In this case the verdict obtained by the pursuer in the first trial having been set aside as contrary to evidence, a second trial took place before the Lord President and a special jury. A verdict was returned for the defenders. Each party now moved for the expenses of the first trial.

Rettie for defenders.

Thoms for pursuer.

Miller's Trustee v. *Shield*, 1 Macph. 380, was cited.

At advising—

Lord President—This is a question of some difficulty, but the case is a very special one. I think the general rule is quite correctly laid down in *Miller's Trustee* v. *Shield*, that where there have been two trials, and the party who ultimately prevails failed to succeed in the first, he will not be held entitled to the expenses of that trial in which he has lost. But circumstances may occur to overrule that general principle, and I think that here there are circumstances which are entitled to very great weight. Until our judgment on the bill of exceptions in this case, it had never been authoritatively decided that malice might competently be proved, though not put in issue, and therefore the defenders were to a certain extent excusable in believing that they were not called on at the first trial to meet a proof of malice. Although there was a general allegation of malice on record, that allegation was perfectly general, amounting to nothing more than the use of the word malice. But farther, the nature of the evidence led for the purpose of establishing malice was such that it could not have been anticipated to turn out in evidence to be substantially incorrect in point of fact. I don't say more than that on this point. But the action involved a most serious imputation on the character and conduct of the defenders. When they were successful in getting the verdict of the first jury set aside, and at the second successfully met the case of malice, and so not only escaped from the consequences of the verdict of damages, but vindicated their own character against the serious imputation cast on it by the pursuer, I think they are in a very exceptional position, and have a very strong claim on our indulgent consideration. I am therefore disposed to think they should have the expenses of the first as well as of the second trial.

The other judges concurred.

Agents for the Pursuer—Lindsay & Paterson, W.S.

Saturday, May 22.

SECOND DIVISION.

M'TURK *v.* M'TURK AND OTHERS.

Entail—Prohibition—Irritant and Resolutive Clauses—Act 1685, *c.* 22—11 *and* 12 *Vict.*, *c.* 36.

Terms of a deed which held not to fence the prohibition against sales, alienations, and altering the order of succession by sufficient irritant clauses, and entail accordingly held invalid.

This was an action of declarator brought by James Robert M'Turk, or M'Turk Gibson, Esq., against the next heirs of tailzie, to have it declared that the deed of entail under which he holds the lands of Glencrook, in the parish of Glencairn, Dumfriesshire, is not a valid deed of entail. By section 43 of the Entail Amendment Act, it is enacted that where a deed of tailzie is defective in any one of the prohibitions against alienation and contraction of debt and alteration of the order of succession, it shall be held invalid and ineffectual as regards all the prohibitions, and the estate shall be subject to the deeds and debts of the heir in possession. The disposition and deed of tailzie in question was executed in May 1808, and recorded in the Register of Tailzies in January 1810, and in the books of Council and Session in June 1838. In the entail there was a prohibition against altering the order of succession, and against sales and alienations, and the contraction of debts and of deeds, "whereby the said lands and estate may be burdened or evicted." The irritancy was in the following terms:—"All such deeds to be granted, or debts to be contracted, in so far as the same may affect the said lands and estate, shall be void and null, and the said lands and estate shall be noways affected or burdened therewith, or subjected to, or be liable to be adjudged, or anyways evicted, either in whole or in part, for or by the debts and deeds, legal or voluntary, contracted or granted by any of the said heirs." At the end of the resolutive clause there were the following words, which it was contended by the defenders supplied any defects in the irritant clause—"And upon every such contravention it is hereby expressly provided and declared, not only that the said lands and estate shall not be burdened with the debts and deeds of the heirs of tailzie as before provided, but also that all acts and deeds contrary to the foregoing conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force or effect against the other heirs of tailzie succeeding to the said lands and estate, and that neither the said heirs nor the said estate shall be anyways burdened therewith." The Lord Ordinary (Ormidale) held the entail did not contain the irritant clauses necessary for fencing the prohibitions against sales, alienations, and alterations of the order of succession.

The following is the interlocutor of the Lord Ordinary:—"*Edinburgh, 23d December* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Finds that, in respect the deed of entail in question in this case is defective in its irritant clauses, it is not valid and effectual in terms of the statutes libelled on: Therefore repels the defences, and finds, declares, and decerns in terms of the conclusions of the summons; but finds no expenses due.

"*Note.*—The entail in question is peculiar in its structure, and in many respects not very clearly or distinctly expressed. The question is, whether it can be held to contain all the necessary prohibitive, irritant, and resolutive clauses? The Lord Ordinary is of opinion that it does not contain the irritant clauses necessary for fencing the prohibitions against sales, alienations, and alterations of the order of succession.

"Under the *second* head of what are called in the deed its 'provisions, limitations, and restrictions,' there is a prohibition against altering the order of succession; and under the *third* head there is not only a prohibition against sales and alienations, and the contraction of debts, and of 'deeds whereby the said lands and estate may be burdened or evicted;' but also an irritancy in these terms:—'Declaring hereby that all such *deeds* to be granted, or debts to be contracted, in so far as the same may affect the said lands and estate, shall be void and null, and the said lands and estate shall be noways affected or burdened therewith, or sub-

jected to, or be liable to be adjudged, or any way evicted, either in whole or in part, for or by the debts and deeds, legal or voluntary, contracted, or granted by any of the said heirs hereby substituted to me, who shall succeed to the said lands and estate, and that whether such debts or deeds shall have been contracted or done before or after their succession to or obtaining possession of the said lands and estate.' The Lord Ordinary considers it to be clear that there is not in this part of the deed any irritancy that can be held to apply either to sales and alienations, or to an alteration of the order of succession; the irritancy quoted being limited, by the manner in which it is expressed, to debts and deeds of the nature of incumbrances whereby the estate might be burdened or evicted. As authorities so far in point, reference may be made to the Blair-Adam case (*Barclay* v. *Adam*, 8th February 1821, Hume's Decisions, 877, and 18th May 1821, 1 Sh. App. 24); to the Overton case (*Lang* v. *Lang*, 16th August 1839, Maclean and Rob. App. 871); to the Ulbster case (*Sinclair* v. *Sinclair*, 26th February 1841, 3 D. 636); and to the case of Auchterhouse (*Ogilvie* v. *Airlie*, 27th March 1855, 2 Macq. 260) in all of which an irritancy of 'facts and deeds,' or of 'debts and deeds,' was held to apply only to a limited class of things specified in the immediately preceding portion of the prohibitory clause, and not to other matters, such as sales and alienations, or alterations of the order of succession mentioned in an earlier part of it. The relative 'such' in the present case makes it an *a fortiori* one on the point referred to.

"But there are, in an after part of the deed here in question, under sub-division *second* of branch *sixth*, expressions which the Lord Ordinary understood to be those chiefly relied on by the defenders as supplying the defect in the irritant clause in branch *third*. Sub-division *second* of branch sixth commences with a resolutive clause, applicable not only to the prohibitions against sales and alienations, and alterations of the order of succession, but to all the other prohibitions in the deed, and then it bears that 'upon every such contravention it is hereby expressly provided and declared, not only that the said lands and estate *shall not be burdened with the debts and deeds of the heirs of tailzie, as before provided*, but also that all *acts and deeds* contrary to the foregoing conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force or effect *against the other heirs of tailzie* succeeding to the said lands and estate, *and that neither the said heirs nor the* said estate shall be anyways burdened therewith.' It was argued on the part of the defenders that there was here a sufficient irritancy of every act or deed of an heir, in violation of any and all of the prohibitions, including sales, alienations, and alterations of the order of succession. But clear it is that at any rate no such comprehensive meaning can be given to the first part of this clause, which must be held to relate exclusively to the prohibition against the contracting of debts, or granting of deeds, whereby the lands could be evicted, as previously provided, under the third head of the entail. This, however, may not be so clear under the latter part of the clause, which bears that 'all acts and deeds contrary to the foregoing conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force or effect;' and if the clause had stopped there, the defender's argument would have been more formidable than it now is, but it will be observed that the clause goes on—and it must be looked at as a whole, for it is not susceptible of division into parts 'against the other heirs of tailzie, and that neither the said heirs nor the said estate shall be anyways burdened therewith.' It is only by giving to the expression 'burdened therewith' thus used the same meaning as if it had been 'affected thereby' that the defenders could with any plausibility maintain that there was here a complete and effectual irritancy applicable to the prohibitions against sales, alienations, and alterations of the order of succession. But the Lord Ordinary does not think that the expression 'burdened therewith' can be so dealt with, or can, in the construction of a deed of entail, be diverted from its usual and natural meaning. An estate may be burdened with a debt or a servitude, or with a legacy or gift, or other specific provision, but to say that it is burdened with a sale or entire alienation of it, or with an alteration of the prescribed order of succession, appears to the Lord Ordinary to be a misapplication of the meaning of words, and, indeed, to be unintelligible according to any ordinary or correct use of language. But supposing, in the most favourable view for the defender, that the expression 'burdened therewith' is susceptible of two modes of reading, by one of which the result is to give effect to the fetters, and by the other not to give effect to the fetters of the entail, 'that,' in the words of Lord Cranworth in *Ogilvie* v. *Airlie*, before cited, 'which does not give effect to the fetters is the one which is *prima facie* to be presumed to be right, because freedom of dealing with property is that which is to be presumed in every case.' Or, in the words of Lord Campbell in the Auchindoir case (*Lumsden* v. *Lumsden*, 18th August 1843, 2 Bell's App. 114), 'If an expression in an entail admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail rather than that which supports it.'

"In support of the same view, it is not unworthy of remark, that there is in a prior part of the deed of entail in question, where the expression 'burdened therewith' occurs, the means of ascertaining, if that were necessary, and supposing the expression to be more flexible in its signification than the Lord Ordinary apprehends it to be, what must be held to be its true import in the present instance. Thus, in the third branch of the deed which has been already noticed, the expression 'burdened therewith' has been shown to have such a qualified or limited meaning as clearly not to include sales, alienations, or alterations of the order of succession, and it is a settled point in the construction of deeds of entail that when a word of a flexible meaning has been used in a doubtful sense in one part of a deed, if it has occurred in a preceding part where the meaning is clear, it will be interpreted to have the same meaning in both instances. It was so ruled in the first as in the second Prestonfield case (*Dick* v. *Drysdale*, 14th January, 1812, F. C.; and *Cunningham* v. *Cunningham*, 9th March 1852, 14 D. 636), and also in the Blairadam, Overton, and Ulbster cases, before cited.

"It may be further observed, that the acts and deeds said by the defenders to be irritated, and to include sales, alienations, and alterations of the order of succession, are not declared to be in themselves 'null and void' as provided by the Entail Act 1685, cap. 22, but merely to be of no force and effect as against, not the contravener, but 'the other heirs of tailzie succeeding to the said lands,' &c.

Unless, therefore, the expression, 'burdened therewith,' as applicable to the lands in the after part of the clause, is held to be equivalent to a total nullification of every act and deed in contravention of all or any of the prohibitions, it follows that the irritancy is defective.

"The result is, that the Lord Ordinary, keeping in view that deeds of entail are subject to the strictest construction, is of opinion that the entail challenged in the present case is invalid and ineffectual, in respect the prohibition against sales, alienations, and altering the order of succession are not fenced by the necessary irritancies; and he has therefore pronounced judgment in favour of the pursuer as concluded for."

The defenders reclaimed.

CLARK and LEE for them.

The following cases were quoted:—*Marquis of Breadalbane* v. *Campbell*, 1st April 1841, 2 Robinson's Appeals, p. 109; *Wharncliffe* v. *Nairne*, 12 D. p. 1, 5th July 1850; 7 Bell's Appeals, p. 132; *Horne* v. *Rennie*, 3 Shaw and Maclean, pp. 142, 172; *Sharpe* v. *Sharpe*, 1 Shaw and Maclean, p. 594 (Hoddum), pp. 622, 623; *Graham* v. *Murray*, Duncan, p. 137, 6 Bell's Appeals, p. 441; *Lumsden* v. *Lumsden*, 2 Bell's Appeals, p. 104.

At advising—

LORD COWAN—The defect alleged to exist in the deed of tailzie, challenged in this action, is in the irritant clause—by which the three cardinal prohibitions a strict tailzie must contain are protected. The prohibitory clauses are in all respects correctly expressed; and it is not necessary to advert further to their terms than to notice those of the prohibition against the contraction of debt because of their connection with the irritant clause which immediately follows: "nor to contract debts nor grant deeds whereby the said lands and estate may be burdened or evicted from them; declaring hereby that all *such* deeds to be granted or debts to be contracted, in so far as the same may affect the said lands and estate, shall be void and null, and the said lands and estate shall be no ways affected or burdened therewith," and so forth. The Lord Ordinary has justly held this irritant clause to be of limited import, and to be confined in its application to deeds granted or debts contracted, whereby the lands and estate may be burdened or evicted from the heirs of entail. The only deeds and debts declared to be void and null are those set forth at the close of the prohibitory clause in the words which I have quoted. All "such" deeds as are there mentioned are alone within the declaration of nullity. Deeds of alteration in the order of succession are not struck at, and as little are deeds by which any sale or alienation of the estate may be effected; but debts contracted and deeds granted whereby the lands and estate may be burdened or evicted are to be void and null. This irritant clause, therefore, is essentially defective. The decisions referred to in the note to the interlocutor are conclusive on this point.

In a subsequent part of the deed, however, there occurs a general irritant clause, the terms of which require careful consideration. It is introduced by words referring to any contravention by the heirs of entail of the conditions of tailzie, or any of them, that is (if any heir of tailzie) "shall not perform the said conditions and provisions, or shall act contrary to the said restrictions and limitations, or any of them;" then the right of the heir so contravening is resolved; and there follows the clause which is for consideration: "and upon every such contravention it is hereby expressly provided and declared, not only that the said lands and estate shall not be *burdened* with the debts and deeds of the heirs of tailzie, *as before provided*"—words which plainly have reference to the limited irritancy in the preceding part of the deed to which I have adverted—"but also that all acts and deeds contrary to the foregoing conditions and restrictions, or to the true intent and meaning of these presents, shall be *of no force or effect against the other heirs of tailzie* succeeding to the said lands and estate, and that neither the said heirs nor the said estate shall be any ways *burdened* therewith." It will be observed that there is not in this part of the deed any declaration that the acts and deeds in contravention of the tailzie shall be *null and void*. In the previous part of it there is such a declaration, but applicable only to that limited class of deeds granted, whereby the lands and estate might be burdened or evicted from the other heirs of tailzie. Hence, while the right of the heir contravening the tailzied provisions by deeds altering the order of succession, or by deeds of alienation and sale, is effectually resolved by the general terms of the clause—such deeds of contravention are not struck at by any express declaration of nullity. But there are expressions employed which are contended to be legally sufficient to support the validity of the entail. The question is, whether this contention be or be not well founded?

The statute declares it lawful to tailzie lands and estates, and to affect the succession thereto with irritant and resolutive clauses, containing the three cardinal prohibitions against sales, contraction of debt, and alteration of the order of succession, "declaring all such deeds to be in themselves null and void," and the contravening heir's right to accresce to the next heir of tailzie. There can be no doubt that the more usual and the best form of the irritant clause, if conveyancers would only adopt it, is to adopt the express statutory words, and to declare them to be applicable to all deeds contravening the prohibitions of the tailzie or any of them. But it cannot be predicated that the use of the statutory phraseology is essential in this sense, that unless the very words occur in the deed the tailzie must be held invalid. No precise form for any of the clauses of a strict tailzie is prescribed by the statute. The inquiry always is, whether the terms actually employed in the particular entail are sufficient clearly and distinctly to express the thing contemplated. This was one of the questions which occurred in the keenly-contested case of *Lindsay* v. *The Earl of Aboyne* (House of Lords, 5th Sept. 1844; Bell's App. Cases, p. 254). The words of that deed, which both this Court and the House of Lords held to form a good irritant clause, were, "that upon every contravention which may happen by and through the said George Strathaven, my son, or any of the other heirs succeeding to the said lands and estate, their failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions before written, it is hereby expressly provided and declared, not only that the lands and estate before disponed shall not be burdened with or liable to the debts, deeds, or acts of the said George Lord Strathaven, or any other of the heirs contravening, as is already herein provided, but also all debts contracted, deeds granted, and facts done contrary to the conditions and restrictions appointed by me, or to the true intent and meaning

hereof, shall be of no force, strength, nor effect, and be ineffectual and unavailable against the other heirs called to succeed, and who, as well as the said lands and estate, shall nowise be burdened therewith, but free therefrom, in the same manner as if such debts or deeds had never been contracted or granted, or such acts or omissions had never been done or happened." Let the comprehensiveness of these expressions be fully weighed. The acts and deeds of contravention are declared to be "of no force, strength, and effect"—in absolute terms—for the words which follow, "and be ineffectual," and so forth, are not stated as a limitation or qualification of what precedes them. The syntax of the sentence requires that they be read as something additional and expansive, not as qualifying and restrictive. And so as regards the latter part of the clause. The acts and deeds of contravention are not merely declared not to *burden* the lands and estate, but it is added that the lands and estate shall be "free therefrom, in the same manner as if they had never been done or granted." So weighty and comprehensive were the expressions thus employed, that they were considered by this Court and in the House of Lords to embrace all that an express declaration of nullity could have operated. On this ground, the want of an express declaration to that effect was held not to invalidate the tailzie.

The same question had previously arisen in the case of *Sharp* (18th April 1835, 1 Shaw and M'Lean, 594), as to an irritant clause in the same terms, and it is obvious from both reports that the objection to the tailzie would have met with a similar fate, and the irritancy been sustained, had it not been for the defective syntax of the irritant clause dwelt on in the House of Lords. This it was which led to the reversal of the decision of this Court on appeal. It cannot be said, therefore, that the absence of an express declaration of nullity will be fatal to the entail if other expressions occur in the deed unambiguously and clearly declaring the acts of contravention to be invalid and ineffectual, in terms necessarily implying the same thing as the statutory words. Can the words employed in this deed be so read and understood?

Acts and deeds of contravention, it is declared, "shall be of no force or effect *against the other heirs of tailzie*;" and it is farther declared that, "neither the said heirs nor the said estate shall be any ways *burdened* therewith." These terms do not import, and are not equivalent to, an express declaration of absolute nullity. They cannot in my opinion be held to operate the same legal effect as the statutory words. The declaration in the deed is not to the effect simply that the acts and deeds of contravention shall be of no force, strength, or effect. The words are followed by expressions which limit their application. The acts and deeds are to be of no force or effect "against the other heirs of tailzie,"—that is all. It must be held that they are left effectual against the contravening heir himself, not merely as personally chargeable against him, which they cannot but be in every case, but to all effects; and if so capable of being followed by diligence or other legal execution, so as to affect every estate in his person, including the entailed estate of which he is fiar. This could not possibly happen had the deeds themselves been irritated as null and void.

Then as to the words which follow, they do not remedy this essential defect. The other heirs of tailzie and the estate are declared not to be *burdened* therewith. But can this be held equivalent to a declaration of absolute nullity of all deeds of whatever kind? The word "burdened" is, in its usual acceptation, not applicable to deeds of alteration in the order of succession, or to deeds of alienation and sale. It is a limited phrase in itself, and its collocation in this part of the deed does not require that it should receive a more comprehensive interpretation. The very ambiguity which attends its import and effect, arising from the limited sense in which it is elsewhere used in the deed, forbids the inference that there is in the words employed sufficient to infer that declaration of nullity of the acts of contravention which the statute imperatively requires.

I am of opinion, therefore, for the reasons I have stated, that the interlocutor should be adhered to.

The other Judges concurred.

Agents for Pursuers—J. & J. Milligan, W.S.

Agents for Defenders—Mackenzie & Kermack, W.S.

Tuesday, May 25.

FIRST DIVISION.

BANNATINE'S TRUSTEES *v.* CUNNINGHAME.

*Reclaiming Note — Competency—*31 *and* 32 *Vict., cap.* 100. The Court of Session Act 1868 does not alter the period within which reclaiming notes must be presented according to the former statutes, except as to certain interlocutors specified in section 28.

In this action of count, reckoning, and payment, at the instance of the testamentary trustees of the deceased Richard Bannatine of Glaisnock, against William Allason Cunninghame, as factor and commissioner for the deceased, the Lord Ordinary on 26th March, 1869, pronounced this interlocutor —"The Lord Ordinary having heard counsel for the parties, and considered the closed record: Repels the second plea in law stated for the defender, that all parties interested are not called: Repels the first plea in law for the defender, that the pursuers have no title to sue in so far as relates to the minerals in the estate of Logan, as preliminary, but reserves the same as a defence upon the merits: Finds that the defender does not produce or found upon any valid and effectual settlement or conveyance of said minerals, or of the income from the same, by the deceased Mrs Allason Cunninghame in favour of the Miss Logans, Flatfied, during their lives, and that he has no good defence against this action in respect of such settlement or conveyance: Finds that the parties are at issue as to matters of fact bearing upon the claim of the pursuers against the defender in respect of the rents or lordship drawn for the minerals, and the price of minerals sold to the Glasgow and South-Western Railway Company, which ought to be investigated before determining any question as to the legal import and effect of the settlements or conveyances of the said estate: Appoints the cause to be put to the Motion-roll on the first sederunt-day in May next, that the parties may be heard as to the form in which such investigation shall take place, and reserves the question of expenses."

The subsequent interlocutors were these:—

"12*th May* 1869.—LORD BARCAPLE.—*Act. Alt.* —The Lord Ordinary, in respect of the absence of counsel, continues the cause till Friday first.