and will not obviate any of the expense incident thereto. I cannot refrain from stating, however, that this action, so far as it is an action of reduction, was in my opinion wholly unnecessary. A reduction could only be necessary if the memorandum of agreement constituted a bar to other proceedings, but our decision negatives this. As regards the receipts, neither singly nor together can they be held to constitute an agreement, although they may be evidence that an agreement was entered into. But I never heard of it being necessary to reduce a document because an erroneous inference had been drawn as to its effect.

So far as the action is a negative declarator, I think it is competent enough in the Court of Session, although the question involved might quite well have been determined in the Sheriff Court action at the instance of the pursuer, and in any subsequent case ought, I think, to be determined there. The present action may be justified because of the difficulty of gathering from prior decisions what the pursuer's true remedy was, but I think it should not be taken as a precedent in future cases of the same nature. This question was, however, not raised in argument; and as I agree with the reasoning of the Lord Ordinary I concur in the motion which your Lordship in the chair has proposed.

LORD PRESIDENT — With reference to what my brother Lord Salvesen said as to reductive conclusions, my observation as to reduction was entirely confined to the agreement recorded in the register. I quite agree with Lord Salvesen that it is, of course, quite impossible to reduce some of the documents that are here sought to be reduced.

LORD KINNEAR and LORD PEARSON were absent.

The Court adhered and refused the reclaiming note.

Counsel for the Pursuer and Respondent—Watt, K.C.—Hamilton. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders and Reclaimers—M'Clure, K.C.—Murray. Agents—Simpson & Marwick, W.S.

Thursday, February 28.

SECOND DIVISION.

BLEAKLEY'S TRUSTEES *v.* JOHNSTONS.

Succession—Vesting—Discretionary Power to Trustees on Death of Liferentrix to Sell and Divide Property among Beneficiaries—Postponement of Vesting till Exercise of Discretion.

Terms of a holograph trust-disposition and settlement giving discretionary power to trustees after the death of the liferentrix to sell a certain property and divide proceeds amongst the fiars, which were *held* to postpone vesting till the exercise of the discretion.

John Bleakley, boot and shoemaker, Edinburgh, by his holograph trust-disposition and settlement, dated 3rd February 1902, conveyed his whole estate, heritable and moveable, to trustees. He directed his trustees, *inter alia*, "to dispone, convey, and make over that house belonging to me, the south half-flat, being the top half-flat No. 2 (two) Lauriston Terrace, together with the cellar thereunto belonging in Lauriston Lane, Edinburgh, to my niece Margaret (Maggie) Armstrong or Johnston, wife of John Johnston, in liferent, and to her four youngest children in fee, namely, Alice, Harry, Herbert, and George, in fee, at the death of the said Maggie Johnston the house is to be either sold or let, I hope the trustees will do best for the children, rents could go to their benefit when young, it I think would be a pity to sell while they are young, money would soon be fritted away. But when it is realised to be divided thus into five shares—Alice one share, Harry one share, Herbert called after my dear wife's father two shares, the remaining share to George. Should any of the children die before division is made their share, except they have a family, be divided between the survivors, these presents are given subject to regularly paying feu-duty 35s. per anon and keeping the house in good repair together with mutual repairs on tenement allowcate on feu-duty not on rents; should my death and the above Margaret Johnston's death take place while the above children are under age it would be much better to let the house till they were older."

Bleakley, who died on 9th December 1905, was survived by the said Mrs Margaret Armstrong or Johnston and by her said four youngest children, who were born, Alice on 13th February 1888, Harry on 14th June 1890, Herbert on 24th June 1895, and George on 7th May 1897.

Questions having arisen as to the administration of the trust, a special case was presented, to which William M'Culloch Ramsay and others, the trustees under Bleakley's trust-disposition, were the *first* parties, and the said Alice Johnston, Harry Johnston, Herbert Johnston, and George Johnston were the *third* parties. The question of interest to the parties who were second parties to the case was settled.

The case stated—"With regard to the question between the first and third parties, the third parties maintain that, subject to Mrs Johnston's liferent, the fee of the top half-flat at 2 Lauriston Terrace, Edinburgh, vested in them *a morte testatoris* in the proportions of one share to Alice Johnston, one share to Harry Johnston, two shares to Herbert Johnston, and one share to George Johnston. The first parties on the other hand maintain (1) that no vesting takes place in the second parties until the half-flat at 2 Lauriston Terrace has been sold, and that with regard to the time when this sale should take place, the first parties, subject always to Mrs Johnston's liferent,

have an absolute discretion; or (2) that vesting is postponed till the termination of Mrs Johnston's liferent, and takes place then only in those of the second parties or their issue who survived that date."

The following questions, *inter alia*, were submitted for the opinion and judgment of the Court:—"(2) Under Mr Bleakley's trust-disposition and settlement, does the fee of the shares of the half-flat at 2 Lauriston Terrace, Edinburgh, falling to the third parties, vest in them *a morte testatoris* in the proportions mentioned in the said trust-disposition and settlement? (3) In the event of the second question being answered in the negative, is vesting in the third parties postponed until the first parties in their absolute discretion shall sell the half-flat at 2 Lauriston Terrace, Edinburgh? Or, is it merely postponed until the death of the liferenter Mrs Johnston?"

Argued for the first parties—Vesting was postponed till they, in the exercise of their discretion, sold the said property. Further, subject to Mrs Johnston's liferent they had an absolute, or at all events a reasonable, discretion as to when they should do so. The only possible meaning of the words the testator had used was that until they exercised their discretion no share vested in the third parties—*Thorburn and Others* v. *Thorburn and Others*, February 16, 1836, 14 S. 485; *Wilkie* v. *Wilkie*, January 27, 1837, 15 S. 430; *Howat's Trustees* v. *Howat and Others*, December 17, 1869, 8 Macph. 337, 7 S.L.R. 157; *Macdougall* v. *M'Farlane's Trustees*, May 16, 1890, 17 R. 761, 27 S.L.R. 638; *White's Trustees* v. *White*, June 20, 1896, 23 R. 836, 33 S.L.R. 660. The survivorship clause was referable to the period of division—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314. There was no repugnancy in it; the destinations must be read as a whole.

Argued for the third parties—(1) The fee vested *a morte testatoris*. They were entitled to take the clause of division as completing the original clause. The survivorship clause was absolutely repugnant to, and inconsistent with, the original gift of fee, and, if so, no matter how clearly it might be expressed, it must be disregarded. Here they were in the category of such cases as *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; *Simson's Trustees* v. *Brown*, March 11, 1890, 17 R. 581, 27 S.L.R. 472; *Smith's Trustees and Others*, March 9, 1894, 31 S.L.R. 538, *per* Lord M'Laren, at p. 541. (2) Assuming they were wrong in their first contention, in any event vesting took place at the death of the liferentrix, their mother Mrs Maggie Johnston. It was not to be presumed that vesting was to be left to the discretion of the trustees. Moreover, the general rule was that a legacy vested at the time when the trustee's declaration as to payment might have been effective. Mrs Johnston's death was the earliest time at which realisation could take place. They referred to *Scott* v. *Scott's Executrix*, January 27, 1877, 4 R. 384, 14 S.L.R. 272, and *Rutherford* v. *Easton's Trustees*, July 2, 1894 (O.H.), 12 S.L.T. 184. In the latter case Lord Kyllachy said that the strong presumption against vesting depending on discretion had always been applied save in the four exceptional cases of *Thorburn* (*sup. cit.*), *Wilkie* (*sup. cit.*), *Howat* (*sup. cit.*), and *M'Dougall* (*sup. cit.*), which were those founded on by the first parties. There was only one period contemplated at which the trustees could exercise their discretion, and that was the death of the liferentrix. They also referred to *Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, 26 S.L.R. 146; *Maclean's Trustees* v. *Maclean*, June 29, 1897, 24 R. 988, 34 S.L.R. 746.

At advising—

LORD ARDWALL—The deed which the Court is here asked to construe is a holograph trust-disposition and settlement drawn by the testator himself, who though not a lawyer seems either to have acquired some knowledge of legal phraseology or got hold of some deed or style from which he copied some of the expressions he uses.

In such a case it is of great importance to endeavour to get at the leading intentions of the testator rather than to endeavour to spell out a meaning from each of the various phrases used in the deed.

The general intention regarding No. 2 Lauriston Terrace was to give the liferent of the house or half flat in question to his niece Mrs Johnston and the fee to her children. Not knowing what the ages of the children might be at the death of their mother, he did not direct his trustees then to sell the house, but to "sell or let" it; he was anxious that it should not be sold if the children were at that time too young to take care of the proceeds of the sale, for fear the money "would soon be fritted away," and he was desirous, apparently, that if the children were so young as not to be able to manage money matters the house should be let and the rents applied by the trustees for their benefit "till they became older." He accordingly resolved to leave the time of the sale entirely in the discretion of the trustees, as they would be in a position at and after the death of the liferentrix to judge what it would be best to do in the interests of the children. But when the house is "realised" his directions are clear and explicit—the proceeds are to be divided into five shares, Herbert to get two shares and the other three children one each. Then follows this very explicit clause:—"Should any of the children die before division is made their share, except they have a family, be divided between the survivors."

To my thinking the scheme of the settlement is simple and clear. The trustees are to determine the date of realisation, and a division is to be made among the then surviving children and the issue of any who have predeceased that period.

The question now arises, when does vesting of their respective shares take place in the children?

It cannot be at the death of the testator, because there is a survivorship clause and

a destination-over plainly referable to a later period. Is it at the death of the widow? I think not, because although that is the earliest period at which realisation could take place, and the trustees might realise and denude then, they are not directed to do so. On the contrary, in certain circumstances they are enjoined not to realise then and consequently not to divide. I therefore arrive at the conclusion that the date of division must be the date of vesting. This view derives support from a closer examination of the clauses of the deed. There is doubtless a gift of the fee to the children as a class in the first portion of the clause under consideration, but there is no gift to the individual children (and be it noted, one of these gets a double portion) till after realisation of the house. Up to that time, apparently, the house was to be held for behoof of them all as a class without distinction of shares and without preference of one over the other. This, I think, all points to there being no gift to the individual children until the period of realisation of the house and division of the proceeds, and secondly, to there being no vesting till that time.

It was maintained, however, for the third parties that to hold that vesting did not take place till the division of the estate was in contravention of the rule of construction which has led the Court in several decided cases to avoid a construction which would fix an uncertain date for vesting, or would make vesting depend on the act of the trustees or other third parties. Now, undoubtedly, where there are no indications of intention to the contrary, that construction of a deed will be preferred which fixes a definite period for vesting, yet, like all similar rules its application is displaced by the express or implied intention of the testator to a contrary effect, and I think there is such contrary intention expressed in the present deed. Effect has frequently been given by the Court to the intention of testators in making the period of vesting of their estates depend upon the period of division or the discretion of their trustees. Examples of this occur in the decided cases of *Thorburn*, 14 S. 485; *Wilkie* v. *Wilkie*, 15 S. 430; *Howat's Trustees* v. *Howat*, 8 Macph. 337; and *White's Trustees*, 23 R. 836. In other cases, such as *MacLean* v. *MacLean's Trustees*, 24 R. 988, it has been held that the main intention of the testator was that his children and the issue of deceased children should all take their shares of his estate as from his death, and that the clauses regarding the division of the residue and the like were merely directions as to the administration of the estate and did not detract from the main purpose of the deed. The case of *Scott* v. *Scott's Executors*, 4 R. 384, in some respects very closely resembles the present, and there it was held that vesting took place in the children and issue of children at the date of the widow's death as the earliest period at which the trustees might, in the exercise of their discretionary powers, have made a division of the estate, and was not postponed till the actual exercise of these powers; but in that case the sole object of the testator in postponing the division of the estate till after a lapse of some time after the death of the annuitant was for the purpose of paying off heritable debts on it, but at the same time the trustees were empowered to sell the heritable subjects under burden of the heritable debts at any time after the death of the annuitant, and it thus plainly appeared that any delay that was directed to take place in the division was purely, so to speak, for administrative purposes, and was not with the view of postponing either vesting in or payment to the children a moment after the death of the widow. In the present case, as I have already pointed out, the postponement of realisation and division by the trustees was specially intended by the testator to provide for the case of the children being too young at the date of their mother's death to manage the proceeds of the property should it then be realised and divided. Accordingly, with this intention, the testator, in my opinion, made the time of realisation and division, and consequently of vesting, wholly dependent on the discretion of the trustees, which he directs them to exercise in certain circumstances by postponing the division, although in other circumstances they may, of course, see it to be their duty to realise and divide immediately on the death of the widow. I may add that there is not, in my opinion, any obligation on the trustees to delay realisation and division till all the children attain majority. At and after the widow's death they must just exercise their discretion as to the best course to follow in view of the interests of all the children and of the estate generally.

On the whole matter, therefore, I am of opinion that the second question should be answered in the negative, the first alternative of the third question in the affirmative, deleting, however, the word "absolute," and the second alternative of the third question in the negative; it is unnecessary to answer the first question owing to the parties having come to an agreement with regard to the matter there dealt with.

LORD STORMONTH DARLING—I agree with Lord Ardwall that it is impossible to hold that vesting took place *a morte testatoris*, for the reason he has stated. We might perhaps have stopped there and declined to answer the further question as between vesting at the death of the liferentrix and at the date of actual realisation and division of the price, on the ground that the question may never arise. If the liferentrix survives the period when the children can no longer be described as "young"—by which vague phrase the testator indicates that he means "under age"—the only reason for postponing the sale and division in the children's interests will have disappeared, and nothing will remain for the trustees but a clear duty of retaining the property until the *death* of the liferentrix, and then selling. But if that lady should unhappily die prematurely, I concur in the view that it will be for the trustees to consider whether it would be more for the children's interests to sell at

once or let for a few years, and that, should they adopt the latter alternative, vesting will not take place till the date of actual sale. But I desire to say nothing that might seem to fetter their discretion, and certainly no one can blame them if they sell at the earliest moment after the expiration of the liferent.

LORD LOW—I have felt great difficulty in this case. There is a strong presumption against the idea that the testator intended vesting to depend on the discretion of his trustees. Further, it is very difficult to distinguish this case from *Scott's Trustees*, to which Lord Ardwall has referred. The clause, however, in which the testator provides that if any of the children should die before division, their share, except they have a family, is to be divided among the survivors, is expressed in language, which when read according to its ordinary meaning is quite unequivocal.

Where unequivocal language is used, it is not safe to refuse to construe that language according to its ordinary meaning simply because there are strong reasons for believing the intention of the testator to have been otherwise.

I accordingly agree that the questions should be answered in the way proposed by Lord Ardwall.

LORD JUSTICE-CLERK—I concur.

The Court answered the second question in the negative; the first alternative of the third in the affirmative, deleting the word "absolute"; and the second alternative of the third in the negative.

Counsel for the First Parties—Morton. Agent—W. R. Ramsay, Solicitor.

Counsel for the Third Parties—Fenton. Agent—Joseph Chalmers, S.S.C.

Thursday, February 28.

SECOND DIVISION.

[Lord Dundas, Ordinary.

BENNETT'S EXECUTRIX *v.* BENNETT'S EXECUTORS.

Succession—Heritable and Moveable—Deed of Acknowledgment — Jus relictæ — Act 1661, *c.* 32.

An acknowledgment for a sum of money was granted on 9th November 1898 in the following terms:—W. B. "We hereby acknowledge that you have deposited with us three thousand pounds, stg. (£3000), which we, at your request, are to hold as a loan from you. We propose to pay interest on this half yearly, which we presume will be agreeable to you"—T. & J. B.; and interest was in fact paid as recorded by receipts written on the back of the acknowledgment.

After the death of the lender in 1905, *held* that the sum of £3000 contained in the deed of acknowledgment was heritable as regarded the widow's *jus relictæ*.

Dawson's Trustees v. *Dawson*, July 9, 1896, 23 R. 1006, 33 S.L.R. 749, *followed*.

On 8th May 1906 Elsie Mary Byrne, executrix-dative of the deceased Margaret Brown Byrne or Bennett, widow of William Bennett, wine and spirit merchant, Govan, raised an action against Robert Sutherland and others, executors-nominate of the said William Bennett, in which she sought declarator that she, as executrix of Mrs Bennett, was entitled to payment of one-half of the net amount of the moveable or personal estate of William Bennett, to which Mrs Bennett had been entitled *jure relictæ* upon his death. The net value of the moveable estate was about £50,000.

The defenders admitted that as William Bennett had died without children, Mrs Bennett became entitled to one-half of her husband's moveable estate as *jus relictæ*, and that as Mrs Bennett had died without receiving payment, the right thereto had passed to the pursuer; but they denied that a certain sum of £3000 which had been deposited by Mr Bennett with Messrs Thomas and James Bernard, Limited, fell within the fund on which was to be calculated Mrs Bennett's *jus relictæ*.

Messrs Bernard's deed of acknowledgment, referred to as No. 12 of process, on the back of which were four receipts for interest "to date," the last being dated 8th May 1902, was:—"9th Nov. 1898.—Mr William Bennett, 113 Langlands Road, Glasgow.—Dear Sir,—With reference to yours of 7th inst. to our Mr Brownhill, we hereby acknowledge that you have deposited with us three thousand pounds stg. (£3000), which we, at your request, are to hold as a loan from you. We propose to pay int. on this half-yearly, which we presume will be agreeable to you.—We are, Yours faithfully,—for Thomas & James Bernard Limited, J. J. Balleny."

The pursuer pleaded, *inter alia*—"(3) The said sum of £3000 held on deposit by the said Thomas & James Bernard Limited, being part of the moveable estate of the deceased William Bennett, the pursuer is entitled to have the same included in the *jus relictæ* fund."

On 22nd November 1906 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Repels the third plea-in-law for the pursuer, and appoints the cause to be enrolled for further procedure: Reserves the question of expenses, and, on the motion of the pursuer, grants leave to reclaim."

Opinion.—"This action is raised by the executrix-dative and sole next-of-kin of the deceased Mrs Bennett against the executors-nominate of that lady's husband, William Bennett, who predeceased her. The only question raised for decision is whether or not a sum of £3000 which was deposited by Mr Bennett during his lifetime with Messrs Thomas & James Bernard, Limited, to be held by them as a loan from him, and which had not been repaid at his death, falls within the fund available for payment