certain double rankings alleged to lie in the person of creditors to a considerable amount against both estates.

The composition offered is a composition of 3s. 7½d. per £, with the usual statutory security, with the addition of a like sum proposed to be paid out of the Brewery Company estate, on which all the Grain Company creditors are to be entitled to rank equally with the Brewery creditors. These latter are to have the same privilege against the Grain Company estate. In other words, the two estates are to be massed; the creditors of both are to be ranked on one common fund; and a dividend of 7s. 3d. to be drawn indiscriminately by all.

I am of opinion that, whatever recommendations there may be to this proposal in the way of expediency or equity, the proceeding is statutorily inadmissible. The question is not whether the scheme would be effectual if the whole creditors on both estates assented to it. The question is, whether it can be carried by the statutory majority in opposition to dissenting creditors. To this result, it is indispensable that the offer should be strictly within the statute.

I conceive that an insuperable objection lies in the bare fact that the scheme implies the massing of two entirely separate estates, both in their funds and liabilities. This appears to me fundamentally at variance with the first principles of the bankrupt law, which devotes each sequestrated estate to its own proper creditors. The theory of the law is that the composition is a fair equivalent for the value of that particular estate, if allowed to be wound up in ordinary course. How can this idea be practically worked out if not merely the estate under sequestration is to be taken into view, but another estate, with which many of the creditors have no concern, and whose affairs are not even so much as brought under their cognizance? The whole object of the law is set aside unless each sequestrated estate is kept entirely by itself, and the composition payable is estimated on its own assets, and payable exclusively to its own creditors.

I am clearly of opinion that a dissenting creditor is entitled to have the statute rigidly followed out in this respect. And whatever may be said on the subject of expediency, I think a ready answer is open to every such creditor. The main ground of expediency on which the present proceeding is defended is, that a great amount of double rankings will come into controversy; and the scheme proposed is a short-hand process for settling them all. But the dissenting creditor on the grain estate is entitled to say that he expects to cut down these double rankings to such an extent as to leave the grain estate in a position of great superiority over that of the brewery, and he objects on that account to the brewery creditors being put on the same level with himself. It is impossible for the Court to decide, under the present proceeding, what is the true amount of the double rankings. But this very fact is one of the strongest objections to the validity of the composition, as to which the Court have thus no means of deciding whether it is reasonable or not. It is a conclusive plea against the proposed composition that it involves a random settlement of the rankings of the creditors; and implies the sanction of the Court, without inquiry, to a universal double ranking on both estates.

I cannot see how it is possible to follow out into practical efficacy this offer of composition, without infringing at every step the principles of the bankrupt law. The creditors of the grain company, while ostensibly having a composition of 7s. 5d. tendered them, have only the statutory security for 3s. 7½d. For the other sum of 3s. 7½d. they have to go against another company, on which many of them have no right to rank as creditors. I see no absolute security that they will make good this sum from the other estate, or that their claim may not be frustrated by a recusant cautioner, or an objecting brewery creditor. Apparently, they could make good no claim, except by taking an untrue affidavit that they are creditors on the brewery estate. The statute seems to me to afford no certain means for the grain company creditors making good any sum of composition from the brewery company estate; and on this account, were there no other reason, the proposed composition is nugatory.

These illustrations might be largely multiplied. In substance they all evolve themselves from the primary objection that two separate sequestrated estates cannot be competently massed to the effect of giving all the creditors on both estates their united funds for an indiscriminate dividend. This primary objection I think it is impossible to overcome.

Agents for M'Laren & Co. and Cochrane, Paterson & Co.—Murdoch, Boyd & Co. S.S.C.

Agent for Young—S. F. Weir, S.S.C.

Agent for Respondent—P. S. Beveridge, S.S.C.

Thursday, July **1.**

FIRST DIVISION.

PEDDIE *v.* HENDERSON.

Jury Trial—Agreement—Building Contract—Sufficiency of Work—Inspector of Works. In an action of damages against a builder for bad work, the Court refused to set aside the verdict as against evidence—Lord Deas *diss.*

Observations, per Lord Deas, as to the liability of contractor for work which is bad and not according to contract, where it is passed by the inspector of works.

This was an action of damages for breach of contract, at the instance of Donald Smith Peddie, C.A., against Alexander Henderson, builder in Edinburgh. The case was tried on March 1869 on the following issues:—

"Whether the defender contracted with the pursuer to execute certain work on the pursuer's proposed buildings at Trinity in terms of offer and acceptance, plans and specification, Nos. 6, 7, 8, 10, 11, 12, 13, and 14 of process; and whether the defender failed to implement the said contract by executing the said work, as regards the drains, in a sufficient manner, to the loss, injury and damage of the pursuer. Damages £200;

OR,

"Whether the pursuer failed timeously to object to the said work, as regards the drains executed by the defender."

After counsel for the parties had addressed the jury, and Lord Ormidale had, in the course of his charge, brought under the consideration of the jury what appeared to him to be the material matters bearing on the first issue, and after having explained to the jury that it was only in the event of their coming to the conclusion that the pursuer was entitled to their verdict under that issue it would be necessary for them to deal with the second or alternative issue, in reference to which

he *inter alia* directed the jury that "they must, in the first place, be satisfied that the drains were left open for some time, and if they are satisfied that they were seen by the clerk of works, and that he either knew or might be held to have known the condition of the pipes, and the manner in which they were laid, and the ground upon which they were laid, and that no objection was taken by him on the part of the pursuer, or by any one else, then, in point of law, the pursuer was precluded from maintaining his present claim." Whereupon the counsel for the pursuer excepted to the said direction, and insisted that Lord Ormidale should give the following direction to the jury:—

"That the pursuer is not precluded from making his claim for damages by the fact that the work, for the insufficiency of which damages are claimed, was seen by the inspector."

Whereupon Lord Ormidale stated to the jury "that there was no objection to that in itself, but that be wished to explain that 'when the work was seen by the inspector' is not stated in the direction as now asked, nor 'how or in what circumstances the work was seen." A great deal depends upon that. Was it seen at a time, or was it seen in such circumstances as entitled the defender to assume that the way in which his work was executed satisfied the inspector. That was a question for them to consider, and if they were of opinion that the whole work which has given rise to this claim of damages was seen by the inspector at a time, and in such circumstances, as would fairly entitle the defender to rely upon his having got the authority and sanction of the inspector for what he was doing, then that might be quite sufficient to preclude the present claim, but not otherwise." Whereupon the counsel for the pursuer excepted to said ruling and direction of Lord Ormidale. And the jury, after a deliberation of about an hour and a-quarter, delivered a verdict in favour of the defender, in the following terms:—

"At Edinburgh, the 26th and 27th days of March 1869, before the Honourable Lord Ormidale, compeared the said pursuer and the said defender by their respective counsel and agents; and a jury having been ballotted and sworn to try the said issues between the said parties, say, upon their oath, that in respect of the matters proven before them they find for the defender under the first issue."

And it was stated on the part of the Jury, in answer to a question put to them by Lord Ormidale, that they had not found it necessary to deal with the second issue. Whereupon the counsel for the pursuer did then and there propose the foresaid exceptions, and requested his Lordship to sign a bill of exceptions, according to the form of the statute in such cases made and provided.

The pursuer was heard on the bill of exceptions and also on a rule to shew cause why the verdict should not be set aside as against evidence.

Orr Paterson for pursuer.

A. Moncrieff for defender.

At advising—

Lord President—We have before us in this case both a bill of exceptions and a rule. The presiding Judge in the course of his charge brought under the consideration of the jury what appeared to him to be material as bearing on the first issue; and, after having explained to the jury that it was only in the event of their coming to the conclusion that the pursuer was entitled to the verdict under that issue, that it would be necessary for them to deal with the second or alternative issue, he gave them a direction specially applicable to the second or alternative issue. And therefore it was not necessary for them to deal with the second issue at all, as the presiding Judge told them, because they had not found for the pursuer upon the first issue. But, in order to prevent any mistake or misunderstanding, his Lordship very properly asked the jury, when they brought in this verdict, whether they had dealt with the second issue at all, or taken it into consideration; and, in answer to that, they stated that they had not found it necessary to deal with the second issue. Now, the exception is confined entirely to the direction which was given for the guidance of the jury in dealing with the second issue, and therefore I think it is clear, and I believe the Court are all of opinion, that the exception cannot be allowed. It has no application to the verdict which was actually returned by the jury.

Then we have to deal with the rule which was granted upon the first of June last, and in regard to that I have to state that the Court, with the exception of Lord Deas, are of opinion that that rule ought to be discharged. The question for the jury, as raised by the first issue, was whether the defender contracted with the pursuer to execute certain work on the pursuer's proposed buildings at Trinity in terms of a certain offer and acceptance, and whether the defender failed to implement the contract by executing the said work, as regards the drains, in a sufficient manner, to the loss, injury, and damage of the pursuer. The Court are very sensible that the question which was submitted to the jury under this issue was a question of very considerable difficulty, but it was a pure question of fact arising upon the evidence led before the jury. In these circumstances, the Court are not at liberty to disturb the verdict of the jury, and they never would have any inclination to do so unless they were quite satisfied that the verdict was decidedly against the weight of the evidence. Now we cannot arrive at that conclusion. We think that the question raised under this issue, viewed with reference to the evidence which was before the jury, was a question of such difficulty on the matter of fact as probably to lead various persons to different conclusions. We cannot doubt that that is so; and, that being so, it would be a usurpation of the function of the jury for the Court to determine a question of that kind adversely to the jury, and to insist that, upon the mere question of fact, the jury shall return a verdict in accordance with the views of the Court before the cause shall be absolutely brought to judgment. For these reasons, we are of opinion, as I said before, with the exception of my brother Lord Deas, that this rule ought to be discharged.

Lord Deas—With respect to the bill of exceptions, I agree with your Lordship that the exceptions cannot be allowed, because the subject-matter of it has no application to the verdict which was returned. There were two issues. The first one was in substance whether the work was executed, as regards the drains, in a sufficient and proper manner; and the second was whether the pursuer failed timeously to object to the work as regards the drains. Now, it is clear enough that if the work was executed in a sufficient manner there is no room for the question of timeously objecting, because there is no room for objection at

all. And, accordingly, the Judge who tried the cause told the jury that if they were satisfied that the work was sufficiently and properly executed, they did not require to consider the other issue about timeous objection, and ought not to do so. And, from the answer they gave to the question put to them, it appears very clear that what they went upon was, that the work was properly and sufficiently executed, and that they did not deal with the other question at all. It is not to be inferred that I concur in all the law stated by the learned Judge. I shall have occasion to express afterwards wherein I could not concur, but the important question here is whether this verdict is to be set aside as contrary to evidence, and I agree with your Lordship that the greatest possible respect is to be paid to the verdict of a jury, and that we are not to set aside the verdict of a jury on the ground of its being contrary to evidence merely, or because we would have returned a different verdict, or on any ground except that it is palpably against the weight of evidence, or in the teeth of evidence. The ground on which I think this verdict should be set aside is that, in my humble opinion, it is in the teeth of the evidence. If that opinion rested on mere conflict of testimony, or believing one witness rather than another, I should not be disposed to interfere; but it is because it rests on what I regard as real evidence that I think myself bound to hold that the verdict should be set aside. The matter complained of is the drains, including the soil-pipes connected with the water-closet arrangements of a house. It was specified that fire-clay pipes were to be used of a certain description. I put no weight on one kind of pipes being used in place of the other, because the probability is that one kind is as good as the other; but whichever was to be used, it was specified that there were to be 23 bends and 18 eyes. It requires no skill or knowledge of the construction of drains of this kind to know that these bends are essential wherever soil-pipes are to be passed through walls, in ascending from one pipe to another, or in going round a corner. There is scarcely any other way in which they can be formed so as to prevent the escape of noxious air, probably dangerous, as well as disagreeable, to the health of the inhabitants of a house and neighbourhood. Every one must know that these bends and eyes are almost essential to secure the purpose for which these drains are made. It was some years before these drains were taken up or examined. The defects were obvious more or less from time to time by the escape of gas. When they were taken up in 1867 it was found that the drains had been to a great extent laid on earth. Every one is agreed that that should not have been done. The contractor himself says it was never done before, and ought not to be done, and there is some little obscurity as to how it came about. Whatever I may think as to that as a fault on the part of the contractor, it is not on that that I venture to rest my opinion. I cannot believe that Mr Peddie or any other architect would sanction such a thing. But I do not rest on that, or on any other such defects, as that the pipes should have been all of one size, although it is plain that if you put a smaller pipe into a larger one, that is wrong, although it is proved to have been done in many places here; because, although I think it very improbable, yet it is possible that when these drains were open for a time some of the pipes may have been broken, and some of the workmen may have replaced the broken bits by pipes of a wrong size. That is possible, and therefore I do not rest upon it. But what I cannot get over is that, when these drains were examined in 1867, the pipes having clearly lain untouched in the earth, these 23 bends and eyes specified in the schedule, and which are admitted to have been paid for, were not there. There were scarcely any of them there,—there were not above two or three of the bends at the utmost I think; and it was found that straight pipes had been inserted into holes in the side of other straight pipes. When I find that to have been the case, I cannot help putting the question to myself how that came about. Is there any conceivable way of explaining that if these bends and eyes, more particularly the bends, were there at the time that the drains were laid, they had rotted in the earth, and straight pipes thrust into other straight pipes had grown into their place; unless you can apply to this the notion of Topsy "guess they growed," I do not see how otherwise the one can have come there and the other disappeared. That that is the state of the fact is undoubted, unless the men that saw the drains taken up in 1867, and swear that these bends and eyes were not there, and that the straight pipes were used in the way I have stated, are swearing that in 1867 they saw that which they did not see; and unless they are doing so, how can any reasonable man come to the conclusion that these drains were executed sufficiently according to the specification and schedule on which the work proceeded. I have the greatest possible respect for the verdict of a jury, but I cannot believe a physical impossibility. I cannot believe that it is physically possible that the one set of pipes rotted away and the other grew. If the learned Judge who tried the case thought that these gentlemen swore what was downright falsehood, contrary to the sight of their own eyes—or, rather perhaps if his opinion was that the jury thought that—I could understand it. If they did not believe the inspector of works, Mr M'Fadyen, and the builder Mr Duncan, and the mason Mr Johnston, I would be slow to interfere with the verdict of the jury, and I do not know that I would touch it at all. But it is not suggested that that is what the jury went upon, and it is not reasonable to suppose that that is what they went upon. The defender himself was present when the drains were taken up in 1867, and saw what was done. He had an opportunity of bringing as many men of skill as he chose to see the state of matters, and he did not bring one; and he does not pretend to contradict what these men say they saw. If they saw that these bends and eyes were not there, I do not require anything more to come to the conclusion that they never could have been there, and the work could not have been executed according to the contract. The contractor himself says that he does not doubt that all these bends and eyes should have been used; he does not doubt that they are all charged, and that he was paid for them, for he says that if they had not been used they would have been deducted in settling his accounts, which they were not. Now, is that state of matters reconcileable with the supposition that this work was executed as it should have been? The evidence of the inspector to my mind goes for very little. The state of mind of that inspector, if it was at the time this work was executed that which it appears to be now, may go to account to some extent for this being allowed to be done; but I do not see that it goes to much more. He was put into the witness box, and I should infer from the very few questions that

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