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

entitled to do, producing only in support thereof the unchallenged investiture of 1783, but none of the subsequent titles.

"So standing the case, the Lord Ordinary thinks that the only point which he can decide is the pursuer's title to sue. Prescription, relevancy, and even title to exclude, cannot be adjudicated on, the first two being on the merits, and the title to exclude not being supported by production of writs.

"The Lord Ordinary thinks, however, that the pursuer, as the case stands, has not instructed a sufficient title to sue, and on this ground only he has dismissed the action.

"The only title to sue which the pursuer has produced is a general service to the late Thomas Ogilvy of Baldovie, M.D., who died, unmarried, 10th March 1767. The service bears that the pursuer is great-grandson of the deceased James Ogilvy, who was cousin of the said deceased Dr Ogilvy.

The defender has produced Dr Ogilvy's deed of settlement (1762), alteration thereon (1766), and instrument of sasine following on these deeds in favour of Elizabeth Ramsay (1783). The Lord Ordinary thinks that these deeds completely divested Dr Ogilvy of the whole lands, without any right of reversion or return to him, and that no general service to Dr Ogilvy can give the pursuer right to reduce Elizabeth Ramsay's conveyances, or what followed thereon.

"Dr Ogilvy was in 1762 unlimited fiar of the lands. In that year, by *mortis causa* deed, he conveyed them to 'Elizabeth Ramsay, my niece, and to the heirs lawfully procreate of her body; whom failing to the said Margaret Ramsay, my niece, and to the heirs lawfully procreate of her body, heritably and irredeemably, without any manner of reversion, redemption, or regress.' By other clauses in the deed he gave power to his nieces to dispose of the lands, and by his deed of alteration of 1766 he empowered his niece, Elizabeth Ramsay, 'In case she shall have no children of her own body,' to sell and dispone the lands without the consent of her sister Margaret. On these deeds Elizabeth Ramsay was infeft after Dr Ogilvy's death, and thus became vested with the fee of the lands, subject to the destination in the deeds.

"Elizabeth Ramsay, the fiar, had issue of her body, her eldest son being Thomas Farquharson, who died 21st November 1860. If Elizabeth Ramsay had died without executing any deed, Thomas Farquharson would have taken the subjects as her son and heir of provision. But in 1799 Elizabeth Ramsay or Farquharson disponed the subjects to her son Thomas Farquharson, and in virtue of this disposition and sasine thereon (1799) Thomas Farquharson, as is set forth by the pursuer himself, possessed till his death in 1860, being upwards of sixty years. This disposition in favour of Thomas Farquharson, and sasine thereon, are the first deeds that the pursuer now seeks to reduce.

"Now, the Lord Ordinary is of opinion that, supposing these deeds challengeable, and the plea of prescription to be got over, the only person who could challenge them would be the heir of Elizabeth Ramsay—her heir of provision, if there be one, if not, her heir-at-law. But her heirs of provision have all failed. She has now no heirs of her body, and her sister Margaret died without issue, so that, if the lands were still in her *hereditas jacens*, they would be taken up by her heir-at-law. But the pursuer has produced no service to Elizabeth Ramsay either in special or in general. All he has produced is a general service to Dr Ogilvy. But Dr Ogilvy conveyed the lands and divested himself, 'without any manner of reversion, redemption, or regress,' so that it is not to his heirs-at-law, but to his niece's heirs-at-law that the lands will ultimately go by succession. Dr Ogilvy's heir has no title whatever.

"The only remaining difficulty is that the pursuer avers that he is heir of Elizabeth Ramsay. He has produced no evidence of this, and a mere assertion is not a title. If he had really meant, however, that he was heir in blood to Elizabeth Ramsay (of course through her father, for she left no descendants), the Lord Ordinary might have been disposed to have sisted process to give the pursuer an opportunity of expeding service. But it is plain this is not what the pursuer means. He did not pretend at the bar to state his relationship to the Ramsays; his contention being that he was only heir to Elizabeth Ramsay of provision, by being heir to Dr Ogilvy, to whom there was an implied clause of return. This the Lord Ordinary thinks is untenable.

"The Lord Ordinary might go one step further. He thinks, on the pursuer's own statement, that Elizabeth Ramsay had full power to convey the lands to her son Thomas Farquharson. Even if it had been a strict entail, it was simply propelling the succession to the next heir in the destination. *A fortiori*, in a simple destination such a deed is valid. Dr Ogilvy's settlement is not a destination with prohibitions, for the prohibition can only be implied from a power given; but even if there had been a prohibition against altering the order of succession, such prohibition would only have been for the benefit of the substitutes, who in this case received the conveyance. It could not be pleaded upon by the pursuer, who is not a substitute favoured by the deed.

"On the whole, and although it would have been more satisfactory to have had the whole deeds produced, and to have given judgment on the merits, the Lord Ordinary thinks the defenders are entitled to have the action as it stands dismissed."

The pursuer reclaimed.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Watson and Smith. Agent—T. Spalding, W.S.

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

Friday, July 4.

FIRST DIVISION.

[Lord Shand, Ordinary

EARL OF MAR *v.* EARL OF KELLIE.

Entail—Succession—Destination.

By deed of entail certain lands were destined to "A and the heirs-male to be procreated of her body, whom failing, to the heirs whatsoever descending from her body."

Held that the expression "heirs-male" must be construed to imply that the whole class of "heirs-male" should be exhausted before the class "heirs whatsoever" could claim under the destination.

Observed, that in the Largie and Fetter-