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.

The Most Noble John James Hugh Henry, Duke of Athole, brought an action against William George Steuart Menzies, Esquire of Culdares, in the county of Perth, to have it found and declared that in consequence of the death of Ronald Stuart Menzies, Esquire of Culdares, who was the vassal last vest and seised in All and haill the lands of Middle Cairdneys and Nether Cairdneys, called Cairdney Taylor, &c. . . . within the barony of Dunkeld and sheriffdom of Perth, a casualty being one year's rent of the lands became due to the pursuer as superior of the said lands upon 22d October 1870, being the date of the death of Ronald Steuart Menzies, and to have the defender decerned and ordained to make payment to the pursuer of the casualty. The late Ronald Steuart Menzies of Culdares, who died on 22nd October 1870, was the last-entered vassal vest and seised in the said lands, conform to precept of *clare constat* in his favour granted by the pursuer's predecessor dated 10th August 1827, and instrument of sasine following thereon dated 24th October and recorded in the General Register of Sasines 21st November 1827.

By trust-disposition and settlement dated 23rd December 1859 he conveyed his whole estates, including the lands in question, to certain trustees. The purposes of the said trust were (1) payment of debts, and deathbed and funeral expenses; (2) expenses of executing the trust; (3) provisions for widow including liferent of the mansion-house; (4) provisions for younger children; (5) "my trustees shall hold the whole rest and residue of my estates, real and personal, generally above disponed and conveyed, or of the prices or produce thereof, in trust for the use and behoof of William George Steuart Menzies, my only son, and the heirs whatsoever of his body, and failing the said William George Steuart Menzies by his death in minority without heirs of his body, for the use of the heirs-male that may yet be procreated of my own body and the heirs whatsoever of their bodies, whom all failing before attaining the years of majority without lawful issue, in trust for the use of the heirs-female that may yet be procreated of my body: . . . And I do hereby direct and appoint my trustees, upon the said William George Steuart Menzies attaining the years of majority, or failing him in manner aforesaid, any other heir-male or female of my body in the order above expressed attaining the years of majority; . . . that my trustees shall forthwith dispone, convey, and make over to and in favour of the said William George Steuart Menzies, and failing him as aforesaid, to and in favour of any other heir-male or female of my body in the order above expressed on their attaining the years of majority . . . the said rest and residue of my means and estate, real and personal, and all the rights and securities thereof vested in my trustees, upon receiving in return a full and complete discharge and exoneration of all their prior actings and management in the affairs of the trust."

The trust-deed conferred upon the trustees "powers of sale by public or private bargain . . . and in general to do or cause to be done everything necessary for the execution of the trust hereby created."

The trustees took infeftment, and thereafter upon the defender, who was the only son of Ronald Steuart Menzies, attaining majority disponed the subjects to him by disposition and assignation in his favour dated 15th, 17th, 21st, and 23rd July, and recorded in the Division of the General Register of Sasines applicable to the county of Perth 11th August 1880.

The pursuer averred that upon the death of the said Ronald Stuart a casualty of one year's rent of the subjects became due.

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 relief-duty as heir of the last vassal.

The pursuer pleaded—"(1) A casualty of one year's rent of the subjects and others mentioned in the summons having become due by the defender to the pursuer as superior thereof upon the death of the said Ronald Steuart Menzies, the previous vassal, the pursuer, is entitled to decree as concluded for."

The defender pleaded—"(2) The defender, being the heir of the late Ronald Steuart Menzies, is only bound to pay the casualty due as for the entry of an heir, being relief duty. (3) In respect of the act 50 and 51 Vict. cap. 69, the defender should be assoilzied."

The Conveyancing Acts Amendment Act 1887 (50 and 51 Vict. c. 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 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 Ronald Stewart Menzies, the vassal last vest and seised in the lands libelled; therefore sustains the second plea-in-law for the defender, and assoilzies the defender from the conclusions of the summons, and decerns, &c.

"*Opinion.*—The present case differs from that against Mr Stewart of Strathgarrie in this respect, that the trustees of the last vassal were infeft when the Act of 1874 came into operation. But they had conveyed the lands to the present defender before the superior had made any claim for a casualty; and the action is accordingly directed against the defender as the last vassal's successor in the lands.

"For the reasons I have stated in the cases of *Stuart* v. *Hamilton*, and *Stuart* v. *Jackson*, I think the casualty payable by the defender is relief and not composition.

"The lands fell into non-entry by the death of Mr Ronald Menzies in 1870, and for the purpose of the present action they are still to be considered as in that position, notwithstanding the implied entries of Mr Menzies' trustees and of the defender. The summons accordingly sets forth correctly that Mr Ronald Menzies was the vassal last vest and seised in the estate, and it follows that the character of the casualty payable by the defender will depend upon whether he is the heir of that investiture. He has completed his title as a disponee. But the form of his title is immaterial, because it is admitted that he is in fact the heir, and on the authority of *Mackintosh* v. *Mackintosh* he is therefore liable for relief-duty only.

"It is said that the old investiture was superseded by the implied entry of the trustees. But an implied entry on which no casualty has been paid cannot be deemed to have extinguished the prior investiture, because it cannot be pleaded in answer to the claim for casualties; and the pursuer is therefore perfectly accurate in his averment that Mr Ronald Menzies was the last entered vassal. The trustees' infeftment is no doubt an important step in the title completed by the present defender, and the superior is therefore quite entitled to found upon it, although it cannot be pleaded in this action as the entry of a new vassal for the purpose of determining whether the defender's right is that of a singular successor or of an heir. But if it be looked at for that purpose, it is conclusive of the present question in favour of the defender. If the defender had presented his father's conveyance to his trustees and the trustees' conveyance to himself, and demanded a charter of confirmation under the old law, the superior would have been bound to grant a charter on payment of relief, because the trust is to convey to the truster's eldest son —that is, to the heir; and it follows that the casualty exigible from the defender is relief-duty only.

"The Act of 1887 has no application either to this case or to the case of the *Duke of Athole* v. *Stewart*, because both of these actions had been instituted before the Act became law."

The pursuer reclaimed, and argued—[The argument was taken after that in the preceding case and before it had been decided] —This case was certainly not ruled by that of *Stuart* v. *Jackson*. The peculiarities of that case were not here. Again, the trustees here did not hold for the heir alone, but for the general purposes of the trust. Several alternative lines of destination were pointed out to them to be given effect to according to circumstances. Further, the trustees here were infeft at the passing of the 1874 Act, and did not convey to the defender until 1880, and they possessed a power of sale. In both these respects this case differed from the preceding one, and was even more strongly in favour of the reclaimer's claims. It was clearly under the class of cases of which *Grindlay* v. *Hill* was the leading example, and was ruled by *Stuart* v. *Hamilton*. [For these and other authorities see preceding case of *Duke of Athole* v. *Stewart*.]

Argued for respondent—This case was ruled by that of *Stuart* v. *Jackson*. In that case also the trustees were infeft in 1874, and there was a power of sale, but here, as there (see Lord President's opinion), the power was not general, but only for the purposes of carrying out the trust. In that respect it differed from the case of *Grindlay* v. *Hill*, and also in this respect, that there was no change of investiture. The respondent here was heir-at-law of the last-entered vassal, and as such only liable for relief-duty. [See argument for respondent in preceding case of *Duke of Athole* v. *Stewart*.]

At advising—

Lord Lee—I am unable to find any good ground for distinguishing this case from that of *Harington Stuart* v. *Jackson*.

The fact that the trustees were infeft at the date of the Act 1874 is not sufficient, in my opinion, to deprive the defender, as heir of his father, of his right to obtain entry upon payment of relief-duty. For the same fact existed in *Jackson's* case, and the trust here, as there, was a trust for conveyance to the heir. He was not disinherited, nor had the trustees power to pass him over or do anything but convey to him, unless he failed to attain majority. In my view, as explained in the case of *Stewart of Strathgarrie*, the circumstance that the trust-deed contained a destination is of no more consequence here than it was in the case of the *Marquis of Hastings*. The principle of the case of *Stewart* v. *Jackson*, and of the case of *Mackintosh*, seems to me to rule the present case.

With regard to *Grindlay* v. *Hill* one thing is certain, that if it is irreconcileable with the cases of *Edderline's Creditors* and other cases following it must be held to have been ill decided. But it appears from the report to have been decided on the principle that the title demanded, viz., a charter of adjudication following upon a decree of adjudication in implement against the heir, would have enabled them to hold the estate, not for the heir, who was an infant without any vested right, but against him and for the Merchant Company of Edinburgh, who were to get the estate unless the heir survived a certain age. In short, it placed the trustees necessarily in the position of singular successors, or trustees for a singular successor, by a title which was adverse to the heir except in a certain event. The case was therefore

decided as a case falling under the rule established in the *Magistrates of Musselburgh* v. *Brown*, that even an heir is not entitled to demand a charter containing an assignable precept by which a singular successor may be entered without payment of composition as a singular successor.

The superior in *Grindlay* v. *Hill* offered to grant a precept of *clare constat* in favour of the heir, by which he would have been entered as heir upon payment of relief-duty only. But this the trustees refused.

In the present case the power of sale could not have been used against the heir unless the other purposes of the trust had rendered a sale necessary, which was not the case. But it is settled that a power of sale will not convert a trust-right into an absolute right, or cause it to be exclusive of the radical right *in hæreditate jacente* of the truster. I cannot think that this right, whatever its nature, was extinguished in the present case by the statutory entry of the trustees any more than in the case of *Jackson*. The title in that case was exactly in the same position. The trustees were infeft in 1865, and the conveyance to Jackson, the defender, was in 1883, after the statute of 1874 had taken effect.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—The same considerations as weighed with me in the preceding case of *Stewart of Strathgarrie* lead me to think that the pursuer is entitled to decree. The specialities of the trust make for the pursuer, but it is not necessary to go into them.

LORD JUSTICE-CLERK—As in the preceding case I concur with Lord Lee, but, as there, with difficulty.

The Court adhered.

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

Counsel for the Defender and Respondent—Sol.-Gen. Darling, Q.C.—Guthrie. Agents—J. & A. Hastie, S.S.C.

Thursday, March 20.

WHOLE COURT.

[Lord M'Laren, Ordinary.

WATSON *v.* WATSON.

Husband and Wife—Divorce—Desertion—Divorce not Contingent on Remonstrance—Process—Additional Proof—Statute 1573—*Conjugal Rights Act* 1862 (24 *and* 25 *Vict. cap.* 86), *sec.* 11.

In an undefended action of divorce by a husband on the ground of desertion it was proved that the defender had more than four years before the action left the pursuer's house, taking with her all the furniture, and that she had not returned or proposed to return to his house. It was also proved that she was a person of very bad temper. The pursuer deponed, *inter alia*, "I have been quite willing to receive her back to live with me," but there was no evidence of his having made any efforts to induce her to return to him, although both parties were resident in the same county. The defender was not called as a witness at the proof, but the pursuer offered if necessary to examine her as a witness, and to call other evidence as to his willingness to adhere, and the defender's unreasonable, wilful, and obstinate desertion.

Held (1), by a majority of the Whole Court (*diss.* Lords Young and Trayner), that the facts proved were not sufficient to found a decree for divorce.

Held (2), by a majority of the Whole Court, that the pursuer of an action of divorce for desertion does not require in all cases to prove direct remonstrance with the defender for absence as a condition of obtaining decree, and that in the present case, in view of the pursuer's offer, the case should be remitted to the Lord Ordinary for the additional proof proposed.

Diss. Lord President, Lord Justice-Clerk, and Lords Adam, Lee, and M'Laren—*abs.* Lord Kinnear—who held that in order to meet the requirements of the Act 1573 (modified by the Conjugal Rights Act 1862), which was the only authority for divorce for desertion, there must be obstinate non-adherence on one side, and an expressed desire for adherence and remonstrance for absence on the other.

In August 1889 Charles Watson, Newtyle, Forfarshire, raised an action of divorce against his wife Mrs Ann Small or Watson on the ground of wilful desertion. The action was not defended.

From the proof allowed by the Lord Ordinary (M'LAREN) it appeared that the parties were married in June 1873, that they cohabited together until March 1874, when the pursuer on his return from work one evening found that the defender had left the house, taking with her all the furniture.

The spouses were at that time living at Whiteinch, Glasgow, and the defender on leaving the pursuer returned to Newtyle. There were no children of the marriage.

The pursuer deponed—"She was a woman of a very irritating temper. When we were going to Newtyle in the train an hour after our marriage she commenced to abuse me, and she continued doing that very often all the time we lived together. She expressed dislike to me. She had no cause for that to my knowledge. I was kind to her. There was no arrangement that she should separate from me in March 1874. She is at present conducting a registry business in Perth Road, Dundee, under her maiden name. I have been quite willing to receive her back to live with me." This evidence of the pursuer as to the defender's ill-temper and desertion was corroborated by the evidence of his brother and sister. There was no evidence that the pursuer