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-

dren in fee, according to their respective rights and interests, and reserving to them all their rights and interests respectively as between themselves, the said interest only, at the rate of £4 per centum per annum, of the said sum of £4000 to be paid to the said Mrs Isabella Anne Campbell on her own receipt during her lifetime." The balance (£3400) was invested in guaranteed stocks and debentures in the same terms.

On 27th November the liferentrix died, and the question arose which had been reserved in the second of the cases above referred to. Colin Ward Campbell, as heir of his mother, claimed the whole price of Leckuary, invested as above described. The younger children maintained that the price fell to be equally divided among the whole children of their mother, the liferentrix.

This case was then presented, Colin Ward Campbell being the first party, and his younger brothers and sisters second parties.

Argued for first party—The testator had declared his intention that the estate should remain in his family. The presumption was that he intended it to descend in the ordinary course in which heritage descends. The nature of the estate as purely heritable aided this intention. The testator used four expressions—"lawful issue of her body," "heirs of her body," "children," and "heirs"—synonymously. The last mentioned indicated plainly the meaning to be given to the first-mentioned term. Though the point had been reserved at a previous stage of the case, Lord Rutherfurd (the Lord Ordinary) and Lord Wood had expressed opinions in the first party's favour.

Argued for second party—The natural and ordinary meaning of the words "lawful issue of her body" must be given them, the more so as the testator put a gloss upon them by calling them "children."—Erskine, iii. 8, 48; *Herris*, 26th Nov. 1806, Hume 528; *Waddell* v. *Pollock*, 19th June 1828, 6 Shaw 999; *Hibble* v. *M'Donald*, 16th Feb. 1832, 10 Shaw 341.

At advising—

Lord Justice-Clerk—The settlement of the late Charles Campbell of Leckuary was before this Court for months at a period of time now considerably distant, and the question which we have now to determine lies within a very narrow compass indeed. It depends upon the fifth purpose of the trust-settlement, under which the estate of Leckuary was settled in these terms:—"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 her obtaining the age of twenty-five years or being lawfully married, whichever of these events shall first happen." The eldest daughter did succeed, inasmuch as the settler left no son, and the question arose whether she was to get the estate in fee or only in liferent. The Court found in 1843 that she was entitled to liferent only, and consequently upon her death the second part of the fifth purpose has fallen to be interpreted—"and failing her by decease, or 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." Then there is a third part of that fifth clause, which says—"and failing her also by decease without leaving heirs of her body, then to my youngest daughter and the heirs of her body;" but that has not taken effect, because the eldest daughter had children, and consequently did not die without leaving issue, and the destination that followed has never taken effect at all. But the question that is raised for our decision is this, Whether the words "failing by decease and without leaving lawful issue of her body," although they are introduced there solely as a condition in respect of which the second destination would take effect, and although that destination has entirely failed to take effect by reason that the condition has not been operated, do not by inference mean a destination of the property to all the children of the eldest daughter, and not merely her heir-at-law? That question was raised in 1852, although it was not decided. Lord Rutherfurd in the Outer House considered it fully and gave a very full and lucid opinion upon it. He went through all the authorities, and he held that, taking the context along with this clause, it was quite plain, this being a real estate which the testator intended should descend in terms of his settlement, there was no reason on which the words "lawful issue" in this part of the clause should receive a different interpretation from the words "heirs of her body," applicable to the youngest daughter, in the concluding part of the clause, or should be part of the deed, or should be construed otherwise than "as a special destination to the children as they should necessarily take as heirs of their parent in heritage." It would be doing violence to the manifest meaning of the settlement to construe them as they might be construed in an ordinary marriage-contract, where there are no words to qualify them, and no indication of intention as bringing in the younger children to take as joint-fiars with their elder brother.

In that view, and without saying anything further, I entirely concur. But in so doing I do not give any opinion as to what might be the general effect of the words "lawful issue" standing alone in a deed such as this, where there are no controlling words and no indication of intention. But without expressing any opinion on that point, I should have had no difficulty in coming to the same result even without the context. Reading the words which are here for construction according to their natural meaning and import, I do not think that they affect the question in the slightest degree. It is not a destination to this lady in liferent and the issue of her body in fee. It is a destination to this lady in liferent, and failing issue of her body to her sisters in succession in similar terms. By implication the lady's issue take in the event of the destination-over not coming into effect. But that implication is merely that the issue take by the rules of law according to the nature of the estate. There is no destination in words to the heir of her body, and that is to be presumed because the estate is heritage.

Lord Young—I am of the same opinion, and venture to think the case is a very clear one. There might have been something to say in favour of the view which has not been presented to us at all—nor are parties here interested

to present it—that there was intestacy upon the death of Mrs Campbell, and that the heirs of the original truster should come in. If there was no intestacy, I think it is clear that the estate must go to Mrs Campbell's heir, for the trustees are directed to make over the estate "to my eldest daughter upon her attaining twenty-five years or being lawfully married, whichever of these events shall first happen, and failing her by decease without leaving lawful issue of her body," and unless her heir is to die there is no destination-over at all. There is a destination-over if she died without issue. But she did not die without issue, and therefore she left issue, so that there is no destination beyond her. And if you cannot apply a destination to an heir, or a direction that her heir shall take the estate, the result would be intestacy, and intestacy in that event would produce the resulting term—that is to say, an estate in the hands of trustees, but without anybody under the trust-deed having a right to claim it, and so resulting to the heir of the deceased truster. He left only daughters, who would be his heirs as heirs-portioners, and upon their decease, if they are dead, the estate would go to their heirs. But I entirely agree with your Lordship, that there being no destination-over in the event, and which has happened, of Mrs Campbell dying leaving issue, that the estate must go to her heir, the law determining which of the issue she leaves is heir. Now, her eldest son is so undoubtedly. She left issue. There is no destination-over in that case. I think, therefore, the estate must go to that one of her issue who is her heir-at-law—that is, the first party to this case. I rather regret the result, although I reach it without any doubt or difficulty, because it is equitable that a sum of money, which this substantially is, should be divided amongst all the children. But the law says otherwise, and we must give effect to it.

Lord Craighill—I concur, and have nothing to add in explanation.

The Court pronounced this interlocutor:—

"Find that under the destination in the trust-disposition and deed of settlement of the truster, the late Charles Campbell, the right to the estate of Leckuary vested in the party of the first part, as eldest son and heir of Mrs Isabella Anne Campbell, his mother, and that the funds in question, as representing the price of the said estate, fall to the party of the first part, and do not fall to be divided equally among the whole children of the said Mrs Isabella Anne Campbell: Find that the expenses of all the parties to the Special Case fall to be paid out of the funds of the trust-estate," &c.

Counsel for First Party—Mackintosh. Agents—J. & G. Douglas, W.S.

Counsel for Second Party—J. P. B. Robertson. Agent—John Forrester, W.S.

HIGH COURT OF JUSTICIARY.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill).

Saturday, March 19.

WEMYSS *v.* BLACK.

Justiciary Cases—General Police and Improvement (Scotland) Act (25 *and* 26 *Vict. c.* 106), *sec.* 251—*Wilful Obstruction.*

Certain persons having been convicted before the police magistrate of a burgh of an offence under this section, in so far as they "being three in number, to the obstruction and annoyance of the residents or passers-by, did wilfully cause an obstruction on the public footpath of the said street by means of congregating"—*held* that the charge did not set forth any offence, and conviction *quashed—Diss.* Lord Justice-Clerk, who held that while mere standing talking on the street might not create an obstruction, and be an offence under the statute, it having been found in this case by the magistrate that the doing so was "wilful," an offence had been committed.

Jurisdiction—Review, Limitation of—General Police and Improvement (Scotland) Act 1862, *secs.* 430 and 437.

Sentence pronounced on the above-mentioned complaint *suspended* by the High Court of Justiciary, notwithstanding the provisions of sec. 430 of the General Police Act 1862, on the ground that the complaint was outwith the statute.

The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), provides by sec. 251 that any person shall be liable to a penalty of forty shillings, or in the option of the police magistrate to imprisonment for a period not exceeding fourteen days, who in any "street" or "private street," to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, viz.— . . "Every person who causes any public carriage, sledge, truck or barrow, with or without horses, or any beast of burden, to stand longer than is necessary for loading or unloading goods or for taking up and setting down passengers (except hackney carriages and horses or other beasts of draught or burden standing for hire in any place appointed for that purpose by the commissioners or other lawful authority); and every person who by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing or wilfully causes any obstruction in any public footpath or other public thoroughfare. . . . . Every person who shall jostle or annoy any person passing thereon" (*i.e.* along a street or private street).

Robert Wemyss, George Barns, and James Farmer were charged under the Summary Procedure Act, at the instance of Roger Black, Procurator-Fiscal of the burgh of Kirkcaldy, at the Police Court of that burgh, with an offence against the General Police and Improvement Act 1862, in so far as they did "on High Street, Kirkcaldy, being a street within the meaning of the 251st section of said Act . . . to the obstruction and annoyance of the residents or passengers, wilfully