paid little attention to it. He left it very much to his foreman, who is now dead, and the foreman was assisted by two labourers, one of whom is in America, and the other is nobody knows where. We have not a single workman who was engaged in the work; and the idea that workmen employed in other branches, who happened to see this going on, can be supposed to know or give anything like reliable testimony as to the state of these drains,—a matter which requires the closest inspection,—is totally out of the question. So that virtually you have no evidence whatever that can be relied on for one moment as to the manner in which the drains were executed,—certainly none to account for the fact that the bends and eyes which ought to have been there are awanting. The contractor's statement is that he was very little there, and trusted to his foreman. He admits that if the things were done which are said to have been done here they were very wrong; but he says, at p. 26 F, "Very bad work to make a hole through pipe for a junction in place of a bend; and very bad work to have a pipe of eight inches to connect a pipe of six inches. It was for the inspector to attend to that. If the inspector was pleased, I did not care. If I had noticed it I would have objected, if inspector had not allowed it. Can't mind how many eyes or junctions there were—can't mind so far back." If the inspector was in the state of mind at that time that he was in latterly, I can understand how this might have happened. And that leads me to make the observation, that although I think there is no room for the exception, I don't concur in the law that the learned Judge laid down to the jury—that if they were satisfied that the inspector was there and saw what was going on, that precluded the objections on the part of the proprietor. An inspector has very large powers: he has power to make a great many variations on the work; but I have no idea that it will relieve a contractor from liability for making soil pipes and drains in the way that they ought to be made that the inspector does not object to holes being made through the pipes for a junction in place of a bend, or to a pipe of eight inches connecting a pipe of six inches. I cannot hold that that relieves the contractor. But that is the contractor's view of the law. I have no idea that that is the law; and in the unqualified way in which it was laid down to the jury I could not have concurred. How far the jury may have taken some view of that kind, I don't know. But, according to the clear evidence in the case, if the drains were found in the state in which the witnesses swear they were, it is an absolute physical impossibility that they could have been executed in the way the jury found, viz., in a sufficient and proper manner according to the contract. And therefore, with all my respect for the verdict of a jury in matters of fact and of credibility, I cannot concur with your Lordship in thinking that this verdict ought to stand.

LORD PRESIDENT—Then we disallow the exceptions, and, by a separate interlocutor, we discharge the rule.

Agents for Pursuer—J. & A. Peddie, W.S.

Agents for Defenders—Lindsay & Paterson, W.S.

Thursday, July 1.

SECOND DIVISION.

SPECIAL CASE FOR MRS WATT'S TRUSTEES *v.* MISS MARGARET MACKENZIE.

Deposit-Receipt — Donation—Delivery—Nuncupative Legacy—Special Case. Held that a deceased person having taken a deposit-receipt for £280 in her own name and that of another, and payable to either or survivor, and never having delivered it, but kept it in her own possession, no donation had been constituted *inter vivos* or *mortis causa*, and that the contents of the deposit-receipt formed part of the executry estate of the deceased.

Observed, that to constitute a legacy above £100 Scots there must be a clear expression in writing of the testamentary intention.

The following Special Case was submitted for the opinion of the Court:—

The testatrix, Mrs Campbell Reid or Watt, died on the 31st of January 1869, at the age of 78 years. She was the widow of John Watt, sometime supervisor of excise at Stornoway, and had no children. Her nearest relatives were nephews and nieces. One of these nieces was Miss Margaret L. Mackenzie, the second party to this special case, who lived with the testatrix for about twenty years before her death as her friend and companion, and to whom the testatrix was much attached. The said second party was very attentive to the testatrix in her old age and infirmities. Her aunt, for some years before she died, had become blind. Mrs Watt, on the 24th of February 1864, deposited in the branch bank of the National Bank at Stornoway the sum of £495 out of her monies, in name of herself and Miss Mackenzie. The deposit-receipt obtained for this money was in the following terms:—

£495 stg. *National Bank of Scotland's Office.*
No. 35/259. *Stornoway, 24th Feby.* 1864.

Received from Mrs Campbell Reid Watt, Stornoway, and Miss Margaret L. Mackenzie, Stornoway (payable to either), Four hundred and ninety-five

pounds sterling, to their credit, in deposit-receipt with the National Bank of Scotland.

By order of the Board of Directors.

KEN. MACKENZIE, *Agent.*

Entd. J. C. Lindsay, Accountant.

Endorsed on the back—Campbell R. Watt.

On 27th April 1864 Mrs Watt uplifted £195 of the contents of the said deposit-receipt, along with the interest thereon up to that date, and obtained from the said branch bank a new deposit-receipt for the balance of £300, in name of herself and Miss Mackenzie, and "payable to either." The said deposit-receipt for £300 was, at the request of Mrs Watt, renewed by the bank from time to time, in the same terms, down till the 2d December 1865, when the deposit-receipt for £300 of that date was taken, "payable to either, or survivor," of Mrs Watt and Miss Mackenzie. The said last mentioned deposit-receipt for £300 was again renewed from time to time in the same terms, down until the 29th of February 1868, when it was made payable to "either survivor" of Mrs Watt and Miss Mackenzie; but on the 5th June 1868 the said branch bank paid the contents, with interest, to Mrs Watt herself, and that without any indorsation either by Mrs Watt or Miss Mackenzie, and at the same time Mrs Watt re-deposited £280 in name of herself and Miss Mackenzie, for which the said branch bank granted a receipt in the following terms:—

£280 stg.

No. 39/473. *National Bank of Scotland's Office, Stornoway, 5 June* 1868.

Received from Mrs C. R. Watt, Stornoway, and Miss M. L. Mackenzie, or either, or survivor, Two hundred and eighty pounds sterling, to their credit, in deposit-receipt with the National Bank of Scotland.

By order of the Board of Directors.

KEN. MACKENZIE, *Agent.*

Entd. E. Ross, p. Accountant.

(Not endorsed.)

At each renewal of the said receipts Mrs Watt sometimes endorsed the old receipts, and sometimes she was not required by the bank to do so. Miss Mackenzie was not called on to endorse any of them. Mrs Watt drew the interest which had accrued upon each receipt from the date of the previous receipt up till the date of the renewal. Miss Mackenzie was aware that her aunt Mrs Watt had money deposited in the said branch bank, and that she drew the interest thereon from time to time; but she was not aware until after Mrs Watt's death that any part of the money was deposited in her name, or in the joint names of Mrs Watt and herself, and payable to either or survivor. On the 27th November 1866 Mrs Watt executed the trust-disposition and settlement, which is hereby held to be a part of this case. The first parties to this special case are the trustees and executors acting under said trust-disposition and settlement. A considerable time before Mrs Watt's death, Miss Mackenzie became aware of the provision made for her in the said trust-disposition and settlement; but, in addition, Mrs Watt frequently made the remark to Miss Mackenzie that she "would leave her better than she was aware of." On the 9th December 1868 Mrs Watt uplifted the contents of the deposit-receipt for £280 with the interest thereon, and on the same day she (retaining the interest) renewed the deposit, and obtained a new receipt therefor from the bank, which new receipt is in the following terms:—

I 175/40 £280 stg.

No. 40/124. *National Bank of Scotland's Office, Stornoway, 9th December* 1868.

Received from Mrs Campbell Reid Watt, Stornoway, and Miss M. L. Mackenzie, payable to either or survivor, Two hundred and eighty pounds sterling to their credit, in deposit-receipt with the National Bank of Scotland.

By order of the Board of Directors,

KEN. MACKENZIE, *Agent.*

Entd. E. Ross, p. Accountant.

On the same day on which the above deposit-receipt was obtained, viz., the 9th December 1868, Mrs Watt deposited in the bank an additional sum of £700, and obtained therefor a deposit-receipt, which is in the following terms:—

I 175/39 £700 stg.

National Bank of Scotland's Office.

No. 40/123. *Stornoway, 9th Dec.* 1868.

Received from Mrs Campbell Reid Watt, Stornoway, Seven hundred pounds sterling to her credit, in deposit-receipt with the National Bank of Scotland.

By order of the Board of Directors.

KEN. MACKENZIE, *Agent.*

Entd. E. Loss, p. Accountant.'

Both these deposit-receipts, dated 9th December 1868, were found in the repositories of Mrs Watt at her death, and are now in the possession of the first parties hereto.

The property left by the testatrix consisted of —(1) the sum contained in said deposit-receipt for £700; (2) the sum contained in said deposit-receipt for £280, if the same should be held to have been the exclusive property of the testatrix; (3) the sum of £300 at interest in the hands of her nephew John Reid Mackenzie, Dunedin, New Zealand; (4) Household furniture, valued at £168; (5) value of four shares in the Stornoway Gas Light Company, £12; (6) house in Francis Street, Stornoway, occupied by the deceased up till her death, value about £400.

The questions for the judgment and opinion of the Court are—

(1) Whether the second party hereto is entitled to claim and demand from the first parties the said sum of £280, with interest accrued thereon, or any and what part thereof, besides the legacies bequeathed to the said second party by the said trust-disposition and settlement?

(2) In the event of the second party being found entitled to claim the said sum of £280, can the first parties impute said sum *pro tanto* in payment of the legacy of £600 bequeathed to the second party by the said trust-disposition and settlement?

FRASER for the Trustees.

SCOTT for Miss Mackenzie.

At advising—

LORD JUSTICE-CLERK—The first of the two questions put to us in this case is as to whether one of the parties, Miss Mackenzie, is entitled to claim from the other, who are the testamentary trustees of the late Mrs Watt, the contents of a deposit-receipt for £280, with interest, dated the 9th December 1868, which bears that sum to have been received from the deceased and Miss Mackenzie, to their credit, and payable to either or survivor.

It appears that, of the same date, Miss Watt deposited another sum of £700, in which receipt is acknowledged by the bank as received from Mrs Watt "to her credit."

The £280 deposited on the 9th December had formed a portion of a sum of £495, for which, so early as the 24th February 1864, receipts had been granted as received from the deceased and Miss Mackenzie, payable to either. It had again been deposited on the 5th June 1868, in terms identical with those used in the deposit of 9th December, the difference consisting of the introduction of the words "or survivor."

Interest was drawn from time to time, and the money redeposited by Mrs Watt. Miss Mackenzie was not aware until after Mrs Watt died that the money had been deposited in her name. Mrs Watt kept the deposit-receipts and dealt with the money as her own.

It results from this statement that there had been no donation made in the lifetime of Mrs Watt. No delivery having been made of the deposit-receipt, nor intimation made to Miss Mackenzie of any right conferred on her,—while the full enjoyment and control of the fund remained in Mrs Watt,—it is perfectly clear that no transfer of the sum was made while Mrs Watt lived. Mrs Watt did not gift away that sum to her niece either by way of donation *inter vivos* or by donation *mortis causa*. There was no giving over from herself to a donee, revocably or irrevocably, and the sum therefore formed part of her executry estate at her death. The form of the question assumes this, for it is not whether the bank are bound to pay the amount to Miss Mackenzie, but whether there is constituted a valid claim against the deceased's executry, which the trustees, as holders of that executry estate, must satisfy.

The question then resolves truly into whether a bequest of money may be constituted by a party who is desirous of bequeathing a portion of his estate to a legatee, by taking a receipt from a bank for a deposit of money in name of himself and the intended legatee "and survivor."

If that were possible, consistently with legal principle, it is obvious that such a mode of bequest would become very general, and hence the question is of some general importance.

We have held in the case of *M'Cubbin*, reported in the Jurist, 40th vol., p. 158, that the taking of a deposit-receipt in terms similar to those occurring here, followed by delivery of the receipt in the lifetime of the deceased, constituted a donation. In this case there was no such delivery. In the case of *Cruikshank* a question was raised in which the effect of such a deposit was touched upon. It was not disposed of. In the case of *Cuthel* v. *Burns* the opinion of Lord Benholme, who gave the judgment of the Court, points to documents expressed like the present as not being of the nature of testamentary writings; but the judgment, which was in favour of the party claiming under the receipt, proceeded on a different ground. This is probably the first case in which the question falls to be expressly decided.

I have stated as the condition of the question the possibility of affecting one's succession by such a proceeding. The fund having remained the exclusive property of the deceased up to her death—the question is, whether the taking of a receipt shall operate as a transfer of property from the dead to the living.

As the will of a deceased party can operate any effect on property only by the positive regulations of the law of the country in which he dies, his power over property by natural law having ceased by his death; we must inquire if the prescription of the law as to the formal expression of a deceased's will has or has not been complied with here. What is claimed here is a portion of the executry estate or succession of the deceased—an alleged legacy of £280. The law requires that for the grant of a legacy above £100 Scots there shall be an expression of the testamentary intention of the testator, and there is no such evidence here. We have grounds for gathering from the facts done the wish of the testator, that her niece shall take a part of her succession—that she entertained the intention is clear enough; but the absence of any written expression of that intention seems to me fatal. There is no other evidence in writing—except the signature of the bank clerk, there is no writing of the deceased at all. If a legacy, it is an unwritten one or nuncupative legacy, and that is insufficient.

The deposit-receipts are mercantile documents, not very different in their nature from promissory notes. If the obligation to repay implied in the nature of the transaction were expressed, they would be promissory notes, and liable to stamp duty as such. It is an attempted conversion of a document of commerce for purposes of testamentary succession which has been found unavailing in the case of bills. No doubt it is said that as the bank, in a transaction with Mrs Watt, stipulated for a right in the legatee, there was a *jus quæsitum* to her. The answer is, that no immediate right arose from the contract, that the retention of the full power over the fund on Mrs Watt's part prevented the assertion of any right during her life, and therefore gave no rise to any *jus quæsitum* while she lived. She might have disposed of it without any trammel down to the day of her death. It is a pure question of succession, and so falling under the law, not of *jus quæsitum*, but of succession.

As I answer the first question in the negative, the second is unnecessary to be answered.

The other Judges concurred.

Agent for Trustees—W. R. Skinner, S.S.C.

Agent for Miss Mackenzie—John Walls, S.S.C.

Thursday, July 1.

SINCLAIR *v.* MACBEATH.

Landlord and Tenant—Reference to Oath—Competency—Written agreement—Final judgment—Partial reference. (1) *Held* competent by oath of party to show that as to a particular point, a written agreement did not truly express the understanding of parties. (2) Circumstances in which *held* that a reference to oath was not excluded as being a partial reference after final judgment.

This was a case in which Mr Sinclair of Forss sued his tenant in the lands of Mains of Brimms for implement of an obligation in the latter's lease, by which the tenant became bound to pay interest on improvement expenditure to be made by the landlord, at the rate extracted by the Scottish Drainage Improvement Company. There were two questions at issue—one as to the amount of the capital sum expended by the landlord. and the other as to the meaning of the term interest, which was on the one hand contended to be equivalent to rent-charge, and on the other to denote merely the proportion of the rent-charge which was pro-