invested or lodged in bank in a separate account, but that seems not to have been done, and so from Candlemas 1886 to Lammas 1888 a portion of the capital of the estate remained in the hands of the factor uninvested. Now, suppose the principle of accumulating the funds year by year were applied to that short period, we are not informed what the effect would be, and it seems to me the benefit to the objectors would be very small, perhaps about £5, 5s. Is that a reason for disturbing an arrangement sanctioned by the Accountant of Court and approved of by the Lord Ordinary? I think not. We do not sit here to settle questions of fractional abatements of this kind, but rather to decide points involving questions of general principle.

LORD SHAND—I am of the same opinion, and have nothing to add, except that it is quite evident that the Lord Ordinary has taken great pains with the case, and I should be slow to interfere with his decision unless it were very clear that he had violated some clear rule of court or made some evident blunder.

LORD ADAM and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Reclaimers—Young—Salvesen. Agent—D. Howard Smith, Solicitor.

Counsel for the Petitioner and Respondent—J. A. Reid. Agent—John Rhind, S.S.C.

Thursday, March 20.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF ATHOLE *v.* STEWART.

Superior and Vassal—Entry—Casualty—Composition — Relief — Trust — Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4.

A vassal infeft in certain land, and entered with the superior, died in 1835 leaving a general trust settlement whereby he conveyed his estates to trustees, directing them, *inter alia*, to convey, under burden of a certain liferent, the lands to his eldest son alive at the time of his death and the heirs of his body, whom failing certain other heirs of destination. The trust-deed conferred no power of sale.

The trustees took infeftment in 1835 and conveyed the said lands by disposition dated 1852 and registered 1855 to the truster's eldest son, who took infeftment thereon.

In 1887 the superior of the lands claimed payment of a casualty of composition from the son on the ground that his entry under the 1874 Act implied a confirmation of the infeftment of the trustees, whose entry had therefore effected a change of the investiture. The defender maintained that the trustees had held for him, that no new investiture had been created, that he himself was infeft before the passing of the 1874 Act, that the form of his title was immaterial, that he was heir-at-law of his father and that as such he was liable to pay relief-duty only.

Held that only relief-duty was due.

Diss. Lord Rutherfurd Clark, who thought that the trustees' infeftment was confirmed by the passing of the 1874 Act, and that the defender as disponee of the trustees was liable in a casualty of composition.

The Duke of Athole as superior of the lands of Strathgarrie, within the parish of Moulin, late regality of Athole and sheriffdom of Perth, brought an action against Allan Duncan Stewart of Strathgarrie, to have it found and declared that in consequence of the death of Lieutenant-Colonel Alexander Stewart of Strathgarrie, who was the vassal last vest and seised in all and haill the five merk land of Strathgarrie, &c., . . . a casualty being one year's rent of the lands became due to the pursuer as superior of the said lands upon the 1835, being the date of the death of the said Lieutenant-Colonel Alexander Stewart, and to have the defender decerned and ordained to make payment to the pursuer of said casualty.

The late Lieutenant-Colonel Alexander Stewart of Strathgarrie, who died in 1835, was the last entered vassal vest and seised in the lands, conform to charter of resignation and *novodamus*, dated 21st May 1830, granted in his favour by John, Duke of Athole, and instrument of sasine following thereon. By a general trust-disposition and settlement, dated 17th November 1834, and registered in the Sheriff Court books of the county of Perth 3rd August 1835, Colonel Alexander Stewart conveyed to trustees, *inter alia*, the said lands for the purposes of the trust thereby created.

The purposes of the trust were—(1) Payment of debts, funeral expenses, and expense of executing the trust; (2) payment of an annuity to the widow, or at her option to give her the liferent of the said lands of Strathgarrie; (3) (4) (5) payment of annuities and legacies; (6) "I appoint my said trustees to convey and make over the said lands and estate of Strathgarrie, Invernenty, and other heritable property hereby disponed, but under the burden of the liferent presently secured to the said Mrs Janetta Daniel or Stewart, by the contract of marriage before recited, over the lands of Invernenty and others, or under the burden of the liferent hereby directed to be conveyed to her if she shall declare her acceptance thereof as aforesaid, to and in favour of my eldest son alive at the time of my death, and the heirs of his body, whom failing my other sons in succession and the heirs of their bodies respectively, whom failing to the eldest daughter alive at the time of my death and the heirs of her body, whom failing to my other daughters in succession, and the heirs of their

bodies respectively, the eldest heir-female always excluding heirs portioners;" (7) payment of residue of estate to younger children; (8) "failing my said children and their heirs, I appoint my said trustees to convey my said heritable estate, under the burden of the said liferent . . . to my brother Robert Stewart, and to divide the residue of my personal estate as follows, vizt."

The trustees took infeftment upon the said trust-disposition and settlement by instrument of sasine, recorded in the Particular Register of Sasines for the county of Perth 24th April 1837, and thereafter conveyed the said subjects and others to the defender, who was his father's eldest son, by disposition, dated 13th September, 1st, 6th, and 9th October 1852, and registered in the Books of Council and Session 1st May 1855.

The said trust-disposition and settlement contained no power of sale. The pursuer averred that upon the death of Colonel Stewart a casualty of one year's rent became due in respect of the lands above mentioned.

The defender denied that a casualty of one year's rent became due at that date, and stated that he had all along been and still was willing to pay the relief-duty of 1s. due by him as his father's eldest son and heir-at-law, and as such the heir of the investiture. He further stated that the trustees never held the fee of the said lands for any purpose except to convey the same to him as his father's eldest son.

The pursuer pleaded—"A casualty of one year's rent of the lands mentioned in the summons having become due by the defender to the pursuer as superior thereof, upon the death of the said Lieutenant-Colonel Alexander Stewart, the previous vassal, the pursuer is entitled to decree as concluded for."

The defender pleaded—"(3) The trustees of the said Lieutenant-Colonel Alexander Stewart having held the said lands of Strathgarrie solely for behoof of the defender, as heir aforesaid, without power of sale, he is only liable in payment of relief-duty. (4) The defender being only liable to the pursuer in relief-duty, is entitled to absolvitor, with expenses. (5) In respect of the Act 50 and 51 Vict. cap. 69, the defender should be assoilzied."

The Conveyancing Act Amendment Act 1887 (50 and 51 Vict. cap. 69), by sec. 1 enacts—"Where by a trust-disposition and settlement, or other *mortis causa* writing, any heritable estate is conveyed to trustees for behoof of or with directions to convey the same to the heir of the testator, whether forthwith or after the expiration of any period of time not exceeding 25 years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate, the trustees under such trust-disposition and settlement, or other *mortis causa* writing, shall not upon their entering or by reason of their having, prior to the date of this Act, entered with the superior by infeftment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the same by succession to the testator without the same having been conveyed to trustees; and the heir upon thereafter entering with the superior by infeftment or otherwise shall not be liable for any further casualty in respect of his entry, but whether the heir shall have been entered or not another casualty shall become exigible upon his death in the same manner as if he had been duly entered with the superior."

The Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Finds that the defender is the eldest son and heir-at-law of the late Lieutenant-Colonel Alexander Stewart, who was the vassal last vest and seised in the lands libelled; therefore sustains the fourth plea-in-law for the defender, and assoilzies the defender from the conclusions of the summons, and decerns, &c.

"*Opinion.*—This is an action for recovery of a casualty which is said to have become due in consequence of the death of Colonel Alexander Stewart, the vassal last vest and seised in the estate.

"The summons is not precisely accurate, in so far as it sets forth that the casualty became due in 1835, on the last vassal's death. It could not become due until the passing of the Conveyancing Act 1874, which for the first time gave to superiors the right which the pursuer seeks to enforce in this action. But the inaccuracy is merely formal, and in no way affects the validity of the claim. The pursuer's right to enforce the claim for a casualty by this action arises from the lands being in the position which but for the Act of 1874 would have entitled him to sue a declarator of non-entry against the successor of the last entered vassal. The lands fell into non-entry by the death of Colonel Stewart, and they are still in that position, because although the defender, who is infeft, has been entered by implication under the Act of 1874, his implied entry cannot be pleaded in answer to the claim for a casualty. The pursuer's case therefore appears to me to be perfectly well founded in so far as he claims to treat Colonel Stewart as the vassal last vest and seised in the estate, because he was undoubtedly the last vassal whom the superior can be required to be considered as duly entered for the purposes of the present case.

"For the reasons explained in the cases of *Stuart* v. *Jackson* and *Stuart* v. *Hamilton*, I think it follows that the amount of the casualty payable by the present defender must be determined by his relation to Colonel Stewart, whom the pursuer acknowledges to have been the last vassal; and since the defender is the eldest son and heir-at-law of Colonel Stewart, I am of opinion, on the authority of *Mackintosh* v. *Mackintosh*, 13 R. 692, that he is liable only for relief notwithstanding that his title is in form that of a disponee. There is nothing to prevent the defender making up a title as heir of the investiture, except that he has already completed a title by infeftment on a conveyance by his father's trustees in 1853, so that on the passing of the Act of 1874 he was entered with the superior to the same effect as if he had obtained a charter of confirmation. The case of *Mackintosh* is therefore directly in point.

"It is said that the defender must pay composition because he is the disponee of a disponee; that the implied confirmation of his infeftment necessarily implies a confirmation of the previous infeftment of the trustees, from whom he derived right; and that a change of the investiture must therefore be held to have been effected by the entry of the trustees, who could not have obtained an entry under the old law except for payment of composition. I should have thought this argument unsound if the trustees had been still infeft in 1874, so as to be entered by implication of the statute. Their implied entry could not affect the investiture for the purpose of this action, because it cannot be pleaded; and accordingly the pursuer avers, and I think rightly avers, that his last-entered vassal was Colonel Stewart, who died in 1835.

"But the trustees were divested, and the defender himself was the proprietor infeft when the statute of 1847 came into operation. I do not doubt that under the statute the defender must be held to have been entered to the same effect as if the trustees' infeftment and his infeftment had been confirmed in the same charter. But it does not at all follow that he must pay the same casualty as might have been demanded from the trustees if they had applied for an entry independently of him at the date of their infeftment. It is the defender's own infeftment, and not theirs, which has effected the entry, and the pursuer can have no higher claim than if the defender had applied for a confirmation of the trust-disposition and infeftment, and of the conveyance by the trustees to himself and his own infeftment, prior to the passing of the Act. And if he had demanded an entry in that manner, I think it clear that he must have been entered on payment of relief duty only. The sole purpose of the trust, in so far as regards the lands in question, was to provide for a liferent to the truster's widow, and to convey the lands to his eldest son under burden of the liferent. When the trustees had conveyed to the son in execution of the trust he was in no different position, so far as the rights of the superior are concerned, than if his father had conveyed to him directly, and he had entered by charter of confirmation or resignation upon that conveyance. But in that case he must have been entered on payment of relief. The form of his title would have been immaterial, because he was in fact the heir.

"I think it necessary to consider, therefore, whether the trustees themselves could have entered without payment of composition. But the authorities cited to establish the contrary do not appear to me to be in point. The trustees could not have used their infeftment to bring in a stranger to the investiture, because they could not convey to anyone except the eldest son and heir-at-law of the last vassal. The case of *Grindlay* v. *Hill* therefore would not have been applicable."

The pursuer reclaimed to the Second Division, and argued—When the Lord Ordinary pronounced the interlocutor under review he proceeded on the view that if a vassal when asked to pay a casualty was *de facto* heir of the last entered vassal that entitled him to pay relief-duty only, and that there was no need to look further and see how he had made up his title. That had been since declared unsound in the case of *Stuart* v. *Hamilton*, July 18, 1889, 16 R. 1030. In that case it had been held that the implied entry under the 1874 Act confirmed the new investiture, which could only be enfranchised by the defender paying composition although *de facto* heir of the last-entered vassal. That case ruled the present unless the more recent case of *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85—upon which the defender relied—applied. That case was very peculiar. The trust infeftment in that case was merely a burdening infeftment which turned out to be a trust for nobody. The defender there, although he took a disposition from his father's trustees, could have passed over the trust and made up his title by service to his father, and on that ground the Lord President held he did not fall under *Hamilton's* case, but was only liable in relief-duty. All trusts were not mere burdens although the other side almost put their case as high as that. If they were, all previous cases were wrongly decided. That view only received support from the case of *Lord Home* v. *Lyell*, 20th December 1887, 15 R. 193, where there was a very peculiar trust. Here the defender could not have served himself heir to his father, but could only take through the trustees. These trustees did not hold merely for the heir-at-law, but for all the purposes of the trust, and under the 6th purpose of the trust-deed the trustees were directed to convey to the eldest son alive at Colonel Stewart's death, who might not have been Colonel Stewart's heir-at-law, for there might have been a grandson by an elder but predeceasing son. That disposed of any argument founded upon the Act of 1887. Further, that declaratory Act was unnecessary if the law was as the defender maintained. The infeftment of trustees was *prima facie* the introduction of singular successors, and singular successors having been introduced, the casualty due was composition and not relief. This case was directly ruled by the case of *Grindlay* v. *Hill*, January 18, 1810, F.C. (see also *Magistrates of Musselburgh* v. *Brown*, February 21, 1840, F.C., and M. 15,038) which had always been recognised as good law, and had been followed in the cases of *Rossmore's Trustees* v. *Brownlie*, November 23, 1877, 5 R. 201, and *Lamont* v. *Rankine's Trustees*, February 28, 1879, 6 R. 739—*aff.* February 27, 1880, 7 R. (H. of L.) 10, decided since the 1874 Act. The only distinction between this case and that of *Grindlay* was that here there was no power of sale, but that was immaterial.

Argued for respondent—This case was on all fours with *Stuart* v. *Jackson*, *supra*, and should be decided accordingly. The trust here was for the benefit of the defender, and did not create a new investiture —*Campbell* v. *Speirs*, December 14, 1790—*aff.* March 5, 1791, 3 Pat. App. 201; *Camp-*

bell v. *Edderline's Creditors*, January 14, 1801, M. App. "Adjudication," No. 11; *Marquis of Huntly* v. *Earl of Fife*, July 20, 1887, 14 R. 1091 (Lord Kinnear); *Lord Home* v. *Lyell, supra;* Act 50 and 51 Vict. cap. 69. *Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692, decided that a disponee who as in this case had recorded his disposition, and was thereby entered with the superior, but was heir of the last-entered vassal, was liable in relief-duty only—see also *M'Kenzie* v. *M'Kenzie*, 1777, M. App., *voce* "Superior and Vassal," No. 2, and *Marquis of Hastings* v. *Oswald*, May 27, 1859, 21 D. 871. In *Jackson's* case the Lord President distinctly said "the form of making up the heir's title is of no consequence." Even if the case of *Stuart* v. *Jackson* did not rule the present case, the case of *Stuart* v. *Hamilton, supra*, relied on by the reclaimer was not in point. In that case a new investiture was held to have been erected by the implied entry under the 1874 Act before the disposition to the heir-at-law of the last-entered vassal. Here the defender had taken infeftment upon disposition in 1852, and was consequently himself the entered vassal upon the passing of the 1874 Act. Had that been the order of dates in *Hamilton's* case the decisions arrived at would probably have been different. As it was, it was a decision by a majority of one of the whole Court.

At advising—

LORD LEE—I am of opinion that the interlocutor of the Lord Ordinary is right.

Assuming, as I am bound to assume, that the decision in *Harington Stuart* v. *Hamilton* is sound (although I cannot forget that the case would have been decided the other way if Lord Fraser had lived and continued to retain the opinion which he had returned), the general question as to the effect of an implied entry under the Statute of 1874 must be taken to have been settled otherwise than according to the Lord Ordinary's opinion.

But the present case does not depend on the general question, but upon a question as to the effect of a conveyance in trust. And in this particular case that question is complicated by the fact that the trust had come to an end before any entry was obtained or any casualty demanded. The defender himself was the proprietor infeft when the Statute of 1874 came into operation. The vassal last vest and seised in the lands was Colonel Alexander Stewart, his father, and the defender as his father's eldest son was his heir-at-law. The only question here then is, whether the fact that the defender did not complete his title as heir-at-law, but by infeftment on his father's trust-disposition and settlement, makes him liable to pay composition as a singular successor? I agree with the Lord Ordinary that the form of the title has no such effect, and I think that this point was settled in *Harington Stuart* v. *Jackson* by the same Judges who decided the case of *Harington Stuart* v. *Hamilton*.

But if the form of the title has not that effect, is there anything in the substance of the trust-settlement in this case which puts the defender in the position of a singular successor? Does it contain (to use the expression of the Lord President in the case of *Jackson*) any disinherison of the defender? It appears to me to be a trust for the defender as absolute and unlimited fiar of the estate, and being such, my opinion is that the defender can be in no worse position than he would have held if the conveyance directed to be made in his favour by the trustees had been made directly by Colonel Stewart himself. For a disposition to trustees for the purpose of conveying an estate to A as unlimited fiar is a disposition which the superior could not enforce or found upon to the effect of preventing A completing his title as heir-at-law; and it is not doubtful that a direct disposition to one who is heir *alioqui successurus* has not the effect, though the title be completed under it, of making the heir liable to the superior in a composition as singular successor—*Mackintosh*, 13 R. 692.

It was urged that the trust here was for a conveyance containing a destination. But a mere destination, which the institute can put an end to at his pleasure, is nothing; and even a tailzied destination, under which the heir is compelled to complete his title, is of no effect as making the heir of the existing investiture a singular successor. This is conclusively settled by the case of the *Marquis of Hastings* v. *Oswald*, 21 D. 871, and by the series of cases commencing with *Mackenzie* v. *Mackenzie*, collected in Ross' Leading Cases on Land Rights, vol. ii.

The destination appointed by the trust-deed in this case was "in favour of my eldest son alive at the time of my death, and the heirs of his body, whom failing my other sons in succession, and the heirs of their bodies respectively, whom failing to the eldest daughter, . . . always excluding heirs-portioners."

Apart from the exclusion of heirs-portioners, this was just a destination according to the legal order of succession. But the material point, in my opinion, is that the eldest son was entitled to take, and did take, as an unlimited fiar, and was entitled to require the trustees to convey to him (as they did convey to him), "and his heirs and assignees whomsoever," without mention of the other heirs. Indeed, there was nothing in the trust-deed which could prevent the defender serving as heir-at-law to his father. What the effect would have been if he had done so, and conveyed away the estate, it is unnecessary to consider. Whether it would have extinguished the trust or would only have created a mid-superiority is of no consequence in this case.

But it was urged that the infeftment of the trustees and of the defender by virtue of their disposition had the effect of extinguishing any right which the defender might otherwise have possessed, inasmuch as this left nothing *in hæreditate jacente* of Colonel Stewart which could be taken up by service. It is not by any means clear

that such would have been the effect even if the trustees had completed a feudal title, for a confirmation of the trust deed would not have imported any change of the investiture. This was a trust for the continuation of the investiture. The case of *Edderline's Creditors*, M. App. "Adjudication," No. 11, and 1 Ross' L.C. p. 458, shows that a conveyance in trust even with powers of sale does not absolutely divest the grantor, but operates as a mere burden on the radical right, and the opinion of Lord President Campbell in the case of *Campbell* v. *Speirs* (affirmed in the House of Lords) 1 Ross' L.C. p. 464, 3 Pat. App. No. 201, seems to me to be very important on this point. For in that case the grantor of the trust-deed was dead. It was a trust for the payment of the truster's debts with power to take possession and sell what portion should be necessary, and ultimately settled the residue on certain heirs of entail. The deed contained procuratory and precept, and the trustees took infeftment on the precept, but renounced the procuratory in favour of the apparent heir. The question was, whether the title so standing in the trustees after the truster's death his apparent heir had a right to be enrolled as a voter? It was objected that his father having conveyed his estate to trustees for the purposes mentioned in the trust-deed and with possession he was entirely divested. The Court, without proceeding on the renunciation, held the objection arising from the trust settlement as without any solid foundation. The Lord President's note of his opinion bears—"But independent of this renunciation can it be said that he is divested of the right of voting by a settlement in his own favour, or, which is the same thing, trustees for him, the *dominium directum* still remaining *in hæreditate jacente* untaken up. The objector must be able to show that a trust conveyance for the purpose of management and for the heir's own behoof *quoad* the reversion is an alienation from the heir."

In the case of *Melville* v. *Preston* also Lord Corehouse observed (16 S. 471)—"As to the feudal difficulty pleaded by the defender, it is without foundation. It is true there cannot be two co-existing and co-ordinate infeftments in fee-simple in one and the same estate. But nothing is more common than to have an infeftment in fee simple burdened either with an entail or a trust."

The case of *Lord Home* v. *Lyell*, in my opinion, has an important bearing on this point. For it leads directly to the conclusion that unless the trust-deed was an alienation from the heir, it cannot deprive the heir of the right to obtain an entry on the footing of his being the heir. My opinion is that instead of being an alienation from the heir, the trust in this case was a trust for the heir, and for no one else, if the heir survived and took up the succession. All the others mentioned in the destination are mere conditional institutes. The trust accordingly has been so executed by a conveyance to the defender "and his heirs and assignees whomsoever." None of the conditional institutes object that this was not the proper mode of executing the trust, and it is scarcely necessary to observe that the superior has no title to object that the trust limited the rights of the heir, and should have been executed in a different form.

In the present case, however, it seems to me unnecessary to consider whether a public infeftment under the trust would have made it feudally impossible for the heir to complete a title directly in his own favour. For the trustees never were entered with the superior. They had merely a base infeftment, and such an infeftment clearly interposed no obstacle to a service by the heir, or a precept of *clare constat* in his favour, which followed by infeftment would have left the heir proprietor, infeft in a mid-superiority which might have been consolidated, after the date of the trustees' disposition in his favour, by a resignation *ad remanentiam*.

Between the date of the disposition by the trustees, and the Act of 1874 the defender held both a base infeftment in the *dominium utile* and a personal right as heir to the *dominium directum* which remained in *hæreditate jacente* of his father, and my opinion is that although the implied entry effected by the Act of 1874 may have rendered it unnecessary or even impossible that the heir should thereafter enter as an heir in point of form, it had no effect in depriving the heir of his personal right to be dealt with as an heir in the question of casualties.

The case of *Mackintosh* appears to me to be conclusive against the notion that the difficulty or impossibility in point of form of obtaining entry by service as heir is of any consequence in the question of casualties.

In that case the Lord Ordinary had decided against the vassal upon that ground. His Lordship's opinion was—"The defender by completing his title as he has done has prevented himself from offering to enter as heir. There is nothing now to enter to. The fee is full." But his judgment was altered on the express ground "that the form of the entry is immaterial." In that case the extinction of the heir's right to complete his title as heir (with respect to one half of the subjects) was not less complete than it is here. But it was held that being *de facto* the heir, though entered as a disponee, he was liable only in payment of relief.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—This case differs from *Stuart* v. *Jackson* in two respects—first, in that the defender, not the trustees, was infeft at the time when the Act of 1874 came into force; and second, in that the trust-deed is different.

In my opinion the first point is not material. When by the force of the Act of 1874 the defender was impliedly entered with the superior, the disposition to the trustees and their infeftment thereon was at the same time confirmed as a title prior to the title of the defender. This had the effect of

completing their title under the superior, and of extinguishing the fee which had existed in the person of General Stewart. The consequence was that no service to General Stewart was possible. Therefore the defender is entered with the superior as the disponee of the trustees, and apart from the question which arises on the trust-deed the case seems to me to be ruled by the decision of the Court in *Stuart* v. *Hamilton*.

I have next to consider the trust-deed. The estate was conveyed to the trustees in order that they might convey it to a series of heirs. As it turned out, the defender was the institute under the destination, and was also his father's heir. The trustees conveyed to him and his heirs—neglecting the destination. But though they chose to execute the trust in that way they were not the less trustees for the purposes which I have mentioned.

In order to the execution of the trust it was necessary that the truster should be denuded of the estate, and that the trustees should be invested in it. Accordingly they made up their title by taking infeftment on the trust-disposition. Prior to the Act of 1874 a mid-superiority remained in the *hæreditas jacens* of General Stewart. But that estate was extinguished by the implied confirmation by which the trustees are entered with the superior. By consequence they are interposed as entered vassals between General Stewart and the defender, from which it follows that the latter can only enter as their disponee.

The question comes to be, whether the trustees are to be regarded as singular successors, so that the defender in entering as their disponee is entering as the disponee of a singular successor. I do not see how trustees can be aught else than singular successors. They are strangers to the investiture. This was decided in the old case of *Grindlay*. It is said that they are not singular successors if they hold for the heir. I do not see that that fact makes any difference. They are not the less strangers to the investiture, and if they make up their title with the superior they can enter in no other character than as singular successors.

In the case of *Stuart* v. *Jackson* the trustees were infeft, and notwithstanding that fact it was held that the heir, who had taken a disposition from them, was liable in relief only. I concurred in that decision, though I may say that I did so with much hesitation. But the principle of the decision was that the trust in that case was to be considered as a mere burden on the fee, and notwithstanding the title which the trustees had made it was still open for the heir to serve to the last-entered vassal. In this case no such service in my opinion would be possible. For the estate was conveyed to the trustees in order that they in their turn might convey it to a series of heirs. That they conveyed it to the defender alone does not alter the character of the trust. In my opinion the truster when the trustees took infeftment was absolutely denuded of everything but the mid-superiority, which again was extinguished by the implied entry of the defender. The trustees were thus interposed as singular successors between General Stewart and the defender, so that he could only enter as their disponee.

I think therefore that the pursuer is entitled to decree.

LORD JUSTICE-CLERK—I concur with Lord Lee but with difficulty, and my difficulty would have been even greater but for the case of *Stuart* v. *Jackson*.

The Court adhered.

Counsel for Pursuer and Reclaimer—D.-F. Balfour, Q.C.—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender and Respondent—Sol.-Gen. Darling, Q.C.—Guthrie. Agent—Charles P. Finlay, W.S.

Thursday, March 20.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF ATHOLE *v.* MENZIES.

Superior and Vassal—Entry—Casualty—Composition—Relief—Trust—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4.

A vassal infeft in certain lands and entered with the superior died in 1870 leaving a trust-disposition and settlement whereby he conveyed his estates to trustees, directing them, *inter alia*, to hold the lands in trust for the use and behoof of his only son and the heirs whatsoever of his body, and failing him by his death in minority without heirs of his body, for the use of the heirs-male to be procreated of the truster's body and the heirs of their bodies, whom failing for the use of heirs-female, and failing children and certain other lines of destination, for the use of such persons as the truster might thereafter appoint, and whom all failing, for his own nearest heirs whomsoever. The trustees were further directed to pay over the said estate upon the heir thereto attaining majority, and they were given powers of sale by public or private bargain.

The trustees took infeftment in 1870, and in 1880 conveyed the said estates to the truster's only son.

In 1887 the superior in the lands claimed payment of a casualty of composition from the son on the ground that the implied entry of the trustees superseded the old investiture, and that the defender as their disponee was liable. The defender maintained that no new investiture had been created, as the trustees held for him, that the form of his title was immaterial, and that as his father's heir-at-law he was only liable to pay relief-duty.

Held (*diss* Lord Rutherfurd Clark) that only relief-duty was due.