occupies the house, in which he dwells, and the stamp office, and therefore this sub-section cannot apply to the case. As your Lordship has observed, that raises a question upon which a difference of opinion has occurred amongst eminent Judges in England, and I shall not express any opinion upon it. I shall only say this, that upon the argument which we have heard on these cases, I am not satisfied at this moment that the circumstance that the proprietor himself occupies part of the building would exclude sub-section 1, and if it were necessary to determine that point in the Crown's favour in order to decide this question, I should not be prepared at this moment so to decide. But assuming for the purposes of this case that sub-section 1st does apply to a case where part of a house or building has been divided into and let in different tenements, I am of opinion that in this case Mr Coutts cannot get the benefit of this sub-section. If it had appeared or been the fact that the doors of communication shown on these plans as existing on the 1st and 2d floors of this building had been built up or permanently closed, I should have been of opinion that the exemption did apply to the part of the premises occupied by Coutts & Morrison; for in that case we should have had these premises with a separate entrance of their own, which admitted the partners of that firm and their clerks and people going there on business, and no one else, to the portion of the building given off to Coutts & Morrison. There would, in my opinion, in that case have been such structural division in this building as amounted to the creation of a different tenement let to Coutts & Morrison by Mr Coutts. But it makes all the difference, I think, that there is not that permanent structural division. We have here, in the first place, a door of communication between the upper part of this dwelling-house and the passage leading into Coutts & Morrison's office, and we have in addition another door of communication between the stamp office and the passage on the ground floor, which again leads into Coutts & Morrison's offices both downstairs and above. I do not say that that second door of communication is of the same importance in this case as the upper one which connects the dwelling-house with the offices; and it may be that if the door of communication from the dwelling-house to the offices had been permanently closed, that would have been enough to make the case one for exemption. But as it is, I think the case does not come within sub-section 1 as being a house—one property divided into and let in different tenements, because there is not a structural division which would make the offices of Coutts & Morrison a different tenement.

It is said, no doubt, in this case that the passage or communication is only used occasionally by Mr Coutts during the pleasure of his firm, for his personal convenience, and out of office hours. It is extremely difficult to accept that, or to see why a door of communication of that kind should be used out of office hours, when it must be of more convenience to Mr Coutts during the day and during office hours; but even taking it so, the passage is available at all hours of the day; and that being so, it appears to me that you cannot predicate of Coutts & Morrison's office that it is a separate tenement structurally divided from the house. Upon that ground I agree with your Lordships in holding that sub-section 1 does not apply. And I may just observe that if we were to hold in this case that this door of communication which may be used by Mr Coutts at any time—and I assume is used by him only, or persons at his house—were not held as a communication which distinguished the case from a structural division, I do not know where in other cases it would be possible to draw the line. We should have other cases in which a door of this kind existed and was used all day long, it might be, or where two or three such doors were used, and the same argument would apply. I think the line must simply be drawn by looking at the particular premises, and ascertaining whether they are so structurally shut off from the rest of the building occupied as to form an entirely separate tenement of itself, and I do not think Coutts & Morrison's office is in that position.

The Lords reversed the determination of the Commissioners in so far as they had sustained the appeal as to the writing chambers occupied by Coutts & Morrison, and *quoad ultra* affirmed the determination.

Counsel for the Inland Revenue—Lord Advocate (Balfour, Q.C.)—Solicitor-General (Asher)—Rutherfurd. Agent—D. Crole.

Counsel for Coutts — Trayner — Mackintosh. Agent—A. Morrison, S.S.C.

Thursday, December 15.

SECOND DIVISION.

[Lord Adam, Ordinary.

GLEN *v.* LYON AND OTHERS.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill.)

Passive Title—Apparent Heir—Statute 1695, *c.* 24—*Ratification of a Null Deed.*

An heir-apparent ratified a disposition granted by his deceased predecessor in favour of his widow of certain heritable subjects, the disposition being null from defects in its execution. The Court *repelled* an action of reduction raised (after the widow and her successors had possessed for forty-five years) at the instance of a subsequent heir — who made up a title as heir-at-law to the original disponer, passing over the apparent heir — on the ground that the possession of the widow under the deed and the ratification was truly possession by the heir-apparent, and that the ratification was a "deed" of the apparent heir for which the pursuer was liable under the Act 1695, cap. 24.

Writ—Notary—Ex facie *Nullity—Presumption.*

Held that a disposition of heritage executed in 1836 by a notary before four witnesses was null *ab initio*, and could not form a title on which prescription could proceed.

Question—Whether a deed of ratification of such a disposition, granted by the heir-apparent of the disponer, constituted, when read along with the disposition, a title which, for-

tified by prescriptive possession, would, independently of the Act 1695, cap. 24, bar a party serving as heir to the disponer from challenging the disposition?

Opinions negative per Lord Justice-Clerk and Lord Craighill; *affirmative per* Lord Young.

Statute 1695, *cap.* 24—*Onerous Deed.*

Held that a ratification by an heir-apparent of a disposition granted by his predecessor (his brother) in favour of his widow, and allowed to remain unchallenged for forty-five years, must be presumed *post tantum temporis* to be an onerous deed.

Opinion (*per* Lord Justice-Clerk) that it was onerous as being a rational provision in favour of a person who had a natural claim upon the granter.

William Scales, writer in Glasgow, died in the year 1827 possessed of and infeft in certain heritable subjects in Glasgow and the suburbs. He left a disposition and settlement, dated 5th October 1822, in which he assigned and disponed to his father and mother, and the survivor of them, in liferent only, and to his brothers and sisters that might be alive at his death, equally in fee in certain proportions, all and sundry the whole heritable and moveable property that should belong to him at the period of his decease—one-ninth *pro indiviso* share being conveyed to his brother John Scales. John Scales made up a title to his brother as heir-at-law, and was infeft in the subjects conform to three separate instruments of sasine, dated 2d July 1831. In implement of this disposition and settlement by his brother William, John Scales executed on 20th February 1834 a disposition containing procuratory and precept, in which he conveyed to the persons and in the proportions named in the settlement, and among the rest he conveyed one-ninth *pro indiviso* share to himself. John Scales immediately entered into possession of the subjects thereby conveyed, and although he never passed infeftment in his favour on the said disposition, he continued in the possession and enjoyment of his one-ninth share of the said subjects until his death, which took place on 1st July 1836. He died without leaving issue, and intestate in so far as his heritable property was concerned. He, however, left a disposition and settlement dated 1st July 1836, and bearing to be executed by one notary, James Service, and four witnesses, in respect the granter was unable to write, in which he disponed to and in favour of Agnes Rodger, his spouse, her heirs and assignees whomsoever, his one-ninth *pro indiviso* share. Appended to that disposition and settlement there was a minute of ratification, dated 2d July 1836, by his immediate younger brother and heir-at-law, Park Scales, bearing to ratify, approve of, and confirm the said disposition. John Scales *in omnibus* and for himself and his heirs renounced all objections thereagainst *ex capite lecti*, or on the ground of the same being subscribed by one notary-public only, or any other ground or pretext whatever—declaring, however, that this ratification was granted on this express condition, "that the same shall infer no warrandice or responsibility of any kind on me." The widow, Mrs Agnes Rodger, entered into possession of the subjects forthwith, and on the 18th of March 1837 took infeftment on the open precept contained in the disposition by John Scales to himself, the instrument of sasine proceeding only on the assignation to the precept contained in her husband's disposition and settlement. She possessed for thirty-three years, and died in 1869. She left a trust-disposition and settlement dated 10th October 1848, conveying her whole means and estate, heritable and moveable, to William Lyon and others, to be held by them for certain educational purposes. These trustees recorded the disposition and entered into possession of the subjects, and continued in possession of them up to the date of the action, which was raised on the 8th March 1881 against the trustees by Ninian Glen, in the capacity of heir-at-law of John Scales, to whom, as the proprietor last infeft, he had made up a title in the manner provided by the 10th section of the Conveyancing (Scotland) Act 1874. The object of the action was to have the above deeds dealing with John Scales' one-ninth share of the heritable subjects reduced, and further, to have the pursuer's right declared to the said subjects. The heir-at-law, Park Scales, died in 1856, having made up no title to the property.

The pursuer pleaded—"(1) The disposition and settlement by John Scales of 1st July 1836 not having been subscribed by himself, but by one notary-public only for him, was ineffectual to convey heritable estate. (2) The ratification thereof, dated 2d July 1836, was ineffectual to validate that disposition so as to supply the want of sufficient signature thereto. (3) The disposition and settlement by John Scales being intrinsically null as a conveyance of heritage, was incapable of homologation. (4) The ratification dated 2d July 1836 being a gratuitous deed, and signed by one who was only an heir-apparent, and who died without having any vested right in the said subjects, cannot operate as a conveyance of the same. (5) The instrument of sasine which purported to follow on the said disposition was ineffectual, inasmuch as the warrant on which it proceeded was defective in the requisite solemnities. (6) The title of Mrs Agnes Rodger, otherwise Rodgers or Scales, to the heritable subjects in question having been radically defective, her trust-disposition and settlement was ineffectual to confer any right thereto upon her trust disponees. . . . (8) The said Park Scales, although heir-apparent of John Scales, never having been in possession of the subjects in question, the ratfication by him is not a deed which can receive any effect in virtue of the provisions of the Statute 1695, cap. 24. (9) The ratification having been gratuitous, and not of an onerous character, could only bind the granter thereof, and does not come under the said statute so as to be binding on the pursuer."

The defenders, on the other hand, maintained that Park Scales was, within the meaning of the Act 1695, cap. 24, by himself or others, in possession of the subjects for the space of three years and upwards, and that the said ratification was within the meaning of the said statute a deed for which the pursuer was liable. They further maintained that they had a good prescriptive title to the subjects.

They pleaded—"(1) No title to sue. (2) The action is excluded by the provisions of the Statute 1617, cap. 12, and 37 and 38 Vict. cap. 94, sec. 34. (3) The action is barred by Park Scales'

deed of 2d July 1836. (4) *Mora*, taciturnity, and acquiescence. . . . (6) The action is groundless, in respect (1st) that the disposition and settlement of 1st July 1836 was and is a valid and legal deed; and (2d) that even if in itself defective and invalid, it was, having regard to the provisions of, and also apart from, the Act 1695, cap. 24, validated by the ratification of 2d July 1836 and the possession of the subjects by Mrs Scales; and, *separatim*, was validated by possession, by *rei interventus*, and by homologation."

The Lord Ordinary (ADAM) reduced, decerned, and declared in terms of the conclusions of the action.

He added this note—"The late John Scales died on 1st July 1836. He left a disposition and settlement of that date, bearing to be subscribed for him by one notary before four witnesses, by which he, *inter alia*, disponed to his wife Agnes Rodger his one-ninth share *pro indiviso* of certain heritable subjects in Glasgow.

"Appended to this disposition and settlement there is a ratification dated 2d July 1836, by Park Scales, the immediate younger brother and heir-at-law of John Scales, by which he ratifies, approves, and confirms the said disposition and settlement, and renounces all objections thereagainst *ex capite lecti*, or on the ground of its having been subscribed by only one notary, or on any other ground.

"Mrs Scales was infeft in the said subjects conform to instrument of sasine in her favour, dated the 13th and recorded in the particular register of sasines 18th March 1837. This infeftment proceeded upon an unexecuted precept of sasine in favour of John Scales and others, contained in a disposition of the said subjects in his favour, and to which Mrs Scales had acquired right by his disposition and settlement, provided that deed was valid, or had been subsequently validated.

"Mrs Scales continued in possession of the subjects until her death in 1869. She left a trust-disposition and settlement, dated October 10, 1848, by which she disponed to the present defenders, *inter alia*, the foresaid subjects, to be held by them for certain educational purposes, and the subjects have been in their possession since her death.

"The pursuer is the heir in heritage of the said John Scales, and now claims the said subjects as being still in his *hæreditas jacens*, never having been validly disponed by him.

"There is no doubt that the disposition and settlement of 1st July 1836, having been subscribed by only one notary, has not been subscribed as required by the Act 1579, cap. 80, and is therefore ineffectual to convey heritage. It is maintained, however, by the defenders that the deed is validated by the subsequent ratification by Park Scales, the heir-at-law. The Lord Ordinary does not think so. He thinks that the deed was intrinsically null, and was in no better condition than if it had not been signed at all, and therefore that it could not be validated by the subsequent ratification.

"It is said, however, that the pursuer is not entitled to insist in this reduction, because under the Act 1695, cap. 24, he is liable for the debts and deeds of Park Scales, and is therefore bound by the deed of ratification executed by him. The Lord Ordinary thinks, however, that Park Scales never was in possession of the subjects, and therefore that the Act does not apply.

"Mrs Scales possessed the subjects from her husband's death in 1836 till her own death in 1869, and since then they have been possessed by the defenders. There has been, so far as the Lord Ordinary can see, no period of three years during which the subjects were possessed in apparency by Park Scales. Mrs Scales did not possess the subjects under any right or title derived from him, so that her possession could, in law, be held to be possession by him. She bore to be in possession in virtue of a title derived from John Scales, her husband.

"The pursuer therefore is not barred from insisting in this reduction by Park Scales' ratification.

"It is further maintained by the defenders that they have a good prescriptive title to the subjects. The defenders being singular successors, require to show that possession for the prescriptive period has followed not on a sasine merely, but they must connect that sasine with an *ex facie* valid charter or disposition. In this case the disposition produced and founded on by them as giving Mrs Scales right to the precept, in virtue of which sasine was given to her, is John Scales' disposition and settlement. But that deed is *ex facie* invalid, and is therefore not a sufficient title for prescription.

"Notwithstanding therefore the lapse of time which has taken place, during which the defenders' title to the subjects has remained unchallenged, the Lord Ordinary does not think that the defenders have any good defence now that the challenge has been made. He does not think, however, that it is a case in which the pursuer should have his expenses, although he has been successful."

The defenders reclaimed, and argued—(1) The informal disposition was homologated and approbated by the heir-apparent's minute, and therefore effect must be given to it—*Callander* v. *Callender's Trustees*, 2 Macph. 291; Ersk. Inst. iii, 3, 47; 1 Bell's Comm. 145, 5th edit.; Bell's Prin. sect. 27. (2) Under it the widow possessed the subjects in question undisturbed for forty-five years, and therefore the pursuer was barred from his action of reduction by prescription. (3) But apart from this latter plea, the pursuer was in the position of one who has passed over the apparent heir in making up his title to the subjects, and therefore under the Statute 1695, cap. 24, he was liable for the debts and deeds of the person so passed over. This barred his challenge of the apparent heir's deed of ratification. It was vain to attempt to elude the statute by maintaining that the apparent heir was not in possession for the statutory period of three years, for it was settled law that possession by a person deriving right from the apparent heir was the possession of the apparent heir. In this case therefore the widow's possession must be held to be his—*Heir of Kinminity* v. *The Creditors*, July 16, 1756, 5 Br. Supp. 853; *Yule* v. *Ritchie*, February 10, 1758, M. 5299; *Corbett* v. *Porterfield*, June 20, 1839, 1 D. 1038; *Duncan* v. *Duncan*, December 8, 1859, 22 D. 180. Again, this ratification was essentially an "onerous" deed in the sense of the statute—*Corbett* v. *Porterfield, supra*; *Kennedy* v. *Kennedy*, February

11, 1829, 7 S. 397; *Adamson* v. *Inglis*, November 16, 1832, 11 S. 40; *Countess Dowager of Glencairn* v. *Graham*, May 23, 1800, M. *voce* Heir-Apparent, App. 1; *M'Adam* v. *M'Adam*, July 15, 1879, 6 R. 1256.

The pursuer replied—(1) John Scales' disposition was null in respect of its not being executed in conformity with the statutory solemnities—Ersk. Inst. iii, 2, 9; *Rolland* v. *Rolland's Trustees*, July 1, 1767, M. 16,851; *Shepherd* v. *Grant's Trustees*, January 24, 1844, 6 D. 464; *Ferrie* v. *Ferrie's Trustees*, January 23, 1863, 1 Macph. 291. (2) It was not sound law to argue that the apparent heir could homologate a null deed. The passages from Erskine and Bell only relate to homologation by one who adopts his own deed. (3) The widow could not plead prescription—there lapse of time was not enough to substantiate such a plea—there must be a title on which to found prescription. The widow had only produced a ratification by an apparent heir of an originally null deed—Ersk. Inst. iii. 7, 4. (4) The Statute 1695, cap. 24, did not apply (1st) because the apparent heir never possessed for three years, and (2d) because the ratification was not an "onerous" deed in the sense of the statute. The statute did not apply to purely "gratuitous" deeds such as this—Bell's Comm. 7th edit. 709; *Marquis of Clydesdale* v. *Earl of Dundonald*, January 16, 1726, M. 1174; *Russell* v. *Russell*, December 7, 1852, 15 D. 192; *Orr* v. *Orr's Trustees*, February 10, 1871, 9 Macph. 500.

The Lords after hearing counsel made avizandum with the case.

At advising—

Lord Justice-Clerk—The facts which it is necessary to keep in mind in considering the questions which have been raised in this case are the following:—The late William Scales, writer in Glasgow, died in the year 1827, possessed of certain heritable subjects in Glasgow and the suburbs in which he was infeft. He left a disposition and settlement by which he conveyed these subjects, or certain of them, to his father and mother in liferent, and to his brothers and sisters in fee in certain proportions—one-ninth *pro indiviso* share being conveyed to his brother John Scales. John Scales made up a title to his brother as heir-at-law, and was infeft in the subjects on the 2d July 1831, after which he proceeded to grant a disposition to the persons and in the proportions named in the settlement, and among the rest he conveyed one-ninth *pro indiviso* share to himself. This disposition was dated on the 20th February 1834, and contained procuratory and precept.

John Scales made up no title to his one-ninth share under this disposition. He died on the 1st July 1836, and there was produced after his death an instrument bearing to be a disposition and settlement of his one-ninth share of these subjects, and bearing to be dated on the day of his death, and to be executed by one notary, James Service, and four witnesses, in respect the granter was unable to write. The next day, being the 2d July, the immediate younger brother of John Scales, and his heir-at-law, executed a formal minute of ratification, which is engrossed on this alleged disposition and settlement, and by which he ratified, approved of, and confirmed the above disposition and settlement *in omnibus*, and for himself and his heirs renounced all objection thereagainst *ex capite lecti*, or on the ground of the same being subscribed by one notary-public only, or on any other ground or pretext whatever; "declaring, however, that this ratification was granted on this express condition, that the same shall infer no warrandice or responsibility of any kind on me." The widow, Agnes Rodger, entered into possession of the subjects forthwith, and in 1837 took infeftment on the open precept contained in the disposition by John Scales to himself, the instrument of sasine proceeding only on the assignation to the precept contained in her husband's disposition and settlement. She possessed for thirty-three years, and died in the year 1869. She left a settlement conveying her whole means, heritable and moveable, to trustees for the purposes therein mentioned These trustees recorded the disposition, entered into possession of the subjects in question, and have continued in possession of them ever since. The present action was raised on 8th March 1881 (being nearly forty-five years after the death of John Scales) by the pursuer, in the capacity of heir-at-law of John Scales, to whom as the proprietor last infeft he has made up a title under the new form, and the object of the action is to have his right to the property declared, and also to have it declared that the defenders have no right or title thereto. The heir-at-law, Park Scales, died in 1856, having made up no title to the property. The question is, whether the pursuer is entitled to prevail in this demand? It is certainly not one made under favourable circumstances in the face of forty-five years' adverse possession.

I am of opinion, First, that the instrument entituled a disposition and settlement by John Scales in favour of his widow cannot be considered as a conveyance of the property mentioned in it to any effect whatever. It is simply an unexecuted disposition, and it does not appear that John Scales ever authorised it. The assertion of the notary that John Scales gave him authority to sign, he himself being unable to write, is not evidence of that fact, for the law requires the attestation of two notaries before the want of the granter's signature can be supplied. It follows that John Scales died intestate as regarded his heritage, and that the right in his heritable succession devolved on his death on his heir-at-law. No length of possession would have availed to give efficacy to this instrument, which was not the deed of John Scales in any legal or effectual sense. Mr Erskine says (b. iii. t. 7, s. 9) "that a bond or instrument of sasine without subscribing witnesses cannot become valid by any lapse of time."

But I am of opinion, Secondly, that the deed of ratification must be held to have included, as if engrossed in it, all the clauses contained in this inept instrument, and that the heir-at-law Park Scales thereby bound himself to confirm the right thereby attempted to be bestowed on the disponee named therein, and to do every act necessary for that purpose which he had it in his power to do, as long as by so doing he incurred no responsibility or liability. I think this deed, as it stands, which bound the heir-at-law to communicate all his rights when required, was in itself a good title of possession to the disponee named in the ineffectual conveyance, and that although the infeftment taken on the open pre-

cept assigned by the disposition might not be effectual, the disponee was entitled to possess, and must be held to have possessed, on the right so acquired from the apparent heir. This, however, does not imply that the heir possessing on apparency would bind his successor in the property excepting under the Statute 1695, c. 24.

If this be so, then it follows that the pursuer cannot pass by Park Scales without fulfilling this obligation under the Act 1695, c. 24, provided the possession of the disponee was truly the possession of the heir-apparent from whom her right was derived, and second, that the ratification was an onerous deed in the sense of that statute.

I am of opinion, Thirdly, that seeing that the disposition and settlement was not a habile title of possession, and that the deed of ratification flowing from the heir-apparent was a good title of possession against the granter, who was himself entitled otherwise to possess, the possession of the widow was the possession of the heir-apparent in the sense of the statute. It is settled law that possession by a person deriving right from the heir-apparent is his possession in the sense of the statute, and it has been so found in a variety of cases. In particular, in the case of *Yule* the possession of a disponee from the heir-apparent was found to be the possession of the heir-apparent—*Yule* v. *Ritchie*, M. 5299—and in the case of *Kinminity*, Br. Supp. 5853, it was held that if an apparent heir be three years in possession in right of his apparency, or if another possess by a right derived from him, the lands are liable for his debts. So in the more recent case of *Porterfield*, 1 D. 999, it was found that the possession of a factor possessing a disputed estate by arrangement between two claimants, during a law-suit, was to be considered to be the possession of the successful competitor.

I am further of opinion, Fourthly, that this deed of ratification was an onerous deed in the sense of that statute, or at least must now be considered as such in the present process. On the authorities I should have been disposed to hold that the ratification of a conveyance to his brother's widow, indicating, although unexecuted, what he believed to be the wish of his deceased brother, was a rational and not a gratuitous deed. It is settled—and the case of *Porterfield* is an authority to that effect—that provisions to persons having a natural claim granted by an heir-apparent in possession are not to be held gratuitous deeds under this statute; and in the case of *Adamson*, 11 S., in which the whole authorities were reviewed, a deed in favour of a niece, granted for love, favour, and affection, and also for services, was held not to be gratuitous, but to be onerous in the sense of the Act. On these points the note of Lord Moncreiff in the case of *Adamson*, and that of Lord Cockburn in the case of *Porterfield*, are instructive, as containing a full exposition of the law in regard to them.

But I am inclined to hold that no such question can arise here. What the causes were that induced Park Scales to execute this ratification we cannot now tell. But after possession has continued without challenge beyond the years of prescription, everything is to be presumed in favour of it, and the duty which might otherwise be devolved on the party pleading upon it of proving its onerosity seems to be entirely taken off by the lapse of time.

I have not been able to see my way to sustaining the plea of prescription, but if I am right in the grounds I have explained, it is unnecessary to consider this further.

Lord Young—I agree with the Lord Ordinary that the disposition of 1836 was null *ab initio*, but I do not agree with him that it was incapable of being validated by subsequent ratification. The maxim is—*quod ab initio non valet tractu temporis non convalescit.* But the defenders do not rely on the mere lapse of time, or *tractus temporis*, but on a deed of ratification, approval, and confirmation, and I cannot assent to the proposition that a deed *quod ab initio non valet* may not be validated by a subsequent deed. It may be that the subsequent deed, having regard to its terms or its author, will not suffice, but the general proposition of the Lord Ordinary is, I think, erroneous. Thus, I think it clear that a subsequent deed of ratification by the disponer himself (John Scales) would have been efficacious, assuming that the viciously executed deed was therein well identified. I assume a vice in the execution which infers nullity, and, assuming that, venture to assert that the vicious deed may be so incorporated by reference into a subsequent well-executed deed that it shall have effect. It was, indeed, so in terms decided in *Callander* v. *Callander*, 2 Macph. 291. Here there is no question of the identity of the deed ratified, for the deed is on a single sheet of paper, and the ratification is written on the same sheet. Nor do I think that the terms of the ratification are defective. If, therefore, the ratification (good in form and execution) had been by the author of the disposition (John Scales) I should not have doubted its efficacy to validate the disposition although viciously executed, notwithstanding that lapse of time would not have had that effect. The deed, however, was not ratified by the author of it, but by his apparent heir, who, although he survived him for thirty years, never made up a title. Had this heir served, or even had he survived the passing of the Act of 1874, whereby a personal right vests without service, there could, I think, clearly have been no question of the efficacy of his ratification, for the property of the land would in either case have been vested in him, so that he could effectually dispone or ratify and confirm a disposition of it. Dying unserved, and before the Act, he had no power to dispone or ratify a disposition—that is, had no legal power to do what he in fact did, and this as a ground of objection to what he did was available to all parties interested for the period of the long prescription of forty years, but I think no longer. The objection, as I regard it, resolves itself into this, that the ratification relied on, and which would have validated the deed ratified had it (the ratification) proceeded *a habente potestatem*, is inept, having proceeded *a non habente potestatem*. But this is the very objection which it is the object and especial virtue of the long prescription to exclude. Indeed, I do not know what else it does. On the disposition of 1836, admittedly vicious *ab initio*, but well ratified, if the ratifier had the power to ratify, an open precept in favour of the disponer was executed and infeftment taken forty-five years ago, and on this possession has been since held without challenge. I am of opinion that the objection that either the

disposition or the ratification proceeded *a non habente potestatem* now comes too late. Had the heir-apparent himself executed a disposition on which infeftment with possession for forty years followed, the case would have been too clear for argument, as indeed it would have been even had he been destitute of right as well as vesting title. It is the policy of the law of prescription to exclude all question as to the right and title of the maker of a deed on which peaceable possession has endured for forty years.

I think the case may safely and satisfactorily be decided on the ground I have stated, viz., prescription, irrespective of the Act of 1695. I have to say, however, that I think the ratification was binding on, and enforceable against, the heir-apparent, and so a debt of his within the meaning of that Act, whether he received a valuable consideration for it (which it is impossible now to ascertain), or only did a reasonable and becoming thing in granting it. I should also hold, were it necessary, that he was in possession within the meaning of the Act, through those who possessed by virtue of his deed—at least in this sense, that by his deed they could always maintain and defend their possession against him.

Lord Craighill—The material facts of this case are few in number, and have been summarised by the Lord Ordinary in the opening portion of the note to his interlocutor. I shall therefore proceed at once to consider the questions which have been submitted for the decision of the Court. These are—(1) Whether the testamentary disposition by the late John Scales in favour of his wife, taken in connection with the ratification by his heir, sasine having passed upon the former, is a title for prescription? (2) Whether the ratification by the heir of the granter validates the disposition, and excludes the pursuer's right of succession? and lastly (3) Whether the ratification is not a deed by an heir three years in possession, which the pursuer of the action, who seeks to recover the estate left by his brother, cannot repudiate, but by the Act of 1695, c. 24, is under obligation to fulfil.

1. Upon the first question much does not require to be said, as the plea of prescription, if not withdrawn, was only lightly urged. More than forty years have run since the disponer died, since the heir ratified, and since the widow was infeft. But mere lapse of time is not enough. There must be a title for prescription, and unless the disposition as ratified is, in the sense of the Act 1617, c. 12, such a title, the right of the defenders cannot be held to be secured by prescription. Sasine by itself is not a title. The widow and the defenders being singular successors, there must be produced (to use the words of Erskine, iii, 7, 4) "a charter of the lands, under which is included every deed of alienation, whether by disposition or even by a bare procuratory of resignation with a sasine proceeding on it, and dated previously to the forty years' possession." A deed purporting to be such a disposition has been produced, but it was signed on behalf of the granter, not by two notaries as prescribed by the Act 1579, c. 80, but only by one. There is nothing in the eye of the law to evidence execution of the deed. The signature of one notary counts for nothing, and so, to repeat the words of the Lord Ordinary, "the deed was intrinsically null, and was in no better condition than if it had not been signed at all." The deed, such as it was, was ratified by the heir of the granter, but the ratification was not the title on which the widow was ~~not~~ infeft. The deed purporting to be a disposition containing an assignation to the unexecuted precept, was set forth as that which constituted her right. Now, prescription does not cure *ex facie* nullities, but only excludes grounds of challenge not disclosed on the face of the title. This is the law as stated by Erskine in another part of the section of his Institutes already cited. The formality of the deeds is there specified as a condition of affecting their sufficiency for prescription, and this, it may be said, has all along been regarded as an elementary principle in this department of the law. For these reasons the plea of prescription cannot be sustained.

2. In considering the second question it is necessary to keep in view that there were two grounds upon which the testamentary disposition of John Scales was open to challenge. The first is that it was granted on deathbed; the second, that it was subscribed by one notary-public only. When Park Scales, the heir-at-law, "ratified, approved of, and confirmed the above disposition and settlement *in omnibus*," the former of these objections was effectually obviated. The heir-at-law for the time was the only person entitled to challenge on the head of deathbed. Such challenge was a privilege belonging only to him, and when he ratified the deed he not only excluded himself, but all who might come after him, from impugning its validity on this ground. But how stands the case upon the other objection. The contention of the defenders is, that although the disposition was imperfect for want of the signature of a second notary, the defect was overcome by the heir's ratification. Now, it may be conceded that he and his heirs were barred by his ratification—nay more, that he or they were under an obligation to do, or suffer to be done, all that was necessary to vest in Mrs Scales a title to the property of her husband's estate as left *in hereditate jacente*. But the rights of third parties were not thereby affected. In this matter, and apart from the Act of 1695, c. 24, mere ratification was only another name for homologation, and it is trite law that third parties are not affected by homologation. The act of the heir, therefore, did not validate the deed so far as third parties were concerned. Nor could it, for their rights were protected by the Act 1579, c. 80, and as regards them the efficacy of that statute could not be impaired by his ratification.

3. But though the pursuer's right of succession is not excluded by the disposition of his predecessor, coupled with the ratification of that predecessor's immediate share, it may be that he will take the succession subject to the burden of that deed. That will depend upon the effect due in the circumstances of the case to the Act 1695, c. 24, and this suggests the next of three questions which have been raised for consideration and decision. The first thing to be determined on this branch of the case is, whether the ratification is a "deed" in the sense of that statute? The objection taken against it is that it is not onerous. But it appears to me that this is an inquiry which by lapse of time is precluded; everything that was

necessary as a cause of granting would now be assumed to have been present as a consideration. The case of *Adamson* v. *Inglis*, November 16, 1832, 11 Sh. 40, establishes this principle, and is a most instructive authority, and apart from that I should be disposed to hold, whatever was the consideration, the ratification was a deed within the meaning of the Act.

The next proposition for determination is whether the heir who ratified can be held to have been three years in possession as required by the Act of 1695? He lived much longer than the three years in apparency, but was he in possession within the meaning of the Act? He never was in the natural possession of the subjects, but it was not necessary that he should be so. If he granted a right to others, he through them would be held to be in possession. This so far is not matter of controversy. Had he granted tacks, or had he drawn rents, his possession could not and would not have been disputed. Nay, more, had he disponed the property on his predecessor's death, he would have been held to have possession through the party predeceasing, on the title which he had granted. This is shown by the decisions in the cases of the *Heir of Kinminity* v. *The Creditors*, July 16, 1756, 5 Brown's Sup. p. 853, and *Yule* v. *Ritchie*, February 10, 1758, M. 5299. In the former case "The Lords unanimously determined that if an heir-apparent for three years possessed lands in the right of his apparency, or *if another possessed them by a right derived from him*, those lands were liable to his debts. The latter case was this—Margaret Miller while she was apparent heir, and before she had been three years in possession, disponed a tenement of land to Ritchie, who entered into possession. Yule, the heir of Margaret Miller, brought a reduction of this disposition as granted by an apparent heir not three years in possession." The defence was that Ritchie's possession must be deemed to be the possession of Margaret Miller, the disponer, so as to make her in the eye of the law to have been three years in possession. And this defence was sustained, the Lords having assoilzied from the reduction. There is no contrary decision, nor have doubts of the soundness of these judgments been expressed by any of our institutional writers. On the contrary, these have been taken as the expression of the law upon the subject, and almost the words of the decision in *Yule* v. *Ritchie* are used by Mr Sandford in his treatise on Heritable Succession, vol. ii. p. 72, in giving his statement of the law upon this subject. It is said, however, that the heir of John Scales granted, not a disposition, but only a ratification of the disposition of his predecessor. That seems to me to be immaterial, if, as I think ~~over~~ the case, the ratification was within the title upon which the widow possessed. This is a reasonable interpretation, and is consonant with the purpose to be accomplished by the statute. It may, therefore, properly be adopted on the present occasion, and that being so, the interlocutor of the Lord Ordinary decerning in favour of the pursuer ought, I think, to be recalled, and the defenders to be assoilzied.

The Lords therefore recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Reclaimers—D.-F. Kinnear, Q.C. —Rhind. Agent—William Officer, S.S.C.

Counsel for Respondent—Mackay—Napier. Agents—H. B. & F. J. Dewar, W.S.

Thursday, December 15.

SECOND DIVISION.

[Lord Adam, Ordinary.

GRAHAM *v.* GRAHAM.

Husband and Wife—Divorce—Reduction of Decree of Divorce in Absence—Collusion.

A husband having obtained decree of divorce against his wife in absence on the ground of adultery, the latter raised an action of reduction on the ground (1) that her husband had collusively agreed to allow her an annuity of £100 and the part guardianship of their children on condition that she would not defend the action; (2) that the decree was not warranted by the evidence adduced in support of it. The Court, on consideration of the proof, *repelled* the action, on the ground (1) that there was no such agreement proved in point of fact; and (2) that the husband had proved his averments of adultery in the original action.

Divorce—Collusion.

Opinion (*per* Lord Young) that in a case where a husband raising an action of divorce for adultery on grounds which he believed to be true, prevailed on his wife to abstain from maintaining a false defence to this action by offering her a suitable provision, he was not guilty of collusion so as to found an action for reducing the decree.

Competency—Action of Reduction on the Ground of Collusion.

Opinion (*per* Lord Young) to the effect that it was *incompetent* for a wife to found on her own fraud to the effect of raising an action of reduction of a decree of divorce which she and her husband had collusively allowed to be pronounced.

This was a reduction of a decree of divorce pronounced in absence on 31st January 1880. The summons of divorce was raised at the instance of Henry Graham, manufacturer, Langholm, against his wife on the ground of adultery with one Edmund Gordon Johnstone, a manufacturer in Langholm. The action was undefended, and the Lord Ordinary (ADAM) upon considering the proof pronounced decree of divorce as craved.

In the present action, which was raised on the 25th May 1880, Mrs Graham sought to have the above decree reduced, on the ground (1st) of fraud and collusion on the part of her husband, the defender in the action; and (2d) that it was not warranted by the evidence adduced in support of it,

She averred that on the 4th December the defender promised her an annuity of £100 a-year, and at the end of two years, if she conducted herself properly, part guardianship of their children, on condition that she would not defend the action of divorce; and she further averred that this offer was renewed on the 24th December at a meeting which took place between them (her brother being also present) at the Edinburgh Hotel,