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

of his widow's *jus relictæ*. It is admitted that Mrs Bennett is entitled to one-half of her husband's moveable estate *jure relictæ*, and that the pursuer is now in right thereof. The document upon the terms of which the question depends is thus expressed—. . . [*quotes, supra*]. . . . Four receipts, dated 12th November 1900, 9th May and 11th November 1901, and 8th May 1902, respectively, for interest 'to date,' are endorsed upon the back of the document, as to the accuracy and authenticity of which no question is raised. The point which thus arises must in my opinion be solved by determining whether or not the fund in question is heritable according to the common law as it stood prior to the passing of the Act 1641, cap. 57, which, though it fell by the recissory Act 1661, cap. 15, was substantially re-enacted by the Act 1661, cap. 32. The common law, as it then stood, though altered as regards succession by these Acts, still remains the same in a question with the widow. I have come to be of opinion that this £3000 was, and is, at common law heritable and not moveable for the purposes of the matter here in dispute. I apprehend that under the old common law a personal obligation for payment of money with interest was moveable until the occurrence either of the stipulated date for repayment of the principal or of the first term of payment of the interest thereon. After the arrival of either of these dates such an obligation became heritable for all purposes, for the reason that money bearing interest was regarded as *quasi feudum* or *feudum pecuniæ*, and the genius of our law was to extend the operation of feudal principles as far as possible. If the term of repayment of the principal was distant or uncertain, then the obligation became heritable when the first term of payment of interest upon it had passed. The doctrine which I have thus summarised will, I think, be found to be established by reference to Stair, iii, 4, 34; Ersk. Inst. ii, ii, 9, 10; 2 Bell's Comm. (7th ed.), p. 7; M. Bell Conv. (3rd ed.) pp. 251, 253, and the cases there cited, to which I may add the recent decision in *Dawson's Trustees*, 1896, 23 R. 1006. This state of the common law was felt to bear hardly upon the just interests of 'the bairns and next-of-kin of the deceased'; and the Scots Acts above mentioned were passed in order to remedy these hardships. The Act 1661, cap. 32, 'concerning heritable and moveable bonds,' ordains that 'all contracts and obligations for sums of money payable to parties at any time' after the date of the Act 1641, cap. 57, 'containing clauses for payment of annual rent and profit, are and shall be holden and interpret to be moveable bonds, except in these cases following' (with which we are not here concerned): 'Declaring always that all such bonds, *quoad fiscum*, shall remain in the same condition as they were before the said sixteenth of November One thousand six hundred and fourty-one, not to fall under the compass of single escheat, nor shall any part thereof pertain to the relict, *jure relictæ*, where the bonds are made to the husband, nor to the husband, *jure mariti*, where the bonds are made to the wife, unless the relict or husband have otherwayes right and interest thereto. . . .' The pursuer's counsel maintained, and it was not seriously disputed, that the document No. 12 of process is not a 'bond' in the ordinary meaning and acceptation of that word. But the Act 1661, cap. 32, uses the words 'contracts and obligations for sums of money . . . containing clauses for payment of annual rent and profit,' in the same sense as the word 'bond'; and I see no reason to doubt that by the common law, as it stood before the Acts, contracts and obligations bearing interest, as well as bonds, were regarded as heritable for all purposes. The real question appears to me to be whether or not this document No. 12 of process falls within the scope of the words which I have just quoted. In my opinion this question must be answered in the affirmative. No. 12 of process is plainly an acknowledgment of a loan—a statement that the granters are indebted in the sum of £3000 to the grantee; and the law infers accordingly an obligation upon the part of the granters to repay that sum. It seems to me, therefore, that the document is, at all events, an obligation for a sum of money; for I see no reason to distinguish in this question between an obligation which the law infers and one which is expressed in the document of debt (*Thiem's Trustees*, 1899, 1 F. 764). It must also, in my judgment, be held that No. 12 of process is an obligation containing a clause for payment of annual rent and profit. The granters 'propose to pay interest . . . half-yearly,' and interest was in fact paid, as recorded upon the back of the paper itself. It does not appear to me to be material that no rate of interest is expressly stipulated. In the absence of such stipulation, the rate of 5 per cent. per annum would probably be presumed; but apart from this, interest was, as I have said, actually paid at some rate—whether 5 per cent. or not I do not know. I am of opinion that under these conditions the obligation contained in No. 12 of process was and is heritable in a question of *jus relictæ*. It was argued for the pursuer that a decision in this sense would import a similar result in the case of a sum of money contained in an ordinary deposit-receipt or in an I O U. I do not think that this would necessarily be so. An ordinary deposit-receipt contains no clause for payment of annual rent at all. The deposited sum simply lies at call. It bears interest, no doubt, but no interest is payable until the principal sum is paid. As regards I O U's, they do not, so far as I am aware, usually stipulate expressly for payment of interest, though I observe that this was so in the I O U in *Thiem's Trustees*, *sup. cit.* In the present case, however, I think that we find a personal debt or obligation for money which is expressly said to bear interest; that at common law it became heritable for all purposes when the term for payment of the first half-year's interest arrived without repayment of the

principal; and that in this question of *jus relictæ* it still retains that character. I shall therefore repel the third plea-in-law for the pursuer, and appoint the cause to be enrolled for further procedure."

The pursuer reclaimed, and argued—The Lord Ordinary, while his general statement of the law was correct, had erred in his application of it in this case. The sum in question here was not heritable *quoad jus relictæ*. That question turned on the common law as it existed prior to the Act 1641, cap. 57, the statutes not touching it. But while the statutes did not apply, it was true, as Lord M'Laren said in *Dawson's Trustees* v. *Dawson*, July 9, 1896, 23 R. 1006, at p. 1010, 33 S.L.R. 749, that the Act 1661, cap. 32, which practically re-enacted 1641, cap. 57, was the best evidence as to the rule of the common law prior to that date. Taking that evidence we found that it was the presence of two things, time not entering into the question in this case, which together made a loan heritable in character—(1) There must be a contract or obligation; (2) the document must contain a stipulation for annual rent. Both were absent here, and consequently the sum in question remained moveable. (1) Contracts and obligations referred respectively to the bilateral and unilateral documents. The document here was not in itself a contract. With reference to its being an obligation, there might be documents that inferred debt but were not in themselves obligations, for they expressed no obligation to repay—*Paterson* v. *Paterson*, November 30, 1897, 25 R. 144 (*per* Lord Kyllachy at p. 172), 35 S.L.R. 150; *Thiem's Trustees* v. *Collie*, March 14, 1899, 1 F. 764 (*per* Lord Trayner at p. 775 and Lord Moncreiff at p. 779), 36 S.L.R. 557. There was a distinction between documents that expressed an obligation and those from which it could be implied. In *Downie* v. *Downie's Trustees*, July 14, 1866, 4 Macph. 1067, 2 S.L.R. 204, there was what was here wanting—an express obligation to repay money in the document itself. (2) There was here no clause of annualrent in the sense of a fixed sum coming in annually. It was necessary to have a clause expressly stipulating for payment of annualrent. In *Dawson* v. *Dawson's Trustees* (*sup. cit.*) the document specified that interest was to be at the rate of 4 per cent. There was there a clear clause of annualrent. *Cunningham* v. *Boswell*, May 29, 1868, 6 Macph. 890, 5 S.L.R. 559, had no application to the present case. The reclaimer also referred to *Ross* v. *Graham*, November 14, 1816, F.C.; *Gordon*, M. 5505; and *Gray*, M. 3629.

Argued for respondents—The Lord Ordinary was right. The document here was a contract or obligation. Provided it amounted to an obligation, it was unnecessary the words should actually be used. In *Thiem's* case (*sup. cit.*) the document did not contain an obligation to repay, being simply an I O U, but the Court held it was an obligation. An obligation which the law inferred was as good as an express obligation. *Cunningham* v. *Boswell* (*sup. cit.*) also showed that a document in order to be an obligation need not express the obligation to repay. Neither need the document be a formal bond. Erskine, in the passage in the Institutes (ii, ii, 9, 10) referred to by the Lord Ordinary, was not treating of a bond as a technical instrument of a particular kind, but was using the word in a popular sense. No Scots conveyancer would call the documents in *Downie* v. *Downie's Trustees* (*sup. cit.*) nor in *Dawson's Trustees* v. *Dawson* (*sup. cit.*) bonds. Here there was a written record of a contract of loan, a statement of an agreement, and no implication was necessary. The important question was—Was this a debt of the kind which the common law of Scotland looked on as a *feudum pecuniæ*? The words "deposited" and "hold as a loan" were important. There was an element of permanence, as the parties had contracted that the money should lie out at interest, and there was a clause contracting for payment thereof about which there was no ambiguity whatever. Where there was a contract to pay interest and no stipulation for a lower rate, it would be presumed to be 5 per cent.—See *Smith* v. *Barlas*, January 15, 1857, 19 D. 267.

At advising—

LORD JUSTICE-CLERK—I agree with the Lord Ordinary in holding that the £3000 held in loan by Messrs Bernard from the deceased Mr Bennett does not form part of the fund upon which *jus relictæ* payable to his widow is to be calculated, and I concur also in his statement of the grounds given for his opinion.

There is no doubt that such a decision would be in accordance with the law of Scotland in early times. The question is whether any change on the ancient common law was made by Act of Parliament. The Acts chiefly affecting the question are the Act of 1641, as altered again by the Act of 1661. Under that latter Act all obligations or contracts for sums of money containing clauses of annual rent or profit are to be "holden and interpret to be moveable bonds," but the Act declares that no part shall fall to the widow as relict when the obligation is to the husband unless she has otherwise an interest in the sum.

It is thus plain that where a person lends out money for an annual return, and draws this, the sum is held to be part of his moveable estate without its being necessary that the loan should take the form of a bond. Now, here there is unquestionably an obligation, the writing expressly declaring that the transaction is a loan, and there is an express statement that interest is to be paid. It is therefore an obligation for money on which a profit is to be gathered from time to time. I cannot assent to the idea that when a loan is acknowledged, there is any need for an express undertaking to repay. The fact that it is a loan implies the right to recover the amount from the debtor with interest. And it is proved conclusively that the interest was regularly paid. I have no hesitation in holding that the case we have to deal with is one falling within the Act of 1661, and that the sum in the obligation is, as regards

the question here, part of the heritable estate of the deceased.

I should have come to this decision apart from authority. But I am confirmed in my view by a study of the case of *Dawson*, quoted at the debate. It seems to me to be a distinct authority for holding as the Lord Ordinary has held in this case.

LORD STORMONTH DARLING—This reclaiming note has been brought by leave of the Lord Ordinary in the course of a process for determining the amount of *jus relictæ* due to the pursuer as executrix of Mrs Bennett, who was widow of a spirit merchant in Govan. The only question raised for decision is whether or not a sum of £3000, deposited by the late Mr Bennett on 9th November 1898 with Messrs Thomas & James Bernard, Limited, to be held by them as a loan from him, which sum had not been repaid at his death, falls within the fund available for payment of his widow's *jus relictæ*. The Lord Ordinary, by repelling the third plea-in-law for the pursuer, has held that this sum does not so fall, and I agree with him for the reasons stated in his opinion.

The question turns entirely on the common law of Scotland as it existed before 16th November 1641, and as it was substantially re-enacted by the Act of 1661, cap. 32. That was an Act "concerning heritable and moveable bonds," and it sets out by ordaining that "all contracts and obligations for sums of money payable to parties at any time, made and dated since the sixteenth day of November One thousand six hundred and forty-one, or to be made in time coming, containing clauses for payment of annual rent and profit, are and shall be holden and interpret to be moveable bonds except in these cases following, viz."—[then follow certain cases in which the "sums" are to be heritable and to pertain to the heir]—"Declaring always that all such bonds, *quoad fiscum*, shall remain in the same condition as they were before the said sixteenth of November 1641 . . . nor shall any part thereof pertain to the relict *jure relictæ* where the bonds are made to the husband, nor to the husband *jure mariti* where the bonds are made to the wife, unless the relict or husband have otherwayes right and interest thereto." The motive of all this, as Erskine explains in his "Institutes" (ii, ii, 9), was that, as personal bonds bearing interest were undoubtedly moveable in their own nature, it was judged unreasonable and unfair to younger children in every case where the creditor himself had manifested an intention to treat the sum in the bond as moveable (as by fixing a day for repayment of the principal, by which day he was presumed to intend to turn his bond into cash), to adhere to the old law which had accounted such bonds as *quasi feuda* and therefore heritable; but that, on the other hand, where the creditor's intention appeared to be different (*e.g.*, if he survived the period for the first payment of interest and thereby showed that he meant to treat his bond as an investment yielding a yearly profit), the bond should still be treated as heritable and certainly so in all questions concerning the fisk and between husband and wife.

First, then, I observe that by the terms of the Act the documents in question do not require to be bonds but simply contracts or obligations for sums of money, and second, I observe that the only other requisite they must possess is that they shall contain "clauses for payment of annual rent and profit."

Now, both these requisites are present here. The Lord Ordinary has quoted in his opinion the exact terms of the letter addressed to the creditor by the secretary of the limited company with which, at the creditor's request, the sum of £3000 had been deposited and was to be held as a loan. It is said that the letter contains no express obligation to repay. But what of that, when it acknowledges receipt of the money "as a loan," from which the law infers an obligation to repay? Next, it is said that there is no clause for payment of annual rent and profit, but only a proposal to pay interest half-yearly at a rate not specified. But it is surely elementary that a promise may be binding, and may therefore be an "obligation," if undertaken as a final engagement, and that this proposal was so undertaken is conclusively shown by the receipts endorsed on the letter by the creditor, and extending down to 8th May 1902. As to the rate of interest, where a debt is acknowledged and interest is promised without any stipulation for a lower rate, it would surely be presumed to be 5 per cent. The trustees of the late Mr Bennett aver that 5 per cent. was the rate which the investment actually bore and there is no averment to the contrary. The obligation under this letter is therefore quite different from the case of an ordinary deposit-receipt from a bank, where no interest is due till the principal is uplifted, and from an IOU, where, in the absence of express stipulation, no interest is payable at all. Here there is an express undertaking to pay interest half-yearly. I therefore hold with the Lord Ordinary that the letter contains an "obligation for payment of annual rent and profit" within the meaning of the Act and is therefore heritable in a question of *jus relictæ*.

I have carefully compared this document with that which was under consideration of the First Division in the comparatively recent case of *Dawson's Trustees*, 23 R. 1006, and which was an acknowledgment in the following terms:—"Received from Mr Michael Dawson the sum of £5000 sterling as a deposit for mission purposes, to bear interest at the rate of 4 per cent. per annum, payable half-yearly at Martinmas and Whitsunday, and to be repaid on three months' notice." If that document does not differ in any material particular from the acknowledgment we have here, then the opinions of Lord Kinnear and Lord M'Laren (in which Lord President Robertson concurred) are absolutely in point, for it was a question dealing solely with *jus relictæ*. I confess my utter inability to discover any essential distinction between the two docu-

ments. That in *Dawson's* case was no more a "bond" in the technical term than this is. It was a written obligation granted by the party with whom the money was deposited. It was "to be repaid on three months' notice," but that, as Lord Kinnear explained, did not make it the less heritable as regarded the widow's rights, when, as here, there was a time fixed for payment of interest, viz., half-yearly, because the arrival of that term (the principal being still left invested as before) "afforded evidence that the creditor intended from the beginning to employ his money for a term of years together at interest." Lord Kinnear founded his whole judgment on its having been determined by many decisions and "laid down as settled law by the institutional writers, that it is the payment of interest which fixes the heritable character of a personal bond." The single point of apparent distinction was that in the *Dawson* acknowledgment the rate of interest (payable half-yearly) was to be 4 per cent. But I have already explained why I cannot regard this as an essential distinction.

I am therefore confirmed in my view that the Lord Ordinary is right by there being recent and binding authority on this very question.

I would only, in conclusion, remind your Lordships that when, by section 117 of the Titles to Land Consolidation Act, all heritable securities were made moveable as regards the succession of the creditor in such security, it was provided that this legislation should not affect the reciprocal rights of husband and wife, or (for the matter of that) the claims of children to legitim; and further, that the right of the creditor to regulate the heritable or moveable character of his own estate was saved by allowing him to leave the succession to his heritable securities still heritable by the simple expedient of taking the securities expressly to his heirs or assignees or successors, excluding executors. So the recognition of the creditor's intention in such matters is no unfamiliar thing in our law, and has received statutory sanction so lately as 1868.

LORD LOW—I am of the same opinion. I agree with the grounds of judgment stated by your Lordships and by the Lord Ordinary, and I have nothing to add.

LORD ARDWALL—I consider the questions raised by this reclaiming note to be of some difficulty. In particular, I have considerable difficulty in holding that the words "we propose to pay interest on this half-yearly" can be regarded as a clause "for payment of annual rent and profit," in the sense of that phrase according to the former common law of Scotland.

But having regard to the dicta of the Judges who decided the case of *Dawson's Trustees* v. *Dawson*, 23 R. 1006, I am unable to draw a distinction in principle between that case and the present sufficient to justify me in differing from the judgment proposed by your Lordships, in which accordingly I concur.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Cooper, K.C.—A. R. Brown. Agents—Henry & Scott, W.S.

Counsel for the Defenders and Respondents—Dean of Faculty (Campbell, K.C.)—Chree. Agents—Cumming & Duff, S.S.C.

Wednesday, March 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LAMONT, NISBETT, & COMPANY *v.* HAMILTON AND OTHERS.

Principal and Agent—Insurance—Ship—Discharge of Principal by Dealings with Agent—Dealings with Managing Owners of Ship Showing Acceptance of them as Principals by Insurance Broker—Cancellation of Insurance Policies.

A firm of insurance brokers who, on the instructions of the managing owners of a steamer, had insured her and paid the insurance premiums, stipulated with the managing owners for the right, in the event of the latter's acceptances not being met at maturity, to cancel the policies and apply the return premiums thence arising in repayment of the general indebtedness to them of the managing owners, who acted for several ships separately owned and kept no separate accounts for each ship. No notice of this stipulation was given to the owners of the steamer. The managing owners subsequently became bankrupt, and the brokers cancelled the policies.

In an action at the instance of the brokers against the owners to recover the premiums paid, *held* that as it was beyond the powers of managing owners to cancel policies, the pursuers, in stipulating with them for the right to do so, unknown to the defenders, had taken the managing owners as sole debtors, and thereby released the defenders.

Xenos v. *Wickham*, 1866, L.R., 2 E. and I. App. 296, *applied*.

On 5th September 1903 Lamont, Nisbett, & Company, marine insurance brokers, Royal Exchange, Glasgow, raised an action against Daniel Hamilton, 147 West George Street, Glasgow, and others, registered owners of nineteen sixty-fourths of the s.s. "Gordon Castle" (defenders), and also against Neil M'Lean and Neil M'Lean junior, shipowners, 27 St Vincent Place, Glasgow, registered owners of thirty-three sixty-fourths of the said steamer, and Thomson M'Lintock, C.A., 88 St Vincent Street, Glasgow, trustee on the sequestrated estates of the said Neil M'Lean and Neil M'Lean junior, for their interest.