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-

perly interest. The Court disposed of both points some time since; and, with reference to the latter, their judgment was that interest meant not rent-charge, but proper interest. The pursuer now lodged a minute of reference, referring to the defender's oath, whether the agreement truly come to between the them was not that the tenant should pay the whole rent-charge, and whether the term interest was not used erroneously to express that meaning.

GORDON, Q.C., and BLACK, for the defender, objected to this reference on two grounds—(1) that it was incompetent to contradict the terms of the written agreement; (2) that it was incompetent to make a *partial* reference after final judgment.

MILLAR, Q.C., and JOHN MARSHALL for pursuer.

The Court unanimously sustained the reference. They held that it was competent by the oath of party to establish that in a certain particular the written instrument did not truly set forth the agreement actually come to; and, with regard to the alleged lateness of the reference, they held that the point here proposed to be referred was one which would be conclusive of a distinct and separate part of the cause, and which, therefore, would not be the beginning of a new litigation, as in the ordinary case of a partial reference after final judgment.

Agent for Pursuer—G. L. Sinclair, W.S.

Agent for Defender—David Forsyth, S.S.C.

Friday, July 2.

FIRST DIVISION.

RICHMONDS *v.* OFFICERS OF STATE.

Teinds—Report of Sub-Commissioners—Proving of the Tenor—Expenses. Circumstances in which the Court *held* that the existence and tenor had been proved of a report by the Sub-Commissioners for Valuation of Teinds.

The action having been defended by the Officers of State for their interest, *held* that the pursuers were not entitled to expenses from them, it lying on the pursuers to establish their case, even in the absence of a contradictor.

This was an action of proving the tenor of a report by the Sub-Commissioners for valuation of the teinds and rents of lands lying within the presbytery of Dunblane, of date 5th October 1629, brought by George Richmond and John Richmond, proprietors of the lands and barony of Balhaldies, and of the lands of Glassingalbeg, lying formerly within the parish of Dunblane, and now within the parish of Ardoch, and county of Perth. The pursuers stated that the original report had gone amissing, and no trace of it was discoverable after 1797, in which year it was produced in an approbation then being carried on at the instance of John Stirling of Kippendavie; but they produced various documents which they alleged proved both its existence and tenor; and, in particular, they referred to a document lately found in the Keir charter-chest, entitled "Copie of the valuations of teinds of the parishe of Dumblane, valued before the Sub-Commissioners within written Oct. 5, 1629 zeirs." The Officers of State appeared and defended the action. A proof was led.

FRASER and DUNCAN for pursuers.

KINNEAR for defenders.

At advising—

The opinion of the Court was delivered by Lord Kinloch.

LORD KINLOCH—The present action has been brought for the purpose of proving the tenor of an alleged report of the Sub-Commissioners for Valuation of Teinds, bearing date in the year 1629, so far as this report regards the pursuers' lands of Balhaldie and Glassingallbeg, formerly situated within the parish of Dunblane, now within that of Ardoch.

I have considered the evidence before us with all the care and anxiety peculiarly appropriate to a case in which the Court is called on to dispense with the necessity of possessing an original deed, and to admit, as equivalent for all legal purposes, a duplicate made up from extrinsic evidence. It is rightly required in such a case that the evidence should be sufficient and satisfactory. But, from the nature of the process, the amount of evidence necessary will vary with the character and circumstances of the special case. The authorities recognise such a difference as, in some respects, matter of general rule; and every case will have its own distinguishing features.

I have come to the conclusion that, in the special circumstances of the present case, the pursuers have established enough to entitle them to decree in terms of their summons.

The document of which the tenor is sought to be proved is not a private writ, liable to be put away for the purposes of concealment by an individual holder. It is a public document, in which many were interested, and in regard to which there is comparatively little risk of successful falsification. It is an alleged valuation, said to have been made by the Sub-Commissioners for the valuation of the teinds of the lands within the presbytery of Dunblane, and to bear special reference to the teinds of the parish of Dunblane. The valuation is said to have been prosecuted at the instance of Thomas Campbell, procurator-fiscal named by the Sub-Commissioners. Its alleged date is 5th October 1629.

It is proved by conclusive evidence that a sub-valuation of the lands of that parish was actually made of the precise date stated, and was recognised and given effect to in repeated instances. This is proved by excerpts from successive processes of approbation, specially libelled on this very sub-valuation, and in which decree of approbation was pronounced of valuations therein contained. Within eight years of the date of the sub-valuation, viz., in 1637, there was a process of approbation as to the lands of Keir and others, founded on the valuation of these Sub-Commissioners. In 1796 Mr Stirling of Kippendavie raised a process of approbation as to the lands of Whitestone and others, in which the summons is specially laid on this sub-valuation of 5th October 1629; and after referring to the valuation of these lands contained in it, sets forth, "as the principal report of the Sub-Commissioners herewith produced will testify." Decree of approbation was obtained in terms of this summons; the extract decree bearing that the pursuer's procurator, "for verifying the points and articles of the libel produced a book or record containing the principal reports of the Sub-Commissioners of the Presbytery of Dunblane, and particularly the valuation of the pursuer's lands libelled on." In 1806 a summons of approbation was raised at the instance of Sir James Campbell of Aberuchill, in regard to his lands of Kilbride, setting forth "that the Sub-Commissioners appointed for the valuation of the lands and rents of lands lying within the Presbytery of Dunblane, by their report or decree