who said that it indicated a purpose that the fee should vest *a morte testatoris*, because it was a provision for an allowance to the children. The difficulty of that view is that the children were not all alike to take, but only those who could not support themselves, and by the second and third purposes there is a power to make payment to the sons for work to be done. And so I think that so far not much aid can be obtained in interpreting the settlement. Another view of the third clause is that put to us by counsel on the same side, that there was no provision in the trust-deed at all for any of the children intended ultimately to be beneficiaries. It was said with a great deal of force—"It is surely a very improbable thing for a man to make no provision for the children by whom he is to be survived until the date of the apportionment, and who may die before that time arrives. They will get no money at all if they do not get it in the meantime." I do not think that there is much in that view either. It rather appears to me that we cannot derive much light on the interpretation of the fourth, which is the pregnant clause, from the second or third. The fourth clause is to this effect—[*his Lordship here quoted the clause*]. The parties of the second part say that this direction is only for the benefit of children alive at the time of apportionment, or the issue of those who predecease that period, if there be such issue, and they found upon the word "survivors" as leading to that result.

The contention on the other side is that the true intention of the trust was that all the children should take a vested interest *a morte testatoris*, and between those views we have to determine. Undoubtedly there is a strong presumption for the view that the testator meant to confer a benefit on his children as early as possible, unless there is some reason to come to a contrary conclusion, and it is difficult to come to a conclusion as to what should influence a man to do otherwise. But *a priori* presumptions come to little, for the testator's will must be sought in the language he uses, as little aid is to be derived from looking to the peculiarity of the period fixed for apportionment, and consequently of vested interest. It is not in many settlements that such a period as we have here could be directed, but here contracts were to be carried on, and here, we might say, apportionment is to be only at that time for the purpose of giving a right to the children who are then alive. Looking to the words here it seems to me not the purpose of the testator to give a vested interest to his children from his death, but only to give it to those who are alive at the time of apportionment or the issue of the predecessors. One difficulty of the first party is, that if we read the clause as he desires us to do, it will be to give no meaning to the word "survivors" at all. There is no need of it if it only means survivors at the testator's death.

And I think this is well shown by the authority of the well-known case of *Young* v. *Donaldson*. There this contention was maintained, and the decision of the House of Lords was that those were meant who were alive when the apportionment or distribution or payment was to take place. We must walk in the light of that case, and would do so even if words were not used by the testator which makes the authority of that decision almost unnecessary to be invoked. For we have here this declaration—"Declaring that in case of any of my children having predeceased the period of apportionment leaving lawful issue, the issue of such predecessor or predecessors shall be entitled, equally among them *per stirpes*, to the share or shares which would have fallen to their parent or parents had he, she, or they survived that period." Here we have the key furnished to what is spoken of as "survivor." The survivors are those who have not predeceased the period at which the testator has appointed them to invest. The one clause explains the other, and I may add that this view—the view against any presumption of vesting at his death—is strengthened by the subsequent provision relative to the share of the estate which was to fall to the widow.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court answered the question put to them in the negative.

Counsel for First Party—Asher—Keir—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Second Parties—D.F. Kinnear, Q.C.—Mackintosh. Agent—T. J. Gordon, W.S.

Saturday, March 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

HENRY *v.* MORRISON.

Jurisdiction — Appeal from Sheriff — Value of Cause—Competency.

An action *ad factum præstandum*, viz., for delivery of certain I O U's, is competent in the Court of Session, though the sum contained in them is under £25.

Mr Henry, S.S.C., raised an action against D. A. Morrison, the only conclusion of the summons (besides that for expenses) being for delivery of fifteen I O U's for small sums therein specified, the total sum contained in them amounting to £16, 18s. 6d. It appeared that the defender, who was at one time cashier and book-keeper to the pursuer's firm, had obtained possession of these I O U's, which bore to be granted by Mr Scott, the pursuer's partner, and had raised an action in the Sheriff Court against Mr Scott, which was still in dependence, for payment of their contents.

The pursuer pleaded — "The documents libelled being the property of the pursuer, and the defender having illegally taken them away from the pursuer's office, and continuing wrongfully to retain possession thereof, the pursuer is entitled to decree in terms of the conclusions of the summons."

The defender pleaded—"(1) The action is incompetent."

The Lord Ordinary (ADAM) repelled the defender's first plea, and added the following note:—"The first question in this case is, Whether the action is incompetent under the 28th section of

50 Geo. III. cap. 112, in respect that its value does not exceed £25?

"It lies upon the defender, who seeks to oust the jurisdiction of the Court, to prove the affirmative of that proposition, and in order to do so he cannot travel beyond the record in the action, and, it may be, not beyond the conclusions.

"The action is an action for delivery of fifteen I O U's of small amount, amounting in all to £16, 18s. 6d. There are no pecuniary conclusions.

"The action is therefore purely an action *ad factum præstandum*, and is brought by the pursuer for the purpose of recovering possession of certain articles, viz., I O U's, which he alleges are his property. It is said, however, that it appears *ex facie* of the articles sought to be recovered, that their value is under £25, and that therefore that action is incompetent.

"The Lord Ordinary thinks that the question is a delicate one, but he thinks that the action is competent.

"It is clear on the authorities that where the action is solely for delivery of an article of property it does not matter, as regards the competency of the action, how trivial the value of the article may be, and such an action only becomes incompetent where the pursuer himself estimates the pecuniary value to him of the article, and therefore of the action, by inserting an alternative pecuniary conclusion showing that the value of the action is under £25.

"In this case there are no pecuniary conclusions, and it does not appear to the Lord Ordinary necessarily to follow that the value of the I O U's to the pursuer is simply the pecuniary value which they represent. It is clear enough that the action is not brought in respect of the pecuniary value of the I O U's to the pursuer, but for the purpose of aiding his partner Mr Scott in his defence to the action raised against him in the Sheriff Court by the present defender. That may or may not be a legitimate object, but it may give them a value in the pursuer's estimation much beyond the sum of £16, 18s. 6d., which they represent. It is not difficult to imagine a case brought for the recovery of certain pieces of the current coin of the realm which would be by no means met by the tender of coins of equal value. A pursuer may have a *pretium affectionis* even for a crooked sixpence, and if he can show it is his property wrongfully withheld from him he is entitled to recover it. The Lord Ordinary therefore thinks that this action is not incompetent. *Purves* v. *Brock*, 9th July 1867, 5 Macph. 1003; *Shotts Iron Company* v. *Kerr*, 6th Dec. 1871, 10 Macph. 195; *Aberdeen* v. *Wilson*, 16th July 1872, 10 Macph. 971."

The defender reclaimed, and argued—The action was incompetent and should be dismissed. An action *ad factum præstandum* was not competent for a subject of less value than £25, unless there were adventitious circumstances giving it a higher value. The conclusions of the summons, though the first and most obvious, were not the only test of the value of a cause. There was nothing here to show that pursuer had any other object than to obtain the money contained in the I O U's.

Authorities—(Besides those quoted by the Lord Ordinary) *Cameron* v. *Smith*, 24th Feb. 1857, 19 D. 517; *Inglis* v. *Smith*, 17th May 1859, 21 D. 822; *Dobbie* v. *Thomson*, 22d June 1880, 7 R. 983.

At advising—

Lord President—I cannot say that I participate in the Lord Ordinary's doubts on this question, for I think it is a very clear case. This is an action *ad factum præstandum;* there is no pecuniary conclusion, and it is quite impossible for the Court to estimate what the value of the cause really is. The value may far exceed the sum contained in these I O U's, delivery of which is sought, and the real object of the action may be something quite different from the recovery of the money. The object, for instance, might be to vindicate the pursuer's character in an action not now before us, or to prove that the documents were forged, or by the signature upon them to prove the forgery of some writing not now in Court. The pursuer is not bound to disclose his object; if he can instruct that the documents are his property he is entitled to have delivery of them, and it is no matter what the value of the sum contained in them may be. I am therefore of opinion that this action is not incompetent in respect of its value being ascertained to be under £25.

Lord Deas—It was for long a vexed question how the jurisdiction of this Court in causes which fell under these statutes was to be ascertained, but I hold it to be perfectly settled now that the party objecting to the jurisdiction must show on the face of the summons and record that the value of the cause is under £25. The *onus* of proof is on him, and failing that the jurisdiction must be sustained. If we were to go back on that now, we should unsettle what has been settled by much litigation and discussion. Now, if that be correct, I think it is conclusive of this case. There is nothing to show that the value of this action is under the statutory amount. I should not be prepared to hold an action for delivery of a crooked bawbee incompetent. The bawbee may have a value far greater than the mere coin—for instance, there might have been a private marriage, and that the pledge of it, and the coin might be important in proving the marriage; or again, a ring may have a value set on it by its proprietor far beyond its market value, and what good would it be to prove that you could buy it for a pound or less? or take the case your Lordship put, of forgery—would it matter, if the documents were five £1 notes, that they did not amount to the statutory value? I think the rule is quite settled, and a sound one. We cannot go back upon it now, and I see no room for doubt on the matter.

Lord Mure—The conclusion in the summons is *ad factum præstandum*, and I think the matter stands very clearly upon the authorities, and that the Lord Ordinary has read these rightly when he holds that this action is not incompetent. In the cases of *Aberdeen* and the *Shotts Iron Company*, though the leading conclusion was for delivery, there was an alternative pecuniary conclusion for a sum less than £25, but that is not the case here.

Lord Shand—I confess I think this case might

very suitably have been tried in the Sheriff Court, and I regret to see such actions brought here and the expense of a proof in the Court of Session incurred. But that question is not before us, and on the matter of competency I think the authorities are quite clear. The conclusion of the summons is *ad factum præstandum*, and there is nothing to show that the value of the cause is necessarily limited to the sum contained in the I O U's of which delivery is sought.

The Court adhered.

Counsel for Pursuer (Respondent)—D.F. Kinnear, Q.C.—Jameson. Agents—Dove & Lockhart, S.S.C.

Counsel for Defender (Reclaimer)—Kennedy. Agent—D. Howard Smith, Solicitor.

Saturday, March 19.

SECOND DIVISION.

SPECIAL CASE—CAMPBELL *v.* CAMPBELL AND OTHERS.

Succession—Competition among Heirs—Construction of Term "Lawful Issue."

By deed of settlement a testator directed that his estate should be made over by his trustees to his eldest daughter on her attaining twenty-five years of age or being married, and failing her by decease and without leaving lawful issue of her body, he directed his trustees to make over the estate to her younger sister; by the conception and true meaning of the deed, as previously determined by the Court, the eldest daughter was to enjoy a liferent only. *Held* that on her decease the estate, by force of the destination above referred to, passed to her eldest son as her heir in heritage.

Charles Campbell, proprietor of the estate of Leckuary, Argyllshire, died in 1808, leaving a trust-disposition and settlement by which he conveyed his whole estate, heritable and moveable, to trustees. The fourth and fifth purposes of this deed were as follows:—"*Fourthly*, As it is my wish and desire that my estate of Leckuary remain in my family, I direct my said trustees, and survivor of them, in the event of my having a son procreated of my present marriage who shall attain to the age of twenty-five years complete, and be in every respect capable of managing his own affairs, to dispone, convey, and make over to him, at his attaining said age, the foresaid estate of Leckuary, burdened and qualified, however, in such a manner as it shall not be in the power of my son to sell or dispose of the said estate during his life, but he shall only be entitled to the liferent thereof; and failing of him by decease without leaving lawful issue of his body, that then the said estate shall return to my eldest daughter, if in life, and failing thereof to her children, whom failing to my second daughter and her heirs; and as the said estate is burdened with the payment of £50 sterling yearly to Mrs Young, my aunt, I appoint the surplus rents to be applied for the behoof of my whole family until the succession to my said estate opens up to my son or daughter, as before and after mentioned. *Fifthly*, In the event of my having no son procreated of my present marriage, I direct and appoint the said estate of Leckuary to be made over in the foresaid manner, and under the foresaid burdens and qualifications, to my eldest daughter upon attaining the age of twenty-five years or being lawfully married, whichever of these events shall first happen; and failing her by decease, and without leaving lawful issue of her body, then I direct the same to be made over to her immediate younger sister, under the said burdens and qualifications; and failing her also by decease without leaving heirs of her body, then to my youngest daughter and the heirs of her body." Mr Campbell left no son, but he left four daughters, all of whom were married. On the eldest, Isabella Anne Campbell, afterwards wife of Major Neil Campbell, attaining twenty-five, the trustees gave her possession of Leckuary. After the marriage to Major Campbell, her mother, the last surviving trustee of Mr Campbell, on the footing that she was entitled under the deed to the fee of Leckuary, disponed it to her and her heirs and assignees whomsoever, heritably and irredeemably. This disposition contained a clause—"Declaring always, as it is hereby expressly declared, that this disposition is burdened and qualified in terms of the before recited trust-disposition and deed of settlement of the said Charles Campbell." In order to have her right to the fee of Leckuary judicially declared, Mrs Isabella Anne Campbell then raised an action of declarator, calling as defenders her sisters, and her own and their children, to have it found that there being no proper substitution of anyone to her, but a mere direction to convey the estate to others in the event of her predeceasing without issue the term appointed for conveyance to her, she was fee-simple proprietor of Leckuary. In this action (30th May 1834, 5 D. 1083) the Court found that she had a liferent only of the estate. Thereafter her eldest son Colin Ward Campbell having attained majority, he and his mother raised against her younger children, and the other daughters of the truster and their children, an action to have it declared that as liferentrix and fiar of Leckuary they were entitled to dispose of the estate onerously or gratuitously. In this action, which is reported 3d December 1852, 15 D. 173, defences were lodged by the other daughters, and the Court repelled the pursuers' plea and found them not entitled to decree. Their Lordships held that the fee of the estate vested in the issue of Mrs Isabella Anne on their surviving their mother, but reserved the question whether the fee passed to the eldest son or to the whole children equally. At Whitsunday 1871 Leckuary was sold to Mr Malcolm of Poltalloch for £7400. Mrs Isabella Anne Campbell, Colin Ward Campbell, her eldest son, her younger children, through their factor and commissioner, they being abroad, and the husband of one of them, a daughter who had married, conveyed the estate to the purchaser Mr Malcolm of Poltalloch, under real burden of payment of £4000 to Mrs Campbell, Colin Ward Campbell, and the husband of Mrs Campbell's married daughter, who was factor and commissioner for those younger children who were abroad, in trust for behoof of "Mrs Isabella Anne Campbell in liferent, and her chil-