LORD SANDS—In my view of the genesis and construction of section 39 of the Finance Act (No. 2) 1915 (5 and 6 Geo. V, cap. 89) there is (1) a charging definition, (2) an exception, (3) an exception to that exception and (4) an exception to the latter exception. Accordingly, as it seems to me, without perhaps disregarding altogether any intermediate light, we may eliminate exceptions 1 and 2 and attach the final exception to the original definition. This will then run—"The trades and businesses to which this part of this Act applies are all trades or businesses of any description carried on in the United Kingdom . . . excepting the business of a commercial traveller."

The Special Commissioners have found that the appellants carry on the business of commercial travelling. But they have found that they do not fall within the exceptions because as a limited company they cannot be appropriately described as "a commercial traveller." The former finding is not open to review, but the latter is. If the exception had been conceived simply in favour of "a commercial traveller," it might not have been easy to quarrel with the finding. But the exception is in favour of "the business of a commercial traveller." The Commissioners have found that the appellants carry on the business of commercial travelling. As it seems to me this is not distinguishable from a finding that they carry on the business of commercial travellers. The respondents rely upon the singular in the statute, the "a." But both under the special and the general interpretation clauses the plural may be read in. In this view the exception which I have stated above would run "excepting the business of commercial travellers." Accepting the finding of the Commissioners that the appellants carry on the business of commercial travelling it seems to me that they fall under the exception. It might be somewhat inappropriate to describe a limited company as being "a distiller," but there is nothing unusual or inappropriate in describing such a company as one carrying on the business of distillers.

I recognise that the contrary view as adopted by the Commissioners is a maintainable one, particularly in view of the personal elements which underlie the intermediate exceptions (b) and (c). But this is a revenue statute, and a liability which is not made clear by its terms is not to be deduced from considerations of presumed intention.

The Court answered the question of law in the affirmative.

Counsel for Appellants—Robertson, K.C. — King Murray. Agents — Patrick & James, S.S.C.

Counsel for Respondents — Leadbetter, K.C.—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, January 18.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Blackburn, Ordinary.

COOPER SCOTT *v.* GILL SCOTT AND OTHERS.

Prescription — Positive and Negative Prescriptions — Deed of Entail — Intrinsic and Extrinsic Objections—Act 1617, *cap.* 12—*Ex facie Valid Irredeemable Title — Conveyancing* (*Scotland*) *Act* 1874, *sec.* 34.

A deed of entail executed in terms of a trust-disposition and settlement correctly repeated in its narrative clause the destination in the trust-disposition in favour of a certain series of heirs. The dispositive clause, however, interpolated in the destination a person who was a stranger to the investiture thus set forth. The institute who first took the lands under the deed of entail was the person called immediately before the person thus interpolated, and as such institute possessed the lands for more than forty years without challenge. In an action of reduction of the deed of entail after the death of the institute, at the instance of the person who should have been called against the person thus interpolated, *held* (by a majority of Seven Judges, Lord Hunter and Lord Ormidale *diss.*) that though the dispositive clause was contradicted by the terms of the narrative clause, still as the former was unambiguous the objection to the deed was an extrinsic objection, and was therefore excluded both by the positive and by the negative prescriptions.

Observed per the Lord President, Lord Skerrington, and Lord Cullen, that section 34 of the Conveyancing (Scotland) Act 1874 was to be regarded as an amendment of the provisions of the Act 1617, cap. 12, relative to the positive prescription as those provisions had been interpreted by the Court, and that accordingly the words "*ex facie* valid" implied no more than that the title must be free from any "intrinsic nullity" within the meaning of these decisions.

Authorities examined.

John Albert Douglas Cooper Scott, *pursuer*, brought an action against (first) Robert John Gill (otherwise Robert John Gill Scott), and (second) the heirs-male whomsoever of the deceased Mrs Jane Gill or Young, sometime wife of William Young, *defenders*, for declarator that the trustees under the trust-disposition and deed of settlement and relative codicil of the late Peter Redford Scott were bound to execute a deed of entail in terms of a certain destination, that the deed of entail as executed was void in so far as it included in the destination certain persons, and that the pursuer was now entitled to succeed to the entailed estates. The summons also concluded for reduction

of the deed of entail so far as it conveyed the lands included therein to these persons.

The defender Robert John Gill pleaded, *inter alia*—"4. *Esto* that the terms of said deed of entail are not warranted by or did not duly comply with the said trust-disposition and settlement, any right in the pursuer to reduce the said deed is excluded by (*a*) positive prescription, *et separatim* (*b*) the long negative prescription, and the defender is entitled to absolvitor."

The pursuer pleaded, *inter alia*—"4. The defender's averments being irrelevant and insufficient to support his pleas, the defences should be repelled and decree should be granted in terms of the conclusions of the summons. 5. The defender's plea founded on prescription should be repelled in respect that (*a*) deducting the period during which the pursuer was in minority no sufficient period to found prescription has elapsed; (*b*) the title on which the defender founds discloses on the face of it that the defender never had and never could have in the events which have happened any right to the said entailed estates; (*c*) the pursuer had no title to raise the present proceedings until the death of the said John Young Scott on 17th May 1921, and accordingly prescription could not begin to operate against the pursuer until that date; and (*d*) the long negative prescription is not applicable to rights of the nature concerned in the present action."

The *facts* of the case appear from the opinion of the Lord Ordinary (BLACKBURN), who on 11th January 1923 assoilzied the defender from the conclusions of the action.

Opinion.—"Peter Redford Scott died on 23rd May 1865 leaving a trust-disposition and settlement dated in 1861, by the last purpose of which he directed his trustees on the death of the survivor of his brother and sisters, or on the death of the survivor of himself and his wife, whichever of these events should last happen, to lay out and invest the residue of his estate in the purchase of lands, and to convey them along with the lands and estates already belonging to him by a deed of strict entail. The destination directed by the testator was in the first place to the heirs-male of his body and the heirs-male of their bodies, whom failing to the heirs-female of his body and the heirs-male and female of their bodies. The next heir called was his brother Francis Scott, whom failing the heirs-male and heirs-female of his body. When the event occurred on which the trustees were directed to execute the deed of entail, which proved to be the death of the testator's widow on 16th October 1876, the testator and his brother Francis had both predeceased leaving no issue, and accordingly both the above branches of the destination had failed. The destination as directed by the testator further proceeded—'Whom failing the heir-male of the said now deceased Mrs Jane Gill or Young, whom failing the heirs-male of the body of the said Mrs Janet Gill or Cooper, whom failing the heirs-female of her body, . . . whom failing my own nearest heirs whomsoever. . . .' Both the ladies above mentioned were cousins of the testator through their mothers, and at the date when the entail fell to be executed the heir-male of the said deceased Mrs Jane Gill or Young was her only son John, who afterwards adopted the name of Scott and was known as John Young Scott. A deed of entail was executed by the trustees dated 2nd December 1880 and recorded in the Register of Entails on 15th February 1881. Under this deed the estate was conveyed to John Young Scott as the institute under the tailzied destination, and he completed his title by recording a warrant of registration in the General Register of Sasines on 22nd February 1881. He continued in undisturbed possession of the estates under this title till his death without male issue on 17th May 1921. It then appeared that in the tailzied destination the heir called next after the institute was described as 'the heir-male of the deceased Mrs Jane Gill or Young.' Now as the destination to the heir-male of Mrs Jane Gill or Young had already been exhausted by the conveyance of the estates to her son John Young Scott as institute, it would appear that the trustees had no warrant to call another of her heirs in the destination. The result of their having done so is that the defender in this action, who is the person now answering the description of the heir-male of Mrs Jane Gill or Young is not himself any connection by blood of the testator. He now seeks to make up a title to the estates under the destination in the deed of entail while his right to do so is challenged by the pursuer, who is the heir-male of the body of Mrs Janet Gill or Cooper and who claims that he is the person designated by the testator in his trust-disposition and settlement to succeed to the estates on the event which has now occurred. In the present action the pursuer asks declarator (*first*) that the trustees were bound to give effect in the deed of entail to the destination contained in the trust-disposition and settlement; (*second*) that they failed to do so in respect that they substituted the heir-male of the said Mrs Jane Gill or Young to the institute John Young Scott, and accordingly that the deed of entail is to that extent unwarrantable, illegal, inept, and null and void; and (*third*) that the pursuer is now entitled to succeed to the entailed estates. The summons concludes that in any event the deed of entail should be reduced in so far as it purports to convey the estates on the failure of John Young Scott to the heir-male of his mother and that the pursuer should be restored and reponed thereagainst *in integrum*.

"The destination in the trust-disposition and settlement may be open to criticism and may have occasioned some ambiguity as to the testator's intentions, but I do not entertain any doubt that his trustees having by the conveyance of the estate to John Young Scott exhausted the direction to convey to the heir of Mrs Jane Gill or Young were not entitled to call another of her heirs immediately on his failure, and that had the objection now taken to the destination in the deed of entail been stated timeously it must have been success-

ful (*Ochterlony* v. *Ochterlony and Others*, 1887, 4 R. 587). But the institute after being infeft under the deed of entail continued in possession of the estates without challenge for over forty years, and accordingly the defender now pleads both the positive and negative prescription in support of his claim.

The pursuer meets this plea by maintaining that the deed of entail is not a habile document on which to found prescription in respect that it is intrinsically null and void. It is argued that since the deed of entail proceeds on a full narrative of the trust-disposition and settlement, including the destination therein, it is possible by comparing the two destinations one with the other to reach the conclusion *ex gremio* of the deed that the trustees had no warrant for the substitution of Mrs Jane Gill or Young's heirs to the institute in the destination of the entail itself. This assumes that the destination of the trust-disposition and settlement has been accurately repeated in the narrative of the deed of entail, which however can only be proved by extrinsic inquiry, and accordingly the argument so far as based on an intrinsic nullity necessarily fails. But even if a disposition were to bear *in gremio* conclusive evidence that it was granted *a non habente potestatem* this would not in my opinion amount to an essential nullity but would only render the deed voidable within the prescriptive period (*H.M. Advocate* v. *Graham*, 7 D., *per* L.J.-C. Hope at p. 195). Next it was argued that the pursuer himself had no title to raise the present proceedings until the death of the institute, and accordingly that prescription could only begin to run against him from that date. Assuming as I do that the deed of entail was not executed by the trustees in strict accordance with the testator's directions, I do not think it doubtful that any of the substitutes designated under the destination in the trust-disposition and settlement might have challenged its validity from the date when it was recorded, and that the proper person to defend the action would have been the institute infeft under the deed. But the pursuer further argues that so far as he is concerned the running of prescription was interrupted by the fact that he was a minor for two years after he became on his father's death the heir next entitled to succeed under the destination in the trust-disposition and settlement. It has, I think, been long settled that in questions of succession to heritable property the plea of minority as a suspension of prescription is only available to one to whom the right to claim possession of the estates has opened during his own minority (*Gordon*, 1784, M. 10,968; *Maule* v. *Maule*, 1829, 7 Sh. 527; *Black* v. *Mason*, 1881, 8 R. 497). Accordingly it appears to me that the pursuer's answers to the plea of prescription fail and that the institute of entail having being infeft under the deed for over forty years the defender is entitled to have his fourth plea-in-law sustained and to be assoilzied from the conclusions of the action. I may add that had I thought effect should have been given to the minority plea as an interruption of prescription this would in my opinion only have affected the defender's plea so far as founded on the negative prescription. The period required for the running of the positive prescription is in my judgment regulated by section 34 of the Act of 1874, which does not in any event require more than thirty years' possession."

The pursuer reclaimed, and argued—The deed of entail of 1880 was void, and could not afford a foundation either for the positive or for the negative prescription. It was not a deed on which prescription could run. It was self-contradictory, because the narrative clause contradicted the dispositive clause. It was therefore affected by an intrinsic nullity, and was accordingly not protected by the Act of 1617, cap. 12, the object of which was to enable a person who had possessed on a charter for the prescriptive period to stand secure as against persons claiming on the strength of prior rights — Napier on Prescription, p. 49; Millar on Prescription, p. 5. Further, it was not an *ex facie* valid irredeemable title to land in the sense of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 34. The defender could not found on it as a valid charter and sasine or their equivalents as he was bound to do—Ersk., iii, 7, 4, iii, 7, 9; *Scott* v. *Bruce Stewart*, 1779, M. 13,519, 3 Ross, L.C., 334; Napier on Prescription, p. 152. It was true that a mere reference to prior titles would not entitle a pursuer to open up inquiry. But in the present case the title founded on could only be justified by going outside it and by the defender showing that the narrative was wrong. The blunder was of such a kind as to show that the deed proceeded *a non habente potestatem*, and if this were so the deed was bad whether the blunder was in the narrative or the dispositive clause—*Duke of Buccleuch* v. *Cunynghame*, 1826, 5 S. 57, 3 Ross, L.C., 338; *Forbes* v. *Livingstone*, 1827, 6 S. 167, at pp. 168, 173, and 176, 3 Ross, L.C., 342; *Lord Advocate* v. *Graham*, 1844, 7 D. 183, at pp. 193 and 195, 3 Ross, L.C., 352. The present deed was not *ex facie* valid, because the power to grant the deed was recited in the narrative clause, and the operative act was clearly outwith the power — *Fraser* v. *Lord Lovat*, 1898, 25 R. 603, *per* Lord President Robertson at p. 615, and *per* Lord Kinnear at p. 618, 35 S.L.R. 471; *Lord Advocate* v. *Graham* (*cit. sup.*), *per* Lord Moncreiff at p. 204. The case of *Paterson* v. *Purves*, 1823, 1 Shaw App. 401, 3 Ross, L.C., 164, was distinguishable, because that was a case of ignoring the entail and taking the fee-simple title. In *Simpson* v. *Marshall*, 1900, 2 F. 447, 37 S.L.R. 314, the title was held good because the disconformity did not appear *ex facie* of the title. In *Scott* v. *Bruce Stewart* there was no *ex facie* intrinsic nullity. In *Abernethie* v. *Forbes*, 1835, 13 S. 263, and in *Porterfield* v. *Steuart*, 1839, 8 S. 33, the deed was partly intrinsically null and partly intrinsically good. As to the dispositive clause being the leading clause in the deed, reference was made to the cases in Ross, L.C., i, 44, and to *Chancellor* v. *Mosman*, 1872, 10 Macph. 995, and *Mackenzie* v. *Duke of Devonshire*, 1896, 23 R. (H.L.) 32,

33 S.L.R. 628. Other cases dealing with intrinsic nullity were ***Paton*** v. ***Drysdale***, 1725, M. 10,709, 1 Ross, L.C., 194; ***Ainslie*** v. ***Watson***, 1738, M. 10,736, 1 Ross, L.C., 196; ***Grants*** v. ***Shepherd***, 1847, 6 Bell's App. 153, *per* Lord Lyndhurst at p. 171. If the inductive clause set forth the warrant, the validity of the deed could only be judged by reference to the warrant. The question of the negative prescription only arose if the competing title was *ex facie* good. If the defender had not a good title by positive prescription he was an absolute stranger to the investiture—***Cubbison*** v. ***Hyslop***, 1837, 16 S. 112, 3 Ross, L.C., 328, *per* Lord Corehouse. Reference was also made to Sandford on Entails, pp. 246 and 469.

Argued for the defender and respondent—The defender's title was unchallengeable, first, by virtue of the positive prescription, and failing that by virtue of the negative prescription. The institute had possessed under the deed of entail for more than forty years, and the possession of the institute was possession for all the substitutes. An intrinsic nullity meant that the deed was incurably defective. An *ex facie* extrinsic nullity was something in the essentials of the deed which made a reference to prior titles necessary—Stair, ii, 12, 25. The former could not be cured by prescription, the latter could. The narrative clause could not be founded on to contradict the dispositive clause unless there was an ambiguity in the latter—Ersk., iii., 7, 4, and note at p. 851; Bell's Lectures (3rd ed.), ii, p. 706. This meant that having got a probative document it was not permissible to go into prior documents in order to ascertain the legal weight to be attached to it. It might be attacked on extrinsic grounds within the prescriptive period but not thereafter. If the dispositive clause was unambiguous, then it was permissible to isolate it after the lapse of the prescriptive period and to disregard any confusion created by the narrative clause—***Ainslie*** v. ***Watson***, 1738, M. 10,736, 1 Ross, L.C., 196; ***Scott*** v. ***Bruce Stewart***, 1779, M. 13,519, 3 Ross, L.C., 334; ***Paterson*** v. ***Purves***, 1823, 1 Shaw's App. 401, 3 Ross, L.C., 1€4; ***Duke of Buccleuch*** v. ***Cunynghame***, 1826, 5 S. 57, 3 Ross, L.C., 338; ***Forbes*** v. ***Livingstone***, 1827, 6 S. 167, 3 Ross, L.C., 342; ***Abernethie*** v. ***Forbes***, 1835, 13 S., 263, *per* Lord Jeffrey (Ordinary), at p. 268; Stair, ii, 8, 15; Ersk., i, 5, 3; Duff on Deeds, p. 175; Bell's Lectures, ii, p. 1013; Wood's Lectures, p. 254. The case of ***Cubbison*** v. ***Hyslop***, 1837, 16 S. 112, 3 Ross, L.C., 328, showed how the negative prescription might be made available by a person who had failed to substantiate his case by the positive prescription. The negative prescription protected a title not founded on the positive prescription against all attacks based on extrinsic objections. In the present case the deed was not *ex facie* null, and therefore it was fortified by the negative prescription—***Thomson*** v. ***Stewart***, 1840, 2 D. 564; ***Macdonald*** v. ***Lockhart***, 1842, 5 D. 372, *per* Lord President Boyle at p. 375 and Lord Mackenzie at p. 376; ***Shepherd*** v. ***Grant's Trustees***, 1844, 6 D. 464, *per* Lord Jeffrey at p. 509, 6 Bell's App. 153. *Non valens agere* was a good answer as a rule but not against an entail—***H. M. Advocate*** v. ***Graham***, 1844, 7 D. 183, *per* Lord Justice-Clerk Hope at p. 195 and Lord Moncreiff at p. 205. These passages were accepted as good law by Lord Kinnear in ***Lord Advocate*** v. ***Lovat***, 1898, 25 R. 603, at p. 619, 35 S.L.R. 471. In the case of ***Earl of Eglinton*** v. ***Earl of Eglinton***, 1861, 23 D. 1369, the negative prescription was sustained. The case of ***Kinloch*** v. ***Bell***, 1867, 5 Macph. 360, *per* Lord Benholme at p. 370 and Lord Neaves at p. 371, gave some indication of the class of objections that were cut off by the negative prescription. The case of ***Ochterlony*** v. ***Ochterlony***, 1877, 4 R. 587, 14 S.L.R. 385, was also referred to. The defender was the next substitute under a deed of entail which was not *ex facie* null though open to suspicion. The dispositive clause was absolutely plain and unambiguous, and the defender's rights under the deed could not be displaced by a narrative clause inconsistent therewith—***Chancellor*** v. ***Mosman***, 1872, 10 Macph. 995; ***Orr*** v. ***Mitchell***, 1893, 20 R. (H.L.) 27, 30 S.L.R. 591; Bell's Lectures, p. 254.

At advising—

The LORD PRESIDENT intimated that the opinions of the Consulted Judges would be read by LORD SKERRINGTON.

LORD JUSTICE-CLERK (ALNESS)—This case raises interesting and important questions relating to the law of the positive and the negative prescriptions. We have had the advantage of an elaborate and erudite argument from both sides of the bar, and we have been furnished with a copious citation of authority.

The questions to which I have referred arise from the terms of the trust-disposition and settlement of the late Peter Redford Scott. The Lord Ordinary has rehearsed the circumstances which lead up to the action with great particularity, and I abstain from resuming them in detail. So far as material they are not in dispute. Suffice it to say that Mr Scott directed his testamentary trustees, on the occurrence of certain events, to execute a deed of strict entail conveying the heritage which he left, and the heritage which he directed his trustees to purchase, to a carefully defined series of heirs. The trustees, on the occurrence of the events contemplated by the testator, executed and recorded a deed of entail which in its narrative clause repeated the destination in the trust-disposition and settlement. Certain institutes contemplated by the testator in point of fact failed, and the direction which operated at the date of his death is thus set out in the trust-disposition and settlement and in the narrative clause of the deed of entail—"Whom failing the heir-male of the said now deceased Mrs Jane Gill or Young, whom failing the heirs-male of the body of the said Mrs Janet Gill or Cooper." Both the ladies referred to were cousins of the testator. The heir-male of Mrs Jane Gill or Young, who was in point of fact her only son John Young Scott, duly took the estate as the trust-disposition and settlement enjoined.

On his death in 1921, after enjoying undisturbed possession for forty years, it was discovered that the destination contained in the deed of entail called as the next heir "the heir-male of . . . Mrs Jane Gill or Young." For this provision Mr Scott's trust-disposition and settlement afforded no warrant. The heir-male of Mrs Jane Gill or Young, who is a defender in this action, was a stranger to the deed. He, however, essayed to make up a title to the estate under the destination referred to. The pursuer, who is the heir-male of Mrs Janet Gill or Cooper, and who, in virtue of the direction contained in the trust-disposition and settlement, should have been called as the next heir of entail, presented a competing petition for service, and claimed the right to succeed to John Young Scott. He has brought this action to vindicate that claim. The Lord Ordinary, however, assoilzied the defender, and against his judgment this reclaiming note has been taken. The case for the pursuer is that the trustees under the trust-disposition and settlement failed to incorporate in the deed of entail the destination determined by the testator, that the deed of entail is to that extent inept, and that he (the pursuer) is the heir now entitled to succeed to the entailed estate. The defender on the other hand pleads that he enjoys the protection afforded both by the positive and the negative prescription. To this the pursuer replies that the deed on which the defender founds is subject to intrinsic nullity, and that accordingly the defence of prescription is elided.

The area of discussion was considerably narrowed in the course of the second debate. Certain pleas which had been originally urged by the defender were jettisoned by him. The plea of minority, to which the Lord Ordinary in his opinion refers, was abandoned. The plea that the existence of adverse possession is an essential requisite of the positive prescription, and that there was in this case no adverse possession by John Young Scott, was also abandoned. The plea that prescription enfranchises only the individual and not the investiture was abandoned too, and it was conceded that the possession of the institute is the possession of all the substitutes. This admission, though probably inevitable, is at the same time in my judgment a most damaging one on the part of the pursuer.

In point of fact the sole question debated before the Court of Seven Judges was, Does the deed of entail suffer from an intrinsic nullity or does it not? The pursuer maintains that the defender's title is not habile to found prescription, in respect that looking to the contradiction between the narrative and dispositive clauses in the deed of entail it is intrinsically null. The defender replies that the defect in the deed is not intrinsic but extrinsic, and that it has been cured by the positive prescription. He maintains that after twenty years' possession, which he has admittedly enjoyed, all inquiry into earlier titles is excluded, and that he is feudal owner of the estate. He further maintains that if the positive prescription does not avail him he can fall back, and successfully fall back, on the negative prescription, which has now—so he contends—cut off all right of action by the pursuer. The law of the matter is not doubtful. If a deed is intrinsically null, it does not afford a foundation for the operation of prescription. If, however, the defect in the deed is not intrinsic but extrinsic, the deed is a good title on which to prescribe. The question accordingly comes to be, Within which category does this deed fall? Is the nullity with which we are here concerned extrinsic or intrinsic?

In order to answer that question it is obviously imperative to ascertain with as much precision as may be what is an intrinsic and what is an extrinsic nullity. How are they to be defined? It is difficult to furnish an exhaustive definition, but one can at least say, on a survey of the examples given in the authorities, that a deed which is intrinsically null may be described as a deed which suffers on the face of it from an incurable defect in its essentials. The deed must *per se* afford complete and exclusive proof of its nullity. It must be, in short, a self-destructive title. Such a deed is one which, while the older law applied, omitted the word "dispone," a deed which is witnessed by only one witness, or a deed in which essential words are written on an erasure. Such a deed has no effect whatever upon the lands which it purports to convey, and cannot be buttressed by extrinsic evidence. On the other hand any deed which though defective may be made good by separate documentary evidence does not suffer from an intrinsic nullity. The defect is in that case not intrinsic but extrinsic. Stair, Inst. (ii, 12, 25) gives as an illustration of a deed which may be set up by extrinsic evidence one in which the sasine bears not to have been given on the lands. Such a deed appears *prima facie* to be null. But it may not necessarily or truly be so, inasmuch as there may be a Crown clause of dispensation; and the deed may be set up by showing that such a clause in point of fact exists. After twenty years such a deed is unassailable.

As regards the deed of entail in this case, it is plain that the narrative and dispositive clauses are disconform the one to the other. Both cannot be correct. The pursuer says the deed is therefore intrinsically null. "Nay," says the defender, "the only way of proving which clause is correct is by an appeal to the trust-disposition and settlement of Mr Scott. Without referring to that deed, an action of reduction must inevitably fail." And his argument proceeds thus—"The deed of entail is not probative evidence of what the settlement contains. One is not entitled, therefore, to assume that the narrative there quoted is accurate. That can only be ascertained *dehors* the deed, viz., by reference to the trust-disposition and settlement. There is no doubt a mark of interrogation against the deed of entail. It suggests doubts, but these doubts can only be resolved by production of the trust-disposition and settle-

ment. Therefore there is no *ex facie* or intrinsic nullity in this deed, and it is now too late to challenge its validity." Such I apprehend, in rough outline, to be the defender's contention.

The contention, I am bound to say, seems to me at once so simple and conclusive that I should have been disposed to sustain it without appeal to authority. On the other hand, the pursuer's contention seems to me so technical, as compared with a contention which is based on the public policy which the law of prescription embodies, that I should equally have been disposed, apart from authority, to reject it. The pursuer's contention in truth depends for its success upon the accident that the conveyancer recited the narrative clause of the trust-disposition and settlement in the deed of entail instead of referring to it. Had he taken the latter course, the pursuer would, I think, have been constrained to admit that his objection to the defender's title was extrinsic, and that it would be obviated by the running of prescription. But the incaution of the conveyancer—so the pursuer must argue—in resuming the narrative clause in the deed of entail destroys the latter as a foundation for prescription. In other words, if you have to go outside the deed of entail to ascertain the contents of the narrative clause of the settlement, the former is good as a foundation for prescription, but if you have to go outside the deed to ascertain the accuracy of the contents of the narrative clause, the deed is not good as a foundation for prescription. After making due allowance for the artificial province of law in which we are moving, I should not be disposed, if I could avoid it, to give effect to an argument so narrow and indeed finical as that. And if it be said that it is strange that a person whom the testator did not intend to participate in his bounty should intrude himself upon it, and should find his intrusion, if not welcomed, at least sanctioned by the legal doctrine under discussion, then I reply, such is the very function of prescription. It makes what would, apart from it, be a bad claim a good claim, and I apprehend that it does so on wide grounds of policy which are too obvious to need discussion at this time of day. It is manifest that in the application of the doctrine cases which are hard and results which may even be stigmatised as unjust are bound to occur; but I assume that it was deemed right to afford the general protection and finality which prescription confers even though the doctrine may operate hardly in specific cases. On a balance of expediency the doctrine can no doubt be completely vindicated.

But as we have been favoured with an elaborate citation of authority it is right that I should advert to the institutional writers and to at anyrate some of the decisions which were quoted in argument. In the first place, however, it is proper to turn to the Act 1617, cap. 12, in order to ascertain what is required as the foundation for prescription. All that is needed is a charter and sasine. If possession follows thereon for forty years the Act provides that the possessor is secure against attack. I may add that a deed which is intrinsically null is obviously not equivalent to charter and sasine. That, however, is a later development. The Act says nothing of the *quality* of the title, but it is clear, having regard to the decisions to which I am about to refer, that the Courts so far from regarding an intrinsically null deed as equivalent to charter and sasine, regard it as so many words inscribed upon paper which have no legal effect whatever.

As regards the institutional writers, Stair (Inst., ii, 12, 25) says—"Prescription doth not only exclude the preference of other better rights, which if insisted upon within prescription would have been preferred as anterior, and the posterior right thereby reduced as *a non habente potestatem;* but all ground of reduction by the King or other superiors or authors is excluded; so that the neglect of the King's officers cannot be obtruded by the Act of Parliament, declaring that their neglects shall not prejudice the King, *neither any nullity in the titles of prescription, except it be in the essentials thereof;* so prescription cannot sustain a perpetual tack without ish, which is essential thereto; nor a seisin without a symbol, generally or particularly, or not given upon the ground of the land. But all requisites in rights introduced by custom or statute and not essential thereto are cut off by prescription." Again, Erskine (Inst., iii, 7, 4) states that "if the title be a fair genuine writing, and proper for the transmission of property, the possessor is, after the years of prescription, secure by the statute." And in a footnote it is added—"Where a seisin was objected to as having been taken, not on the ground of the lands but at a different place, in consequence of a dispensation in the immediate warrant, viz., a disposition from a subject, the Court sustained the defence of prescription, as previous titles might have contained a regular dispensation, and such dispensation, though a subject superior could not originally grant, yet, being once competently conferred, he could convey it." He further says (Inst., iii, 7, 9)—"The right of setting aside any deed upon extrinsic objections, which do not appear *ex facie* of the writing, but require a separate evidence, *ex gr.*, the right of reduction *ex capite lecti*, is lost if not exercised within forty years But objections arising from intrinsic nullities fall not under the negative prescription. Thus a bond or instrument of seisin without subscribing witnesses cannot become valid by any lapse of time." And Professor Bell in his Lectures on Conveyancing ((3rd ed.), vol. ii, p. 706) says—"In all cases the writings founded on must be free of intrinsic objections; for example, any charter or disposition, forming part of the legal progress, must be probative." If then one finds a probative document apt to convey the lands, no amount of antiquarian research will deprive possession of the legal weight which is held to attach to it.

The decisions appear to conform with the doctrine as expounded by the writers referred to. I shall now consider the most

important of these, and I shall do so chronologically.

The first case to which it is proper to refer is that of *Bruce Stewart* v. *Scott*, (1779) M. 13,519, 3 Ross's Leading Cases 334. In that case an attempt was made to reduce an infeftment on the ground that the sasine had not been taken on any part of the lands conveyed, and that this had been done without any authority other than a clause of dispensation flowing from the granter of the deed. Prescription was pleaded in defence and the defence was sustained. Lord Braxfield (at p. 335) in an opinion which has become historic said—"The true question here is, Whether is the objection to the sasine extrinsic or intrinsic? If *intrinsic*, then the sasine is null from the beginning, and it cannot grow better by being older. A sasine may be a good sasine though not taken on the grounds of the lands in consequence of a dispensation from the Crown. Before prescription is run the person who produces the title must remove the objection to it, but after the prescription the objection comes too late. It is the great purpose of prescription to support bad titles. Good titles stand in no need of prescription." Lord Monboddo said (*ibid.*) —"The only objection here is as to the power of the granter, and that after the years of prescription will be presumed." And Lord Justice-Clerk Miller says—"The question here is, Whether is the objection extrinsic or intrinsic? If there is no sasine there is no right, but here the objection is altogether extrinsic? It is an objection to the title to grant dispensation. How can that be good when an objection to the right of the holder is not good?" In that case if one looked at the documents alone the title was bad. It appeared to suffer from a fatal flaw. Sasine was not given because it was not given on the lands conveyed, and the lands on which it was given were not conveyed. If the objection had been raised within forty years it could only have been met by the production of a royal charter. But after forty years there is every presumption in favour of the possession had, and as it was necessary to go outside the deed to find whether the sasine was good or bad, the objection was held to be extrinsic and to be cured by the course of prescription which had run. In other words, it is not sufficient for the determination of the question that one finds on the face of a deed something that looks like a nullity. It is not enough to stress the nullity. One must probe deeper and inquire and determine the quality of the nullity—whether it is intrinsic or extrinsic in its character. If the former, prescription is of no avail; if the latter, it saves the situation.

So in the present case the defender argues that within forty years he would have been bound to produce the trust-disposition and settlement, but that after forty years he is excused from that necessity. The mere fact that the narrative clause in the deed of entail contains what bears to be a statement of fact does not in his view prove that statement to be correct. The narrative clause, in short, is inconclusive evidence of the correctness of its contents, and after twenty years is presumed to be wrong. Such is the argument.

The next case is *Paterson* v. *Purves*, (1823) 1 Sh. App. 401. There a charter was executed in breach of an entail, but it was held to be fortified by forty years' possession. It was plain on the face of the deed that the granter exceeded his powers But no one argued that the title was inhabile to found prescription.

The next case is the *Duke of Buccleuch* v. *Cunynghame*, (1826) 5 S. 57, 3 Ross's Leading Cases 338. It was there held that all inquiry into prior titles is excluded by the positive prescription even although the prior title is narrated *in gremio* of the title on which prescription is pleaded. Prescription was held to operate although the title bore that the Crown had right by virtue only of the act of annexation, in which there is an express exception of the rights of the Crown to such lands. Lord Balgray said (at p. 60) —"The title of the defender is complete in itself, and he has had forty years' possession. Even granting that the titles had been derived *a non domino*, still he is entitled to plead prescription, whereby inquiry into that fact or into *mala fides* is excluded. In the case of *Forbes of Callender* ((1822) 1 S. 282) a prescriptive title was sustained relative to coal although originally it was excepted from the conveyance, but having been inserted in the subsequent titles, and possession having been enjoyed for forty years, the right to the coal was held to be undoubted." Lord Gillies said (at p. 61)—"It would be a serious question indeed if we were to deny effect to a prescriptive title because it appeared *ex facie* of the deed that the former titles had not been correctly deduced, or that a wrong one had been stated. This is truly the nature of the objection which is now made." And the Lord President said (at p. 61)—"It can scarcely ever happen that there is a prescriptive title without some falsehood connected with it. If the title be in itself perfectly good and derived from the true proprietor, there can be no need of prescription, which is only necessary to cure bad titles." Again, in *Forbes* v. *Livingstone* ((1827) 6 S. 167, 1 W. & S. 657) it was held that the Crown charter of the vassal was a valid title on which to prescribe a right to coal, although the Barons of Exchequer were only authorised to pass Crown charters of the properties as held under the forfeited superior. The Consulted Judges said (p. 173)—"So far as it did not except the coal an error was no doubt committed by the Barons of Exchequer, and the charter in so far as it thus had the effect of conveying the coal was null on the ground of error. Nullity, however, from error is not a relevant ground of objection to a prescriptive title. On the contrary, prescription is in general pleaded to support a title originally invalid, it being otherwise not necessary to found on prescription. The alleged nullity of the charter from defect of form or delay in obtaining it is equally irrelevant when considered as a title of prescription. . . . We see Mr Livingstone pos-

sessing his estate under a series of titles far exceeding the period of forty years, the dispositive clause of which is sufficient to include the coal in the lands, and this is all that is required for founding the plea of a prescriptive title." At the advising Lord Pitmilly said (at p. 184)—"No doubt if a declarator had been brought within forty years of its (the title's) date, it might have been found that the coal was not conveyed, but after prescription no such questions can be looked into." And the Lord Justice-Clerk added (at p. 185)—"I agree, in the words of Lord Meadowbank, that to doubt this title would be to shake to the foundation that statute which is the palladium of the land rights of Scotland."

The next case is *Abernethie* v. *Forbes*, (1835) 13 S. 263. The facts are somewhat remote from those in the case before us and need not be rehearsed, but I desire to refer in particular to what is said by the Lord Ordinary in the course of his opinion at the foot of page 268 of the report.

Then comes the important case of *Cubbison* v. *Hyslop*, (1837) 16 S. 112, 3 Ross's Leading Cases 328. It deals with the negative prescription, and shows how that prescription may be available to a person who has failed to establish his case on the positive prescription. There a reduction was brought of certain decrees of adjudication and sale and of the title made up under them. The reduction failed, for the Court held that there being no *ex facie* nullity the right of challenge was cut off by the negative prescription. Lord Corehouse said (at p. 119)—"For example, A dispones to B, B to C, and so on. One of these dispositions is objected to on the ground of forgery, or because it was impetrated by force or fraud. Now all these objections are cut off by the negative prescription." (Parenthetically it may be observed that falsehood—meaning thereby forgery—is despite what his Lordship says a valid answer to the plea of prescription.) "For although," proceeds Lord Corehouse, "exceptions founded on *ex facie* nullities, for example, that the deed is not subscribed, or that it is tested by only one witness and the like, are not barred, yet all objections not appearing *ex facie* on the deed are effectually cut off by the negative prescription." As Mr Stevenson somewhat picturesquely put it in the first debate—"When prescription begins to run all earlier titles are under sentence of death. When the prescriptive period has expired the sentence is executed."

I now come to the case of *Thomson* v. *Stewart*, (1840) 2 D. 564. There a bill of exchange was granted by a married woman. Now the obligations of a married woman, no doubt, were at that date, generally speaking, null and void. But the Court held that the nullity in such a case was not intrinsic. It was pointed out from the Bench that the bill might have been granted for money which was wholly *in rem versum* of the married woman, in which case her obligation would be good. "If there be any grounds on which that bill can be valid," said Lord Gillies (at p. 570), "I must at this distance of time presume that such grounds did exist, and hold that all challenge is now cut off by the negative prescription." In other words, unless the nullity is made good on the face of the document the nullity affords no answer after the years of the negative prescription have run.

The next case is *Macdonald* v. *Lockhart*, (1842) 5 D. 372, 3 Ross's Leading Cases 367. It was there held that heirs-portioners were entitled to succeed under a deed of entail on which forty years of possession had followed, despite the fact that a prior contract of marriage, in professed implement of which the deed of entail was granted, contained a clause excluding heirs-portioners. The investiture was fortified by prescription and all right of action thereby cut off. The case is of importance also as an answer to the pursuer's argument of *non valens agere*, which has now been abandoned, and it need not further detain us.

The case of *Shepherd* v. *Grant's Trustees* ((1844) 6 D. 464, 3 Ross's Leading Cases 336) affords an excellent example of the doctrine of intrinsic nullity. There the name of the first substitute called in a deed of entail was written on an erasure. It was held that that was a vitiation *in essentialibus* and was fatal to the deed. It was observed from the Bench that the deed was not a legal or effective instrument, that it was not probative, and was therefore null and void as a conveyance of the estate to any disponee, that there was no disposition by the granter—that, in short, the deed was utterly null and void. The decision was affirmed in the House of Lords—6 Bell's App. 173.

I now come to the case of the *Lord Advocate* v. *Graham*, (1844) 7 D. 183. There it was held that prescription having run in favour of the possessors of a patronage upon a title *ex facie* sufficient, certain grounds of challenge and all inquiry into the older titles and the origin of the rights claimed were excluded, and that the positive prescription operated against the annexed property of the Crown. The Lord Justice-Clerk said (at p. 195)—"This ground of challenge is only reached by inquiries into the origin of the title of the party conveying the patronage in 1732 in order to show that the disposition flowed *a non habente potestatem*. It is a fixed principle of law that such inquiries are excluded by the effect of prescription." And again on p. 196 he adds—"No definition of essential nullities in the law of Scotland includes want of title in the granter of the deed on which prescription follows, and every explanation on the other hand limits the import of the exception to the ordinary meaning of the terms—nullities *ex facie* which deprive the title of the character of a formal, complete, and valid instrument. Want of power in the granter is not a *vitium reale*, pleadable against the prescriptive possession of the disponer, else the statute truly effected nothing of value for certainty of heritages." Lord Moncreiff in a noteworthy passage said (at p. 205)—"If the principle of this plea could be listened to as a general doctrine we might shut our books on the law of positive pre-

scription, for in nine cases out of ten which have been tried in reference to that law the allegation of the party seeking to evict the right prescriptively possessed has been that the original titles founded on had proceeded *a non habente potestatem*, and I humbly apprehend that if the statute has any meaning in its preamble and the enactment following it the very purpose of it was to exclude any such inquiry, and to raise an absolute presumption of error, falsehood, forgery, or some other fatal nullity against all the averments, and all the muniments founded on in support of them, for showing that the titles by which the possession has been held were derived from some party who had no power to constitute them." It may be noted that that passage which I have quoted from Lord Moncreiff's opinion has the express assent of Lord Kinnear in the case of *Fraser* v. *Lord Lovat*, (1898) 25 R. 603, at p. 619.

I next refer to the case of *Kinloch* v. *Bell* ((1867) 5 Macph. 360), where it was held that all objections other than those founded on incompetency or nullity appearing *ex facie* of a decree of valuation were cut off by the negative prescription. I refer to the opinions of the Lord Justice-Clerk on p. 368, of Lord Benholme on p. 370, and Lord Neaves on pp. 371-2, in which the distinction between intrinsic and extrinsic nullity is expounded.

Finally I come to the case of *Ochterlony* v. *Ochterlony*, (1877) 4 R. 587. There the institute under a deed of entail discovered, thirty-six years after he entered into possession, that the deed was invalid because the word "irredeemably" in the clause prohibiting alienation was written on an erasure. I desire to refer to the penultimate paragraph of Lord Rutherfurd Clark's opinion on p. 589—"The pursuer further maintains," said he, "that by reason of the long period for which he has possessed the lands under the existing title, his right to possess under that title cannot now be questioned. *If prescription had run the argument of the pursuer would have been sound.*" And that although the defect was manifest to the eye on the face of the deed itself.

The conclusion of the whole matter is this—The defender contends that he holds, as the next substitute in the entail, under a deed which is not *ex facie* null. He argues that in no reported case has the Court held a flaw such as that in the deed of entail with which we are concerned to be an intrinsic nullity. He maintains that the dispositive clause is unambiguous, and that even if it be repugnant to the narrative clause, still, in accordance with a familiar canon of construction, it must receive effect —*Chancellor* v. *Mosman*, 10 Macph. 995; *Orr* v. *Mitchell*, 20 R. (H.L.) 27. At anyrate he contends that his title having been fortified by prescription he has a right to serve under the deed and that no one can now say him nay. I think that that contention is sound and that it is supported both by the opinions of the institutional writers and by the decisions to which I have referred. Accordingly I am for refusing the reclaiming note and affirming the judgment of the Lord Ordinary.

LORD SKERRINGTON—[*His Lordship delivered the following opinion, being that of the Consulted Judges* — LORD PRESIDENT (CLYDE), LORD SKERRINGTON, and LORD CULLEN]—While I think that the Lord Ordinary came to a correct conclusion in regard to the law applicable to this action and that his judgment ought to be affirmed, I should have regarded his opinion as more satisfactory if it had given greater prominence to and had countered what I regard as the real strength of the pursuer's case, viz., the circumstance that the challenge of the validity of the deed of entail is based upon a breach of trust alleged to have been committed by the testamentary trustees who executed the deed, and that the object of the present action is to assert and vindicate for the pursuer a right of succession which would undoubtedly have belonged to him if this breach of trust had not been committed. The angle from which the Lord Ordinary regarded the case would be explained if the argument addressed to him was similar to that addressed to the Seven Judges in assuming that as regards prescription no distinction could be drawn between a breach of trust and a contravention of a personal *jus crediti*. The debate before us proceeded upon the assumption that prescription, both positive and negative, would ordinarily apply in the case of a breach of trust, and that accordingly the only question to be considered in the present case was whether the objection was not so apparent on the face of the deed of entail as to constitute an intrinsic nullity which could not be cured by any length of possession or by any lapse of time however protracted. While I do not dissent from this way of stating the ultimate question which we have to decide, I regard it as unfortunate that a preliminary question which lies at the root of the present litigation was not argued in the ordinary way with a proper citation of authorities, but on the contrary was assumed and passed over in silence. The law, as I understand it, is this—So long as a property belonging to a trust is extant in the hands of a trustee, neither the positive nor the negative prescription can be appealed to by the trustee so as to prevent a beneficiary from vindicating the property for the trust even though the trustee may have been in possession upon a title which makes no reference to the trust. One of the reasons for this is that the possession of the trustee is deemed to be the possession of the beneficiary. Accordingly the whole foundation of the negative prescription—presumed abandonment — fails in such a case. It further follows that although the trustee may have acquired an unchallengeable title to the property by the positive prescription in a question with the general public, he is deemed to have done so for behoof of the beneficiary. His right remains a qualified one in a question with the beneficiary to the same effect as if the trust had been incorporated in the title. The position, however, is different if the trustee transfers the property to a third party who possesses it upon an *ex facie* absolute title. In such a case the third

party may be held to be in possession for his own behoof, and accordingly both the positive and the negative prescriptions may begin to run in his favour and against the right of the beneficiary as from the date of the transference. So long, however, as the prescriptive period has not expired, a third party who is either a gratuitous disponee or an adjudger from the trustee holds the property *tantum et tale* and under burden of any latent trusts which qualified the right of the trustee. While the general rule is as I have stated it, personal claims at the instance of a beneficiary against a trustee may be cut off by the negative prescription even while the trustee remains in office. The general rule is stated by Lord Kinloch in the opinion which he delivered as Lord Ordinary in the case of *University of Aberdeen* v. *Irvine* ((1866) 4 Macph. 392, at pp. 401-2), an opinion expressly approved of by the Lord Chancellor (Cairns) when the case was in the House of Lords, 6 Macph. (H.L.) 29, at p. 37. On the other hand, the exceptional cases in which the claim of the beneficiary may be held to have been cut off by the negative prescription are discussed in the opinions of the Judges in the case of *Barns* v. *Barns' Trustees*, (1857) 19 D. 626. The pursuer does not charge fraud either against the granters or against the grantee of the deed of entail.

In so far as I am competent to express an opinion upon a question which was not argued, I think that the pursuer's demand to have the deed of entail rectified and brought into conformity with the directions of the testator is liable in the absence of some specialty to be cut off by the positive and negative prescriptions. The institute of entail possessed the estate under and in virtue of the deed of entail for more than forty years, viz., from 22nd February 1881, when it was recorded in the Register of Sasines, until his death on 17th May 1921. Accordingly, if there was no specialty in the deed which prevented it from being a habile basis for the positive prescription, the institute acquired an unchallengeable right both for himself and also for the substitutes pointed out in the deed (including the defenders) on the expiry of twenty or, alternatively, of forty years from 22nd February 1881. In like manner the substitutes (including the pursuer) who had a right preferable to that of the defenders as beneficiaries under the testator's trust must, in the absence of any specialty, be held to have lost that right by the negative prescription through their failure to enforce it within forty years of the publication of the deed of entail.

I now come to what I agree with the pursuer's counsel in regarding as the question of importance in the present case, viz., whether there is any peculiarity in the deed of entail which excludes an appeal to prescription in a question between a disponee or an heir of the investiture, on the one hand, and a beneficiary under the testator's trust on the other hand. Obviously the deed of entail is a bungled deed. There is a manifest inconsistency between the way in which the estate has been actually settled by the dispositive clause and the way in which it ought to have been settled if the narrative clause sets forth accurately and exhaustively the directions which the testator gave to his trustees. From this it follows that the deed would not be described in popular language as a deed the validity of which was apparent upon its face. It would be described as a deed which suggested on the face of it a serious doubt whether it was not *ultra vires* of the trustees who granted it and therefore null and void. Accordingly if section 34 of the Conveyancing (Scotland) Act 1874 could be regarded as an isolated piece of legislation it might be doubtful whether the deed of entail with which we are concerned was an "*ex facie* valid irredeemable title to an estate in land" within the meaning of that section. The section ought, however, in my opinion, to be regarded as an amendment of the provisions of the Act 1617, cap. 12, relative to the positive prescription as those provisions have been interpreted by the decisions of the Court—see *Buchanan and Geils* v. *Lord Advocate*, (1882) 9 R. 1218. In this view the words "*ex facie* valid" would imply no more than that the title must be free from any "intrinsic nullity" within the meaning of the decisions in regard to the positive prescription. In any case the true construction of the legislation of 1874 is not of essential importance in the present litigation seeing that the possession under the deed of entail continued for more than forty years, and that the effect of the negative prescription has also to be considered.

After carefully considering the question from the point of view both of principle and of authority, I have come to the conclusion that the inconsistency between the destination as contained in the dispositive clause of the deed of entail and the destination, which according to the narrative clause of the same deed ought to have received operative effect in the dispositive clause, is irrelevant to the question of prescription unless the pursuer can demonstrate that the inconsistency has the effect either (1) of rendering the deed of entail null and void as a conveyance of and title to land, or (2) of converting what at first sight appears to be an absolute title qualified only by the fetters of a strict entail into a title which is further qualified by a trust for behoof of the beneficiaries under the residuary clause of the trust-disposition and settlement of the testator. The second point is not in the case because it was not argued or even suggested by the pursuer's counsel, and rightly so in my opinion, because I do not think that the deed of entail is susceptible of such a construction. I mention the point merely for the sake of completeness and because one branch of the pursuer's fifth plea-in-law might have entitled the pursuer's counsel to argue it. It is possible to figure a disposition which, although unqualified in its dispositive clause, would fall to be construed as a conveyance of the bare legal estate either (*a*) because

the narrative clause made it certain that the disponee and his heirs of provision were not intended to take the property as beneficial owners, or (*b*) because the narrative clause contained a substantive and operative declaration of trust in favour of a third party. Such a disposition as I have figured would be immune from prescription as regards the right of the beneficial owner, seeing that the owner of the legal estate could not prescribe against the terms of his own title.

It now remains to consider the only question argued to us, viz., whether the deed of entail complies with the standard required by the decisions of the Court in regard to the long prescription both positive and negative. Can a disposition which *ex hypothesi* is unqualified by any trust, which is properly executed, and the operative clauses of which are perfect and complete, be correctly described as intrinsically null merely because the narrative clause recites (it may be erroneously) that the granter of the disposition was under a personal obligation arising out of a trust or out of a contract which required him to settle the property in a manner different from that effected by the dispositive clause? The answer must, in my opinion, be in the negative. Infeftment following upon such a disposition would transfer the property from the disponer to the disponee, whereas an intrinsically null disposition would leave the property vested in the disponer. While the phrase "intrinsic nullity" is not to be found in the statutes, I should be slow to believe that the able lawyers who coined it expressed themselves so inaccurately as to apply it to a disposition which when followed by infeftment would perform effectively the ordinary and proper function of a deed of that character. The recital of a personal obligation to settle the property in a manner which differed from that effected by the dispositive clause would not affect the validity of the deed unless it was proved (in the way in which alone it could be proved, viz., by extrinsic evidence) that such an obligation did in fact exist. For all that anyone reading the deed of entail can know, the statement in the narrative clause may be either inaccurate or incomplete—for example, owing to the failure *per incuriam* to refer to a second codicil which directed the insertion in the destination of the very words to which the pursuer takes exception. An action of reduction would be irrelevant if the pursuer confined himself to averring that the destinations in the two clauses were inconsistent, but shrank from averring that the destination in the dispositive clause of the deed of entail was in fact unauthorised by the testator. This fact would have to be proved by the pursuer if the challenge was made during the prescriptive period. After the expiry of that period a challenge based upon an appeal to extrinsic evidence would be excluded, and a presumption *juris et de jure* would arise that the recital of the destination enjoined by the testator was either inaccurate or incomplete.

The decided cases with regard to the positive prescription are consistent with the view which I have expressed. It is unnecessary to examine them in detail as they are conveniently collected in Ross's Leading Cases (Land Rights), vol. iii., pp. 338 *et seq.* To these the later case of *Fraser* v. *Lovat*, 25 R. 603, may be added. The effect of the decisions is correctly stated by Bell in section 2010 of his Principles. An infeftment he says has been held good as a title of prescription "even where the title bore evidence *in gremio* of the objection, but the ground of that objection was to be collected extraneously."

The law is similar in regard to the negative prescription. Thus Erskine states (iii, 7, 9) that "the right of setting aside any deed upon extrinsic objections which do not appear *ex facie* of the writing, but require a separate evidence, *ex gr.*, the right of reduction *ex capite lecti*, is lost if not exercised within forty years. But objections arising from intrinsic nullities fall not under the negative prescription. Thus a bond or instrument of seisin without subscribing witnesses cannot become valid by any lapse of time."

It is proper to note that the pursuer's counsel did not argue that the plea of prescription should be repelled upon the ground that his client had been in minority or *non valens agere* as stated in his fifth plea-in-law.

It was suggested in the course of the debate that the words in the dispositive clause of the deed of entail to which the pursuer objects might possibly be regarded as mere surplusage and therefore held *pro non scriptis*. Seeing, however, that there is no ambiguity as to the meaning and legal effect of the words in question the suggested solution of the difficulty seems to me to be illegitimate and inadmissible. As Lord Davey said in the case of *Mackenzie* v. *Duke of Devonshire and Others* ((1896) 23 R. (H.L.) 32, at p. 35) it is "a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention." Accordingly the pursuer's counsel (properly as I think) refused to argue that the destination in the dispositive clause could be interpreted so as to bring it into harmony with the destination in the narrative clause though his attention was specially directed to this aspect of the case.

LORD ORMIDALE concurred in the opinion of Lord Hunter.

LORD HUNTER—The reclaiming note in this case raises an interesting and, as I think, difficult question under the law of positive prescription relating to heritable rights. Peter Redford Scott died on 23rd May 1865. In terms of his trust-disposition and settlement his trustees were, on the death of the survivor of his brother and sisters and on the death of the survivor of himself and his wife, whichever of these events should last happen, to convey the residue of his estates in terms of a deed of strict entail. The destination directed by the truster was, after provisions in favour

of the heirs of his body and the heirs of the body of his brother Francis Scott, "to the heir-male of the said now deceased Mrs Jane Gill or Young, whom failing the heirs-male of the body of the said Mrs Janet Gill or Cooper, whom failing the heirs-female of her body . . . whom all failing to my own nearest heirs whomsoever." The testator's widow died in October 1876 predeceased by Francis Scott, neither he nor the testator having left any issue. Both Mrs Young and Mrs Cooper were cousins of the testator. The heir-male of the first of these ladies was her only son John, who afterwards assumed the name of Scott. A deed of entail was executed by the trustees dated 2nd December 1880 and recorded in the Register of Entails on 15th February 1881. The narrative of the deed correctly sets forth the reasons for the grant and quotes accurately and verbatim the destination prescribed by the testator. It also narrates that the time has now arrived when in the final execution of the trust they have to denude and execute this deed of strict entail in favour of the series of heirs therein specified. In the dispositive clause the lands are disponed "heritably and irredeemably to and in favour of John Young Scott (formerly named John Young), the heir-male of the said deceased Jane Gill or Young, whom failing the heir-male of the said Mrs Jane Gill or Young now deceased, sometime wife of Mr William Young residing at Galashiels, whom failing the heirs-male of the body of Mrs Janet Gill or Cooper," &c. Between the narrative and the dispositive clause of the deed there is a manifest and apparent discrepancy. According to the former of these clauses only one heir-male of Mrs Young is called to the succession; according to the latter John Young is called as heir-male of his mother, and apparently on his death the heir-male of Mrs Young at that date is called as substitute. But the dispositive clause has internal evidence of careless draftmanship. John Young, the institute, is described as the heir-male of the said deceased Jane Gill or Young, and the first substitute is described as the heir-male of the said Mrs Jane Gill or Young now deceased, sometime wife of Mr William Young residing at Galashiels. If the intention of the draftsman of the deed was to make the heir-male of Mrs Young at a subsequent date substitute to the institute, who was her heir-male at the date of the execution of the deed, one would have expected the full description of Mrs Young to appear when the institute is described as her heir-male and not to be reserved until the substitute is referred to. The language itself suggests that the words "whom failing the heir-male of the said Mrs Jane Gill or Young" are mere surplusage and have been introduced in error by the draftsman. At all events there appears to me to be such uncertainty in the wording of the dispositive clause that reference to the narrative clause is necessary to find out whether the intention of the granters of the deed was to call more than one heir-male of Mrs Young to the succession. It may be said that the summons has not been so framed as appropriately to raise this question. Personally I should be disposed to give the pursuer every facility by way of amendment that may be necessary to avoid a manifest injustice being done him under cover of a narrow and rigid application of the assumed principles of the law of prescription.

John Young Scott completed his title as institute under the tailzied destination by recording a warrant of registration in the General Register of Sasines on 22nd February 1881. He remained in the undisturbed possession of the estates until his death without male issue on 17th May 1921. During the period of John Young Scott's possession of the estate no one was in a position to dispute the validity of that possession, although I assume that it would have been open to any substitute under the entail to get the deed corrected if there was an error in the destination detrimental to his ultimate interests. On the death of John Young Scott both the pursuer, who is heir-male of the body of Mrs Cooper, and the defender, who is heir-male of Mrs Young, presented petitions to the Sheriff of Chancery, each craving to be served as nearest and lawful heir of tailzie and provision in special of the said John Young Scott in the entailed land. The determination of the question involved in these petitions has been postponed until the present case has been decided.

It is not disputed that, in terms of the destination in the trust-disposition and settlement of the late Mr Scott, correctly set forth in the narrative clause of the deed of entail, the pursuer was, on the death of John Young Scott, entitled to succeed to the estate in dispute. The contrary is maintained on record, but the argument on these lines was properly abandoned by defender's counsel when the case was argued before us. The only question now is whether the pursuer's rights cannot be successfully pled because the defender has acquired an adverse and preferable title by the law of positive prescription. Is the defender then in a position to put forward a right so perfected?

Section 34 of the Conveyancing and Land Transfer (Scotland) Act 1874 (37 and 38 Vict. cap. 94) provides—"Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines shall be sufficient foundation for prescription, and possession following on such recorded title for the space of twenty years continually and together, and that peaceably without any lawful interruption made during the said space of twenty years, shall, for all the purposes of the Act of the Parliament of Scotland, 1617 cap. 12, 'Anent prescription of heritable rights,' be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced according to the provisions of the said Act; and if such possession as aforesaid following on an *ex facie* valid irredeemable title recorded as aforesaid shall have continued for the space of thirty years no deduction or allowance

shall be made on account of the years of minority or less age of those against whom the prescription is used and objected, or of any period during which any person against whom prescription is used or objected was under legal disability." Assuming the provisions of this Act to be applicable can the defender bring himself within their scope? I do not think it doubtful that the possession founded on need not be the actual possession of the person maintaining the right. The possession of a vassal may be founded on by a superior, or the possession of an institute by the substitutes of an entail. It may also be admitted that the result of possession for the prescriptive period is to fortify not the individual but the investiture, and that the right may become unchallengeable although the person prejudiced was *non valens agere* during the whole or part of the period of the running of positive prescription. The essential, however, to maintaining the plea is that the title upon which the prescriptive right is founded should be *ex facie* valid. Is that so in the present case? In my opinion it is not. I have referred to the peculiar terms of the dispositive clause and to the *ex facie* discrepancy between the terms of the narrative clause setting forth the heirs of entail to whom the granters of the deed were under obligation to convey and the terms of the dispositive clause, if it is assumed that the words to which I have already drawn attention are not merely redundant or superfluous. Is a disposition *ex facie* valid where the granter of a deed being under an obligation, which he correctly narrates, to dispone to B proceeds erroneously to dispone to C? An infeftment may follow in favour of the latter; but he is not in a position to say that his title is *ex facie* valid, for the title depends both upon the charter and the infeftment. The situation is quite different from that where *ex facie* of the deed the granter professes power to dispone and the challenge depends upon extraneous proof of the want of disposing power.

The efficiency of a prescriptive right in property, depending primarily on an *ex facie* valid title, is established by continuous peaceable and uninterrupted possession for the prescriptive period of time. The question of possession runs into the question of title. The defender has never in fact been in possession of the property for a single day, nor has anyone who was in any general sense his representative so occupied the property. The only infeftment was by registration of John Young Scott's title as institute under the entail. It is said by the pursuer that on 26th March 1885 a petition at the instance of John Young Scott for authority to feu part of the entailed estates was presented to the Sheriff of the Lothians and Peebles at Edinburgh and was intimated to the pursuer's uncle John Cooper, who was then heir-male of Mrs Janet Gill or Cooper, as being the heir entitled to succeed to the said entailed estates. The said John Cooper died on 3rd July 1902 when the pursuer became the heir-male of Mrs Janet Gill or Cooper. The answer of the defender to this allegation is—"It is believed and averred that at the date of the said petition neither the petitioner nor his advisers were aware of the existence and relationship of the defender." The importance of the pursuer's averment consists in the circumstance that the recognised substitute to John Young Scott was the heir-male of Mrs Cooper and not a different heir-male of Mrs Young from the institute who alone of that lady's heirs-male had any right to the succession. No doubt the possession of an institute under an entail is or may be the possession of the substitutes. But in the lifetime of John Young Scott no one claiming any right to succeed under the entail had any right to challenge his right to possession. The earliest moment when the substitute could make an effective claim to the property was the death of the institute. It may be that one of the objects, if not the main object, of the law of prescription is to fortify bad titles—good titles standing in no need of prescription. Can it, however, be said that the title upon which John Young Scott took infeftment is of so clear a character that you must ascribe his possession to the defender and not to the pursuer? Is there not such an apparent weakness in the title that the primary question is, for which of the two claimants was he in fact possessing? So far as I know there is no case where in a similar competition the Court has felt constrained to give the property to the person who admittedly has no claim under the destination of the author of the entail.

The defender maintained that as John Young Scott's possession exceeded the period of forty years, and as the Act of 1874, section 34, had not repealed the provisions of the Act of 1617, cap. 12, as to the prescription of heritable rights, he was entitled to found upon the provisions of the earlier statute. This argument was founded on the contention that there was, or might be, a distinction between the requirements of the two statutes as to the nature of the title required as a foundation for prescription. I do not think this contention is sound; but as the cases upon which the defender relied were mainly, if not entirely, founded upon the earlier statute the argument must be examined in detail.

The Statute of 1617 requires production of a charter of the lands preceding the entry of the forty years' possession with the instrument of sasine following thereon. Stair, Inst. ii, 12, 25, says—"Prescription doth not only exclude the preference of other better rights which if insisted upon within prescription would have been preferred as anterior, and the posterior right thereby reduced as *a non habente potestatem*; but all ground of reduction by the King or other superiors or authors is excluded, so that the neglect of the King's officers cannot be obtruded by the Act of Parliament declaring that their neglects shall not prejudice the King, neither any nullity in the titles of prescription except it be in the essentials thereof." In dealing with the positive prescription Erskine, Inst. ii, 7, 4, says—"After prescription is run in favour

of a singular successor the charter and seisin, if they be formal deeds, will of themselves support the prescription without the necessity of producing the grounds of the charter, or even though if extant they were reducible upon nullities." In a note to Lord Ivory's edition of the work is the sentence —"Even where there is an objection to the formality of the investiture, unless that can be proved by the charter or seisin itself, it may be removed by prescription." Later in the same section the author says—"So that if the title be a fair genuine writing and proper for the transmission of property, the possessor is after the years of prescription secure by the statute." In his Lectures on Conveyancing Professor Bell ((3rd ed.) vol. ii, at p. 706) says—"In all cases the writings founded on must be free of intrinsic objections—for example, any charter or disposition forming part of the legal progress must be probative." It appears to me that an *ex facie* valid irredeemable title is just a title free of intrinsic objections.

A great number of cases were cited to us and examined in detail as illustrating what the Court has regarded as extrinsic objections which are cured by the running of the years of prescription, and intrinsic objections which deprive the writing of the *ex facie* validity which is essential to its being a good foundation for prescriptive possession. I do not consider it necessary to examine each case individually. Some of them dealt with fall under the negative prescription, in which case the question is whether a right to challenge has been lost by failure timeously to assert it, while in the cases under the positive prescription the primary question is whether the person founding upon a right of property so acquired or fortified can produce a sufficient title and prove possession by himself or his author ascribable thereto.

It is quite clear that after the lapse of forty years a person relying upon possession for that period on an *ex facie* valid conveyance is not liable to have his right challenged by proof that the grant proceeded from one who was not the true owner. In *Her Majesty's Advocate* v. *Graham* (7 D. 183) a right of patronage which had been possessed for more than the prescriptive period was challenged by the Crown upon the ground that the patronage had formed part of annexed property of the Crown, from which it had never been separated by any act of dissolution, and that as the patronage had been feudalised in the person of the Crown no adverse possession could be founded on. It was held that as prescription had run in favour of the possessors of the patronage upon a title *ex facie* sufficient, the grounds of challenge and all inquiry into the older titles and into the origin of their rights was excluded. In the course of his opinion in that case Lord Justice-Clerk Hope said (at p. 195)—"The ground of challenge is only reached by *inquiries into the origin* of the title of the party conveying the patronage in 1732 in order to show that the disposition flowed *a non habente potestatem.* It is a fixed principle of law that such inquiries are excluded by the effect of prescription, and there is no distinction admitted by any of the authorities to render such inquiries competent against the party pleading prescription when the challenge is by the Crown. To show that inquiries of any kind into the origin of the title in order to prove that it flows from a person *non habente potestatem disponendi*, even when such inquiries are founded upon or proved by statements in the title itself as to its own origin, are not competent, it is unnecessary to do more than to refer to two well-known cases—1. *Duke of Buccleuch* v. *Cunynghame*, November 30, 1826. The opinions of the Court are only given in Shaw (2nd ed.), p. 55. The defender pleaded prescription, and contended that although it were true that he derived his titles *a non habente potestatem*, yet the possession for forty years excluded inquiry into its origin. The reply to that defence was that the title from the Crown in favour of the defender referred to the origin and source of the Crown's right, viz., the act of annexation, that under that Act the Crown had confessedly no right, as public patronages, of which this was one, were excepted. Hence that as the title must be clear in itself the inquiry into its origin was opened up by the title, and it proved that it flowed *a non habente potestatem*. . . . The Court sustained the prescriptive title as a title to exclude." The other case referred to by the Lord Justice-Clerk is the case of *Forbes* v. *Livingstone* (6 S. 167), which related directly to the validity of an alleged "grant by the Crown as contrary to the Clan Act," and from the opinion of the majority of the Court his Lordship quoted a passage to the effect "that the positive prescription excludes all inquiry beyond forty years into the previous titles, so that it cannot be legally known what were the original titles, and their previous history is excluded." The Lord Ordinary has cited this passage from the opinion of the Lord Justice-Clerk as authority for the proposition that, even if a disposition bore *in gremio* conclusive evidence that it was granted *a non habente potestatem*, this would not amount to an essential nullity, but would only render the deed voidable within the prescriptive period. I do not think that it affords authority for this proposition. Not only in the case with which the Lord Justice-Clerk was actually dealing, but in the two earlier cases to which he refers, what was deprecated was an inquiry independent of the title to show that the granter was not entitled to make the conveyance. In none of the cases did it appear *ex facie* of the deed that the granter had no power of disposition. There was no doubt created by the terms of the dispositive clause or inconsistency between two parts of the deed. In a later part of his opinion (at p. 196) the Lord Justice-Clerk, after pointing out that something that can only be proved by an examination and inquiry into the granter's title is not an essential nullity, says—"No definition of essential nullities in the law of Scotland includes want of title in the granter of the deed on which prescription follows, and every

explanation on the other hand limits the import of the exception to the ordinary meaning of the terms — nullities *ex facie* which deprive the title of the character of a formal, competent, and valid instrument."

In the case of *Shepherd* v. *Grant's Trustees* (6 D. 464) it was held that the circumstance that the name of the first substitute in a deed of entail was written on an erasure constituted a vitiation *in essentialibus* and was fatal to the whole deed. Lord Wood in the course of his opinion said (at p. 475)—"Assuming the deed to be invalid in respect of vitiations *in substantialibus*, I think that although more than forty years have elapsed from the date of the death of the granter, that can be no bar to the pursuer having the fact of the *ex facie* nullity of the deed—which is a part of the progress on which the defenders found — declared, and the right to the estate as it stands independent of that *ex facie* null deed judicially established."

The defenders founded strongly upon a series of cases where the narration of an earlier title was held not to admit reference to that deed as qualifying the right in the later deed. In *Hope Vere* v. *Hope* ((1828) 6 S. 517) an heir possessing under an entail executed a marriage contract which, although bearing to be executed conform to the destination of succession in the entail, in fact altered that destination. It was held that the reference in the contract to the original entail did not qualify the destination of the contract so as to cause it to be construed in accordance with the original entail, and that the new destination was secured from challenge by prescription. In *Macdonald* v. *Lockhart* (5 D. 372) a deed of entail and relative deed of nomination of heirs in 1763 specially referred to a prior contract of marriage to which the entailer was a party, and professed to be in implement thereof, but it differed therefrom in respect that it did not contain a clause excluding heirs-portioners throughout the succession. Infeftment followed on the entail, and succeeding heirs were infeft and possessed on it for more than forty years, there being no exclusion of heirs-portioners. The last heir of entail left two daughters. It was held that they succeeded as heirs-portioners, reference to the terms of the marriage contract being excluded by possession for the prescriptive period on the unqualified title. In both these cases there was no objection *ex facie* of the deeds upon which possession had followed. The attempt was to qualify the title by reference to another deed which if admitted would have allowed extraneous evidence to contradict *ex facie* valid deeds. The Lord Ordinary appears to hold that the pursuer is making a similar attempt in this case, as he requires to go to the trust-disposition and settlement to see whether it has been accurately repeated in the narrative clause of the deed of entail. I do not think that this is a correct way of looking at the question. It is the defender who has to produce an *ex facie* valid title as the foundation for the possession which he alleges has followed. He does not in my opinion satisfy this requirement when he produces a deed where the narrative clause, which bears to be the warrant for the terms in this dispositive clause, shows that he is excluded from the succession.

In the view which I take it is not necessary to consider the case from the standpoint of negative prescription. It is, no doubt, true, as the defenders maintained, that in certain circumstances the negative prescription may be pleaded by one who is not in a position to found on the positive prescription. Two of the cases founded upon in support of this doctrine may be looked at. In *Cubbison* v. *Hyslop* (16 S. 112, 3 Ross's L.C. (Land Rights) 328) the origin of the defender's title was a decree of sale. There had been possession on this decree for more than forty years, but as there had not been infeftment for forty years the title had not been fortified by positive prescription. It was held that challenge of the decree of sale which was *ex facie* valid, was cut off by the negative prescription; the question became one of preference of titles and the defender succeeded in the competition. In *Thomson or Hunter* v. *Stewart* (2 D. 564) a bill of exchange had been accepted by a married woman. On her death the holder charged her son to enter heir, and brought an action of constitution in which the son renounced the succession. The holders of the bill took decree *cognitionis causa* against the *hereditas jacens* of the deceased, and led an adjudication of certain heritage in which the granter of the bill died vest and seised. Possession for about seventy years followed upon the adjudication, but no charter of seisin was ever obtained. In an action of reduction of the right obtained by the adjudger it was held that, though the right was redeemable as no title under the positive prescription had been obtained, objection to the adjudication on the ground that it bore internal evidence that the granter of the bill on which it proceeded was a married woman was excluded by the negative prescription. The fact that the bill had been granted by a married woman was not an absolute nullity but only a nullity pleadable *ope exceptionis* and liable to be elided on various grounds. The title was therefore an *ex facie* valid title. In that case the Lord President (Hope) said (at p. 571)—"The principles elicited in the discussion of *Paul* v. *Reid* (February 8, 1814, F.C.) are quite sufficient to show that a party may be entitled effectually to plead the negative prescription, though he may not be in a condition to avail himself of the positive prescription at the same time." In both these cases the title that was protected by negative prescription was a title that would have been good as a foundation for positive prescription if there had been the necessary infeftment following upon the title. Neither case affords any authority for the defender's contention that if he fails under the positive prescription he is entitled to succeed under the negative.

In my opinion the interlocutor of the Lord Ordinary ought to be recalled, the pleas-in-law for the defender repelled, and decree pronounced in favour of the pursuer.

LORD ANDERSON—In the succession to the entailed estate the defender is undoubtedly an interloper. He is a complete stranger to the destination prescribed by the truster in his settlement. It would, therefore, seem to be inequitable that he should succeed in the action. Where, however, the Court is concerned with prescription of titles, equitable considerations are out of place, and the provisions of the prescription statutes have to be ruthlessly applied.

The defender maintains that he has a better title to the entailed estate than the pursuer. If he makes this good he must succeed. His main contentions were (1) that by the terms of the leading clause of the entail—the dispositive clause—he has priority of succession in a question with the pursuer; (2) that the deed of entail, though it is owing to *ex facie* defect insufficient in itself as a title, is nevertheless an adequate basis for prescription; (3) that there has been possession for the prescriptive period on the deed of entail; (4) that the defender is entitled to found upon that possession; and (5) that he has thus an unassailable title to the entailed estate. If these propositions are established it seems to me that the decision must necessarily be in favour of the defender. It is to be noted that the defence which I have adumbrated is founded entirely on the law of positive prescription. The defenders' counsel relied also on the negative prescription. They did so, however, it seemed to me, merely as makeweight, their main contentions being based on the law of the positive prescription.

It is further to be observed that the period of prescription which the defenders' counsel founded on was not that established by the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 34. This period of prescription requires as its basis an *ex facie* valid irredeemable title to an estate in land duly recorded. Defenders' counsel to meet any suggestion that the deed of entail as it discloses an *ex facie* discrepancy between two clauses, is a deed which though not *ex facie* null is not *ex facie* valid, founded, as he is entitled to do, on the provisions of the Act 1617, cap. 12, which make it sufficient that possession for forty years has followed on either (*a*) "a charter . . . with the instrument of sasine following thereupon" or (*b*) the *ex facie* sasine of an heir. The suggestion that there may be a difference in the character of the deeds which form the necessary basis of prescription under the 1617 and 1874 Acts does not appear to me to be well founded. In my opinion the charter under the former Act must be, like the deed under the later Act, an *ex facie* valid and irredeemable title to land. Now, under the Act of 1617, subject to the necessity for infeftment as the foundation of prescription, the word "charter" has been construed as including any deed whose form of expression is indicative of an intention to dispone—*Heriot's Hospital*, (1695) M. 10,736; *Ker*, (1705) M. 10,813; *Glassford*, (1820) 7 S. 423; see also Stair, ii, 12, 20. It is also, in my judgment, implied in the earlier Act as it is expressed in the later, that the deed be *ex facie* valid. What does that mean? It is obvious that it does not signify a deed which cannot be challenged or impugned, for an unimpeachable deed followed by infeftment is *per se* a complete title to land and prescriptive possession does not require to be invoked. The deed contemplated by both Acts is therefore one which is defective in form but which nevertheless is *ex facie* valid. The requirements of both statutes are, in my opinion, satisfied by a deed which purports to dispone and which is not *ex facie* invalid. The deed of entail in question purports to dispone to the defender. Is or is it not *ex facie* invalid?

Logically, this is the first point to be considered and determined. It is also the part of the case which presents most difficulty. The deed of entail discloses *ex facie* a defect in the shape of a discord between the narrative and the dispositive clauses. Does this defect make the deed invalid? This depends on whether or not the defect is an intrinsic or an extrinsic nullity. If it is the former then the deed is held to be *ab initio* a nullity. It can never form the basis of prescriptive possession, and the nullity may be declared at any time. On the other hand, if the nullity be merely extrinsic, the deed is a good basis for prescription, and after the prescriptive period is free from challenge. On the authorities the test as to whether a nullity is intrinsic or extrinsic would seem to be this—if the nullity can be conclusively established from an examination of the deed itself it is intrinsic; if, on the other hand, it is necessary to go *dehors* the deed to ascertain whether or not there is a fundamental nullity the flaw is extrinsic. Examples of nullities which are intrinsic are met with where a deed has not been signed either by a party or by an instrumentary witness, or where essential matter has been written on an erasure—*Shepherd*, 6 D. 464, *aff.* 6 Bell's App. 173. See also Stair, ii, 12, 25; Ersk. iii, 7, 9. Examples of nullities which were held to be extrinsic are to be found in the following cases:—*Scott*, M. 13,519; *Ainslie*, (1738) 1 Ross's Leading Cases, 196; *Forbes*, 6 S. 167; *Cubbison*, 16 S. 112; *Thomson*, 2 D. 564; *Graham*, 7 D. 183; *Fraser*, 25 R. 603.

Applying the suggested test to the present case I am of opinion that the nullity is extrinsic. We know now that the narrative clause is accurate and the dispositive inaccurate, but for aught disclosed by the deed itself the reverse might have been the case. It is only by going outside the entail and consulting the terms of the trust deed that the truth is ascertained. There is plain inconsistency between the narrative and dispositive clauses of the entail, and it was urged that this was enough to disqualify the deed from being a sufficient basis for prescriptive possession. I am unable to agree. It seems to me that when two clauses of a deed are inconsistent, one of which is the dispositive clause, then that clause, being the ruling clause of the deed, must be given effect to and the other clause ignored, unless it can

be shown from the deed itself that the dispositive clause is erroneous and the other clause correct. It appears to be just another way of stating the foregoing contention to suggest that there is an intermediate stage between *ex facie* validity and *ex facie* invalidity—a *tertium quid*—in which all that can be affirmed is that the deed is not *ex facie* valid. The dispositive clause, however, is *ex facie* valid, and the only reason which can be urged against the dispositive clause receiving effect is that the narrative clause does not harmonise with it. This, in my opinion, is not enough.

The problem for decision may also be stated in this way—the deed of entail contains all the essentials of a good conveyance of heritage. It is clear (1) as to the granter, (2) as to the subject-matter of the grant, (3) as to the grantees, for the language of the dispositive clause seems to be apt to carry the lands to the defender immediately after John Young Scott, and (4) the dispositive clause purports to dispone the lands to the grantees. A deed containing these essentials and nothing more is undoubtedly an *ex facie* valid deed. Does the present deed lose the condition of *ex facie* validity which the possession of these essentials gives it by reason of the fact that a subordinate clause, to wit, the narrative, cannot be fitted into the essential machinery of conveyance? I am of opinion that the character of *ex facie* validity is retained despite the discord between the two clauses. In my opinion, therefore, the deed of entail is an *ex facie* valid title on which to found prescriptive possession. There was admittedly possession on the deed by the institute John Young Scott for a period of forty years.

It was maintained at the former hearing that the defender was not entitled to found on the possession of the institute, but at the debate before Seven Judges this contention was abandoned.

The defender has thus an *ex facie* valid title to the lands in dispute fortified by possession on that title for the prescriptive period. It follows that his title to the lands is now unchallengeable, and that he must therefore be assoilzied.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Wark, K.C.—Gilchrist. Agent—J. Dan Easson, Solicitor.

Counsel for the Defender and Respondent—Chree, K.C.—W. H. Stevenson. Agents—Mylne & Campbell, W.S.

Friday, December 21, 1923.

FIRST DIVISION.

LORD MACDONALD'S *CURATOR BONIS* AND ANOTHER, PETITIONERS.

Company — Winding-Up — Dissolution — Application to Declare Dissolution Void —Heritable Property Unsold and Derelict —Superior Seeking Reconveyance more than Two Years after Dissolution — Nobile Officium.

Eight years after the dissolution of a limited company the superior of certain property which the dissolved company held in feu and which had not been sold by the liquidator, and had become derelict, and the former liquidator petitioned the Court in virtue of its *nobile officium* to declare the dissolution of the company void, and to authorise the former liquidator to grant a disposition of the lands *ad perpetuam remanentiam* in favour of the superior. The feu-duties had not been paid since the dissolution of the company, and the petitioners stated that there was no legal *persona* in existence against whom a declarator of irritancy *ob non solutum canonem* could be brought.

The Court *refused* the petition.

On 25th June 1923 Arthur Herbert Kerr, *curator bonis* to the Right Honourable Ronald Archibald Bosvile Macdonald, Baron Macdonald, and George Allan Robertson, chartered accountant, Edinburgh, *petitioners*, presented a petition to the First Division craving the Court to declare the dissolution of the company known as Skye Marble, Limited, to have been void for the purpose of enabling the petitioner George Allan Robertson, as liquidator of the company, to grant a disposition *ad perpetuam remanentiam* "of the two pieces of ground disponed in the second and third places respectively by the . . . feu-charter, dated 5th and recorded in the Division of the General Register of Sasines applicable to the county of Inverness 29th May 1911, in favour of . . . the Right Honourable Ronald Archibald Bosvile Macdonald, Baron Macdonald, and to authorise the said George Allan Robertson to execute the said disposition *ad perpetuam remanentiam* without adhibiting the seal of the said company."

The petition stated—"That Skye Marble, Limited (hereinafter called the company), was on 16th August 1907 incorporated as a company limited by shares under the Companies Acts 1862 to 1900. The main object of the company was to work marble quarries in the Strath district of the Island of Skye. The company was proprietor of a feu consisting of three pieces of ground in the neighbourhood of Broadford, Skye, under and in virtue of a feu-charter in its favour granted by the Honourable Godfrey Evan Hugh Macdonald (now deceased), then *curator bonis* to the said Lord Macdonald, dated 5th and recorded in the Division of the General Register of Sasines applicable to the county of Inverness 29th May 1911.