river opposite to the said lands and barony to the eastward of the said line, but subject to the custom of the river Tay, which entitles the defenders in making a shot to the westward of the said boundary line, to the full swing of their nets to the eastward of the said boundary line, and entitles the pursuers in making a shot to the east side of the said boundary line to row their boat 24 fathoms to the westward of the said boundary line; and find, subject to the said custom, that the defenders have no right to fish for salmon or fish of the salmon kind in the said river *ex adverso* of the said lands and barony to the eastward of the said line; and reserve the expenses incurred in the Inner House as well as the other expenses in the cause; and remit to the Lord Ordinary, with power to dispose of all questions of expenses."

Counsel for Pursuer and Reclaimer—Solicitor-General (Clark), Q.C., and Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders and Respondents—Fraser and Scott. Agent—John Galletly, S.S.C.

Thursday, July 3.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GILMOUR *v.* GILMOUR.

Trust Disposition for behoof of Creditors—Conveyance—Feudal Title—Infeftment.

An infeftment under a trust-disposition for payment of the truster's creditors does not divest the granter of the feudal title, but merely operates as a burden on the title, and, combined with a power of sale, gives a trustee powers to grant a valid conveyance to a purchaser. *Held*, further, that the heir of the granter cannot avail himself of the trust infeftment to accept a conveyance from the trustee as a feudal title, like a purchaser might have done.

This cause came up by Reclaiming Note against the judgment of the Lord Ordinary (ORMIDALE), in an action for reduction of a disposition in favour of the reclaimer and defender. William Gilmour, sometime timber merchant in Glasgow, acquired by purchase eleven heritable subjects, described in the conclusions of the summons. The whole of these heritable subjects were acquired prior to 1848. By trust-disposition, dated 23d February 1848, he conveyed to James Brock, accountant in Glasgow, as trustee for the purposes therein mentioned, his whole estate, heritable and moveable, including the heritable subjects above mentioned. William Gilmour directed his trustee to hold the means, estate, and effects thereby conveyed in trust for behoof of his whole just and lawful creditors at and preceding the date of the deed. Powers were thereby given to realise and divide the means and estate among the creditors, but under the burden that any surplus that might remain after payment of debts and expenses should be accounted for and paid over to William Gilmour, all as more fully expressed in the trust-disposition. Mr Brock accepted the office of trustee, and intromitted with the estate. William Gilmour died on January 25, 1848, and the trustee died in July 1851, before the whole debts had been paid off, and while a considerable portion of the heritable estate, including the whole of the heritable subjects, remained undisposed of. On 10th February 1852 the defender Alexander Gilmour, a brother of William Gilmour, was appointed judicial factor on the estate conveyed to James Brock in trust as aforesaid, "for the purpose of executing the purposes of the trust not yet fulfilled, contained in the trust-disposition dated 23d February 1848, executed by the said deceased William Gilmour in favour of James Brock, then accountant in Glasgow, and with all the powers conferred by the said trust-deed; and further, with power to him to make up a feudal title in his person to such portions of the heritable property of the said deceased William Gilmour as are still unsold, as well as those which have been sold but are not yet conveyed to the purchasers," and he entered upon the possession of the estates so conveyed in trust, and continued to possess and manage the property down to the year 1871. By that time the whole of the debts of the deceased William Gilmour had been paid out of the income of the estate so conveyed in trust and the proceeds of such portions of the estate as had been sold by the trustee and the judicial factor. The greater portion of the debts were paid by the trustee, and the remainder by the judicial factor. The deceased William Gilmour had only three children, all by his first marriage. One of these—a son—predeceased him without issue. He was survived by the other two, a son and daughter, named respectively John M'Ghie Gilmour, and Margaret Young Gilmour, both of whom were imbecile and incapable of managing their own affairs. Mrs Agnes Drew or Gilmour, the truster's second wife, is still alive. Margaret Young Gilmour died unmarried in 1869. By disposition, dated 17th March 1871, Alexander Gilmour, as judicial factor on the trust estate of the deceased William Gilmour, with the advice and consent of the said James Gilmour, who had been appointed on 3d December 1859 *curator bonis* to the two children of William Gilmour, alienated, assigned, disponed, conveyed, and made over to John M'Ghie Gilmour, and his heirs, assignees, and disponees whomsoever, heritably and irredeemably, the several lands and subjects above described. Alexander Gilmour, as judicial factor foresaid; did not apply for or receive any warrant or authority from the Court to grant the said disposition in favour of the said John M'Ghie Gilmour, and neither the said John M'Ghie Gilmour nor his *curator bonis* ever did make up a title to the property by service. John M'Ghie Gilmour died at Hamilton on the 30th April 1872, unmarried and without issue, and James Gilmour was his nearest heir in heritage. The pursuer is the immediate elder brother, and nearest lawful heir of conquest of the deceased William Gilmour, and claimed, on the death of John M'Ghie Gilmour without having completed his title thereto, to be entitled to succeed to the heritable subjects. He has been served nearest lawful heir of conquest in general to the deceased William Gilmour, and also to John M'Ghie Gilmour.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 26th November* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, Sustains the reasons of reduction, Repels the defences, and reduces, decerns, and declares in terms of the

conclusions of the summons: Finds the pursuer entitled to expenses, allows, &c.

"*Note.*—This would be a very important case in the law of trusts and titles to land if it could be supposed to be attended with any serious difficulty.

"The subjects in dispute were purchased in 1845 by the pursuer's immediate younger brother, William Gilmour, and thereafter the latter executed a trust disposition of all his estate, heritable and moveable, including the subjects in dispute, in favour of Mr Brock, as trustee for behoof of his creditors. It is important to observe that this deed is not in the form or terms of an absolute and unqualified disposition, but expressly bears *in graemio* to be in favour of Mr Brock as trustee for the granter's creditors, and for the purpose of paying his debts; and although the deed contains a power of sale, it also expressly bears that it was granted with and under the burden that after payment of his debts and the expenses of executing the trust, the reversion, if any, of his estate should be accounted for to the truster.

"Mr Brock, the trustee, having died, the defender Alexander Gilmour was in February 1852 appointed judicial factor in his place on the trust estate; and the trust purposes having been fulfilled, and the truster himself being then dead, the subjects now in dispute were, in March 1871, disponed by the judicial factor, by one of the deeds now challenged, to John M'Ghie Gilmour, a lunatic son of the deceased truster, with the consent of the other defender James Gilmour, as his *curator bonis*. John M'Ghie Gilmour had not at this time connected himself by service or otherwise with the truster, nor had the truster's radical right and title to the trust estate been vested in that individual, or taken up by or for him in any form whatever. John M'Ghie Gilmour has since died, and there is no issue or descendant of his father, the truster, surviving.

"It is in this position of matters that the present action has been brought by the pursuer, as entitled to succeed to the subjects in question as heir of conquest of his deceased brother William Gilmour, the truster. The object of the action is to have the interposed title, which was taken and made up in favour of John M'Ghie Gilmour, reduced and set aside.

"That the subjects in question must be held to be still *in haereditate jacente* of the late William Gilmour, and that the pursuer, as that individual's heir of conquest, has right to them—supposing the interposed title made up to them in favour of John M'Ghie Gilmour to be invalid—is not disputed. And whether the title of John M'Ghie Gilmour is invalid or not, is the question for consideration.

"The Lord Ordinary is of opinion that the alleged title of John M'Ghie Gilmour was and is invalid. He holds it to be clear on the authorities that the radical right to the subjects in question remained in William Gilmour, notwithstanding the trust disposition granted by him in favour of Mr Brock. By the express terms of the deed it was limited to certain purposes, and therefore the fee or radical right to his estate must be held to have remained with the truster. It necessarily follows from this that on the purposes of the trust being accomplished, as they have been, the full right and title of the truster revived. Although questions appear to have been in varying circumstances raised on the subject, the Lord Ordinary must hold the principle, as he has now stated it, to be now, and for some time back conclusively settled by the cases of *Campbell* v. *Edderline's Creditors*, Jan. 14, 1801, Mor. "Adjudication," App. No. 11, and *M'Millan* v. *Campbell*, 9 Shaw, 551, and 7 W. and S. 441. And that it has been held to be so settled, and doubtless since acted on, by conveyancers and men of business, may be inferred from the statements on the subject in Duff's Feudal Conveyancing, p. 436, Menzies' Lectures (1st edition), p. 821, and Montgomery Bell's Lectures, p. 751.

"The Lord Ordinary can find no room for distinction in principle between the cases to which he has now referred and the present. The only distinction suggested by the defenders was that arising out of the circumstance that here the trustee Mr Brock, or rather the defender Alexander Gilmour, as having come into his place as judicial factor, on the purposes of the trust being fulfilled, disponed the subjects in question to John M'Ghie Gilmour, who in point of fact was the son and heir of the truster, entitled to succeed to him. But it must be borne in mind that there was no express power in the trust-deed to Mr Brock to convey the residue to John M'Ghie Gilmour, and that that individual never became vested by service or otherwise in the radical right and title which had all along remained in his father William Gilmour, and which was at his death, and has ever since been, *in haereditate jacente* of him. The disposition therefore by the judicial factor in favour of John M'Ghie Gilmour must be held to have been granted by the judicial factor without any warrant or authority, and, as already said, no such warrant or authority is to be found in the trust-deed itself, for acccording to its terms the reversion was expressly declared to belong to the truster, and the trustee taken bound to convey it to him. Besides, from the very nature of a trust bearing *in graemio* of the deed to be granted for a limited purpose, that purpose being fulfilled, the radical right and title of the truster necessarily revived without the necessity of any reconveyance by the trustee. The radical right and title thus remaining from the beginning in William Gilmour, under burden merely of the trust right, and having prior to the disposition by the judicial factor in favour of John M'Ghie Gilmour been entirely freed from that burden, it seems to the Lord Ordinary to be incontrovertible that the judicial factor had no power whatever to grant such a disposition. Had John M'Ghie Gilmour taken up the succession of his father William Gilmour, and put himself in the place of that individual *quoad* the subjects in question by service or otherwise, the matter might have stood very differently, for on that assumption the pursuer's right and title would have been cut off, whether the disposition by the judicial factor could in itself be held to be an efficacious and habile title or not.

"The Lord Ordinary has only further to observe, that he has been unable to see that the discharge by the Court of the judicial factor can be held to affect in the least the question which has now been discussed, more especially seeing that it is expressly admitted by the defenders in their answer to the 12th article of the pursuer's condescendence that the defender Alexander Gilmour, as judicial factor, did not apply for or receive any antecedent warrant or authority from the Court to grant the disposition in favour of John M'Ghie Gilmour, and also that the other defender, as *curator bonis* of that individual, did not apply to or receive any authority from the Court to concur in that dis-

position, or to make up a title to the subjects in the person of John M'Ghie Gilmour, and that no such title, by service or otherwise, was ever made up."

The pursuer *inter alia* pleaded "(1) John M'Ghie Gilmour not having made up a title to his father by service, the heritable subjects described in the conclusions of the summons remained in the *hæreditas jacens* of his father William Gilmour, and on the death of the said John M'Ghie Gilmour passed to the pursuer, as the heir of conquest of the said William Gilmour. (2) It was *ultra vires* of the defender Alexander Gilmour to grant, and of the defender James Gilmour to ask or concur in, the disposition, or to expede the other writs sought to be reduced, and the same are therefore inept and null."

Argued for the defenders—Whether the title made up was a good or a bad one, it was a proper step in a *curator bonis* to have it so made up. A trustee is able to give to the heir of the truster a perfectly good title. In making up a title reconveyance may be a material step. If the trustees hold for a certain purpose, as in this case they did, then the heir of the truster is entitled to a conveyance, and it does not signify whether he serve heir or not, he does not need to do so. There is in *Kerr's Trustees* a strong authority for holding that a title may be effectually made up through trustees.

There are three modes of making up a title—(1) The heir may get himself served in special—this, however, is not a warrant of infeftment—he may, however, go and obtain a precept from chancery, if the holding be of the Crown, or from his superior, if otherwise; (2) By precept of *clare constat*; (3) By adjudication on a trust-bond.

Authorities—Bell's Comm., ii, 391; *Campbell* v. *Edderline's Creditors, supra*; *Rose* v. *Fraser*, Jan. 26, 1709; Ross, vol. i, p. 452; *Brack* v. *Johnston, supra*; *Lady E.* v. *Lady M. Kerr's Trustees*, 5 S. 181, 1 W. and S., 381; *M'Millan* v. *Campbell, supra.*

Authorities (as to service)—Ross' Leading Cases, p. 519, vol. iii. (Land Rights); Menzies' Conveyancing (ed. 1857) p. 757; *Colquhoun* v. *Colquhoun*, July 8, 1831, 9 S. 911; *Fogo* v. *Fogo*, Feb. 25, 1840, 2 D. 651, 4 D. 1063, 2 Bell's App. Cases, 195; *Young's Trustees* v. *Young*, July 19, 1867, 5 Macph. 1101, 4 Scot. Law. Rep., 241; *Buchanan* v. *Angus*, May 15, 1862, 4 Macq. 374; *Horn* v. *Stevenson*, Nov. 6, 1741; 10 and 11 Vict. c. 47, § 4; Juridical Styles, vol. ii, p. 282.

Authorities (where the Court has empowered the guardian to complete the title of a ward)—Thoms on Factors, p. 261; *Band*, Jan. 13, 1741, M. 16,346; *Blackie*, Feb. 1, 1827, 5 S. 249 (n. e. 268); *Campbell*, Jan. 20, 1829, 7 S. 296; *Chisholm*, July 11, 1835, 13 S. 1107; *Campbell* v. *Edderline's Creditors*, Jan. 14, 1801, Mor. "Adjudication," No. 11; *M'Millan* v. *Campbell*, March 4, 1831, 9 S. 551, 7 W. and S. 441; *Ogilvy* v. *Erskine*, May 26, 1837, 15 S. 1027; M'Laren on Trusts, i, p. 93, § 183, ii, p. 49, § 1483-5, § 1492, p. 129, § 1635; *Brack* v. *Johnston*, Nov. 23, 1827, 6 S. 113: *Gordon's Trustees* v. *Harper*, Dec. 4, 1821, F.C; Acts 1489 and 1490; Act 1695, c. 24.

At advising—

Lord Justice-Clerk—The question to be decided in this case arises under the following circumstances:—The late William Gilmour executed on 23d February 1848 a trust-deed for behoof of his creditors, whereby, on the narrative that he was unable to meet his engagements, and in order to prevent preferences, and with a view to the equal distribution of his estate, he conveyed to James Brock, accountant in Glasgow, as trustee for the purposes therein after-mentioned, the whole of his means and estate. The purposes were—1st, to secure to the granter the privileges conferred by the second and third Victoria, cap. 41, as a bankrupt—2nd, to hold the means and estate in trust for behoof of the just and lawful creditors of the granter, with power to the trustee to sell the estate and to grant all necessary titles—3rd, for the purpose of dividing among the creditors the produce of the estate when realised—4th, that the creditors acceding to the trust should not be held to surrender any securities held by them—and, in the 5th place, the deed contains a provision that "these presents are granted with and under the burden, after realising and distributing my said estate, my said trustee or trustees shall account for and pay over to me any surplus that may remain after the payment of said debt, expenses, and others before-mentioned." The trustee was infeft under this disposition, and realised certain portions of both the moveable and the heritable property. The truster, William Gilmour, died in 1849, and James Brock, the trustee, died in July 1851, at which time the debts had not been fully paid off. On the 10th February 1852, the defender, Alexander Gilmour, was appointed judicial factor on the trust estate. He made up his title to the heritable property by declaratory adjudication and entry with the superior, and continued to possess down to the year 1871, before which time the whole debts had been paid, and a large reversion of the estate remained, chiefly consisting of heritable property. William Gilmour left a son and a daughter, both of whom were imbecile. James Gilmour, another brother of the truster, and the heir in heritage of the imbecile son John M'Ghie Gilmour, was appointed his *curator bonis* in 1859. The daughter died in 1869. In 1871 Alexander Gilmour, the judicial factor, executed a disposition of the trust estate in favour of John M'Ghie Gilmour, who was then and had all along been in a state of imbecility; and on this disposition infeftment was taken in his name. Thereupon Alexander Gilmour presented a petition to the Court for exoneration and discharge, narrating the disposition which he had thus granted, and obtained decreet of exoneration, dated 19th July and 17th October 1871. John M'Ghie Gilmour, the son, never made up any other title as the heir of the truster; and he having died in 1872, the heritable property is now claimed in this action by the immediate elder brother of the truster, who has served himself heir of conquest in general to the truster and to his son. On the other hand, James Gilmour, who is the heir in heritage of the deceased John M'Ghie Gilmour, claims the heritable property in that character. The question we have to decide is whether John M'Ghie Gilmour, the son of the truster, died lawfully vest and seized in the heritable property. The Lord Ordinary has found he did not, and I am of opinion that his judgment is right.

The question turns mainly upon the effect of the trust disposition granted by William Gilmour in 1848. Ever since the case of the *Creditors of*

Edderline, Jan. 14, 1801, it has been settled that an infeftment under a trust diposition for payment of the creditors of the truster does not divest the granter of the feudal title to the subjects conveyed, but only creates a burden on that title. Such a deed, when combined with a power of sale, gives the trustee a title to grant a sufficient conveyance to a purchaser, just as an heritable bond and disposition in security gives a similar power to a creditor; although, no doubt, the powers of a trustee under such a conveyance may be free of some of the impediments which stand in the way of a sale by an heritable creditor. But, excepting in so far as creditors accede to such a trust, it is nothing; and if the estate be not sold, or, in so far as it may not be sold, the title of the trustee is nothing but a burden or security, which may be terminated and extinguished by a simple discharge, or by the payment of the debts *aliunde*. Meanwhile the title of the granter remains to all effects precisely as it was before the trust was granted, subject only to the security thereby created, and the acts of the trustee in conformity with the powers conferred upon him.

These principles have been well fixed, and are laid down in all books of conveyancing as settled law. Such a deed being a conveyance *inter vivos*, the conditions of which qualify any infeftment which can be taken upon it, is entirely different in its feudal effect from an absolute conveyance in trust *mortis causa*, or an absolute conveyance *inter vivos*, qualified by a latent or undisclosed trust. In both of the last cases the granter is divested of his feudal right. In the first case absolutely, as in the case of a *mortis causa* disposition. In the second case the granter has nothing left but a *jus crediti* to enforce the personal right to obtain a reconveyance. But in either of these cases the feudal fee is transferred. In the case of a *mortis causa* disposition the absolute fee conferred by the granter may come to be held, from failure of purposes, for the heir at law. In the case of an *inter vivos* absolute conveyance, qualified by a latent trust, the radical right to obtain a reconveyance remains with the granter. But when the infeftment proceeds on a disposition executed *inter vivos* for the payment of creditors, the fee remains undisturbed in the person of the granter, who continues to be as free to deal with it as he is after granting any other heritable security.

This was the doctrine established in the case of *Edderline*. Lord President Campbell has a note on his papers in this case, expressive of a doubt whether an adjudication led by a creditor against the trustee would not also have been good. But this doubt does not affect the general doctrine, and must have proceeded on the trustee's power to sell for payment of debt. The question arose more than once in election cases, whether a trust conveyance for payment of debt divested and disfranchised the granter. In one of these, *Donaldson*, March 11, 1786, Lord Braxfield said, "as long as the estate is not sold it is my property. And I may, when I please, denude the trustees by paying off the debt." Lord Eskgrove observed, "the right is in the debtor, although the creditors have power to sell."—Hailes 2, 994.

The same question arose in *Campbell v. Speirs*, which is the more in point because in that case the trustees had granted a renunciation of their procuratory of resignation in favour of the heir apparent. The Court did not, however, proceed on that, but on the ground that the granter had never been divested. On this renunciation President Campbell's note bears in reference to the reconveyance by the trustee. He says, "I doubt if it be a feudal method of Sir Alexander in the superiority." But he held he had never been divested—"Infeftment (is) in security until sale actually takes place, which will of course actually denude him. But in the meantime the estate belongs to nobody but him."—Ross 1, 465. These two cases may be compared with that of *Ferguson v. Fairlie*, 5 S. 938, in which a disposition *ex facie* absolute, but in reality granted in trust to split superiority and property, was found to divest the granter.

The case of *Macmillan*, which occurred in 1839, recognises this distinction in the clearest possible manner. The question there was whether an heritable proprietor, who had granted a trust-disposition for payment of debt, and had taken an ineffectual reconveyance from the trustee, could execute a valid entail. Lord Moncreiff held that he could, and the Court and the House of Lords affirmed the judgment—the reason being that he had never been divested. He says in his note that "the case of *Edderline* settles the point that a trust conveyance, almost identical with the trust in the present case, does not divest the granter of his feudal title, and is only to be considered as a burden on that title." Such I apprehend is now well fixed as a principle of feudal conveyancing. Thus Mr Montgomery Bell says, vol. 2, p. 751, dealing with trust for payment of creditors, "the trust merely created a burden on his right, and on fulfillment of the purposes the burden is extinguished, and the lands are at his free disposal, just as if he had granted a bond and disposition in security to a creditor, and had paid and obtained a discharge of the debt."

These principles are hardly disputed by the defenders in this case. But it was argued with very great ability that, although it is quite true that a trust of this description only burdens the right of the granter, yet that the granter, or his heir, may, if he think fit, avail himself of the trust infeftment, and accept a conveyance from the trustee as a feudal title to the lands, just as a purchaser from the trustee might have done; and we have been referred to the case of *Lady Essex Kerr* as establishing the proposition, that where there is a formal feudal title in a trustee, and a radical title remaining in the truster to the same lands, the person entitled to the radical right may select which of the two rights he chooses to be the foundation of his own feudal progress.

There appear to be two conclusive answers to the doctrine contended for in this plea. I do not doubt that a title may so stand that the proprietor having the radical right may use a trust title as the foundation of his feudal progress, although, if he had chosen to disregard it, no one had right or interest to plead on the trust title. A strong illustration of this is to be found in the case of *Rose* v. *Fraser*, in which the infeftment of a trust disponee, who held a right granted for election purposes, and apparently absolute, was yet held to entitle the widow of the granter to her terce. But the distinction to which I have already adverted lies at the foundation of this decision, viz., between a right which is *ex facie* absolute, although in reality only a trust, and a right which is *ex facie* only a burden or security.

The distinction is well illustrated by the case of *Lady Essex Kerr*. In that case the Duke of Rox-

burghe had granted a trust-disposition *mortis causa* for certain purposes to be declared. These purposes were declared on deathbed, and they were reduced by the heir-at-law. Thereafter the heir-at-law granted a trust-bond, on which adjudication followed at the instance of the trustee, with a view of making up a title; and a conveyance to the decree of adjudication was granted to the heir-at-law by the trustee. But instead of proceeding to complete the adjudication title, the heir-at-law accepted a disposition from the trustee under the *mortis causa* settlement, and completed a title under that deed. The title so completed was sustained by the Court. But in that case the title of the trustee was entirely unqualified. By the failure of the purposes it resolved into a trust for the heir-at-law, which no one but the heir-at-law could make available, and which, had he thought of it, he might entirely have disregarded. But such a case is entirely different from a title which on the face of it was from first to last nothing but a burden.

The application which was made of this case in the case of *Macmillan* was founded on the opinion expressed by the Court that the heir-at-law might have completed his title by proceeding on the adjudication,—proving that the radical title still remained *in hereditate jacente* of the Duke of Roxburghe. This was doubted by Lord Gifford in giving judgment in the House of Lords (1 W. & S., p. 395); but, even if it did, the trust-title, for want of purposes, was a trust only for the heir-at-law. But it was on the face of it an absolute title as against the rest of the world; and if the heir chose to use it as part of his feudal progress, it was good in point of form, and no one could challenge it.

Although it were otherwise, the case which we have at present before us stands very differently. Even supposing that the heir-at-law had a right to accept the title of his ancestor's trustee as the regulating title of his estate, I doubt greatly if the judicial factor on the estate, at his own hand, and without the authority of the Court, was entitled to complete the title of the lunatic in that way. Supposing there had been an option, it was one which the lunatic could not declare, and which, without judical authority, at all events the judicial factor could not make. I am, therefore, of opinion that the reconveyance by the judicial factor would have operated nothing but a discharge of the burden; and, even in that view, being granted to one who did not represent the granter, was a mere nullity.

LORDS COWAN, BENHOLME, and NEAVES, concurred.

The Court pronounced the following interlocutor:—

"Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report."

Counsel for the Pursuer (Respondent)—Millar Q.C., and J. A. Crichton. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for the Reclaimer (Defender)—Solicitor-General (Clark) Q.C., and Balfour. Agents—Ronald & Ritchie, W.S.

Thursday, July 3.

FIRST DIVISION.

[Lord Gifford, Ordinary.

OGILVY *v.* MITCHELL'S TRUSTEES.

Succession—Title to sue.

Circumstances in which *held* that the pursuer had failed to instruct any sufficient title to sue, and that defenders were entitled to have the action dismissed.

This case came up by Reclaiming Note against the interlocutor of the Lord Ordinary (GIFFORD). In the middle of the last century Dr Ogilvy of Baldovie executed a deed conveying his estates to his niece, Elizabeth Ramsay, and the heirs of her body, in the first place, whom failing, to his niece Margaret Ramsay, and the heirs of her body. The two ladies were permitted by the deed to sell the estate, of one consent. By a subsequent deed he allowed Elizabeth to dispose of the estate if she should have no issue. She had issue, however, and in 1799, instead of leaving the estate to go to her son under Dr Ogilvy's deed, she executed a disposition of the estate in favour of her son, who was infeft in and possessed it until 1860, when he died. At his death his estate was taken up by Captain Mitchell, his cousin on the father's side, who left his property to the Roman Catholic Church. Captain Mitchell's trustees sold the estate to Sir Thomas Munro, and the pursuer raised the present action of reduction to set aside Elizabeth Ramsay's disposition to her son, on the grounds that she had no power to grant any disposition, she having heirs of her body; that she could not dispone the estate to her son, who could make up no valid title except by service as heir of provision under Dr Ogilvy's deed, which he did not do; and that, all the heirs appointed by Dr Ogilvy's deed having failed, the estate reverted to the pursuer as his heir-at-law, and could not be taken up by Captain Mitchell, who was a stranger in Dr Ogilvy's family. The defenders objected to satisfy the production, and contended that Elizabeth Ramsay had an absolute fee in the estate, and could dispose of it to any person she chose, or at all events that she could dispose of it to her son, who was the heir provided by Dr Ogilvy's deed.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 18th March* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record as closed on summons and preliminary defences, and whole process: Finds that the pursuer has instructed no title to sue the present action: To this effect sustains the preliminary defence: Dismisses the action and decerns: Finds the defender entitled to expenses, and remits the account thereof when lodged to the Auditor of Court to tax the same, and to report.

"*Note.*—The pleas stated by the defenders as preliminary are not at all of a preliminary nature, and the Lord Ordinary felt in reference to many of them that it might be expedient to have the production satisfied, and the whole case decided at once. He suggested that the preliminary defences might be reserved, and the production satisfied without prejudice. The defenders, however, insisted in their preliminary pleas, as they were well