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.

"14*th May* 1869.—LORD BARCAPLE.—*Act.* —*Alt.* MARSHALL.—The Lord Ordinary grants leave to the defender to reclaim against the interlocutor of the twenty-sixth of March last."

A reclaiming note was boxed by the defender to the Court on 19th May 1869.

An objection was taken to the competency of the reclaiming note, as not timeously presented.

BALFOUR for respondent.

J. MARSHALL for reclaimer.

The Court took time to consider.

At advising—

LORD PRESIDENT—This is a point of some importance under the recent Act of 1868. We have conferred with the Judges of the other Division, and I have now to state the result of our consultation.

The interlocutor reclaimed against is dated 26th March 1869, and the interlocutor granting leave to reclaim, without which the party could not have reclaimed, is dated 14th May. The reclaiming note is presented on the 19th May, five days after the interlocutor granting leave to reclaim, and fifty-four days after the date of the interlocutor reclaimed against. The reclaiming note, under the previous statute, would have fallen due on the second box-day in vacation, but the reclaimer relies on the peculiar phraseology of the 54th section of the statute as justifying him in presenting it at any time within ten days after the interlocutor granting leave to reclaim. Now the first point to be remarked is the long time which elapsed between the interlocutor reclaimed against and the interlocutor granting leave to reclaim, which is from 26th March to 14th May. Mr Marshall candidly admitted that the cause of this delay was a misapprehension on the part of the reclaimer as to the possibility of obtaining leave in vacation. He had forgotten or failed to observe the provision at the end of the 94th section, which provides that "such leave may be given by such Lord Ordinary, or, in his absence, by the Lord Ordinary sitting on the Bills, during vacation or recess." But the question is, whether the reclaimer is right in holding that, if the reclaiming note is presented within ten days after the date of the interlocutor granting leave, it is of no importance how long that is after the date of the interlocutor sought to be brought under review. We are all, with one exception, of opinion that that contention is not well founded. This statute does not introduce any new rules generally as to the time of presenting reclaiming notes. It leaves the previous rules undisturbed, except as to particular interlocutors, the time for reclaiming against which is fixed by the 28th section. It has been suggested that it is probable that the construction proposed for this 54th section is consistent with the intention of the Legislature, for where no reclaiming note against an interlocutory judgment can be presented without leave, it may turn out, after some subsequent procedure in the case has taken place, that that should still be brought under review, and probably the allowance to reclaim within ten days after the date of the interlocutor granting leave is just to enable a party to reclaim after the ordinary period has elapsed, in order to the better progress of the cause. But that is of no avail to the reclaimer in the construction of the statute, for the same end may be attained in a different way under the 52d section. If it should turn out in the progress of the cause that some interlocutor, pronounced it may be a month or two previously, ought to be submitted to review, the remedy is to reclaim against the last interlocutor of the Lord Ordinary, with his leave, and that will bring up all the interlocutors, and give him the same remedy. But, apart from that, we are of opinion that that reclaiming note against this interlocutor must be presented within the usual period, and that the 54th section is only a limitation, and not an extension, of the time for reclaiming.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—Though forming a very small minority, I feel constrained to intimate that I do not concur in this judgment. I am of opinion that the reclaiming note is competent, and will now briefly state my reasons for so holding.

By the 28th section of the recent statute, it is provided that certain interlocutors may be reclaimed against within six days of their being pronounced. By the 54th section it is enacted, that "except in so far as otherwise provided by the 28th section hereof, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming note, against any interlocutor of the Lord Ordinary without his leave first had and obtained; but where such leave has been obtained, a reclaiming note, presented before the whole cause has been decided in the Outer House, may be lodged within ten days from the date of the interlocutor granting leave."

By the first part of this clause there is, generally speaking, an abolition enacted of all reclaiming notes anterior to the decision of the whole cause. They may still, it is provided, be presented with leave of the Lord Ordinary; and if no more was found in the statute than a general provision to this effect, they would, of course, fall to be presented within the usual reclaiming days. If it was simply intended that the leave of the Lord Ordinary should be obtained prior to the lapse of the reclaiming days, or within any definite portion of that time, it is presumable that the statute would have plainly said so by using such words as "the leave of the Lord Ordinary being always obtained prior to the said reclaiming note being presented;" or "within so many days from the date of the interlocutor intended to be reclaimed against." But the statute provides something very different. It enacts, that "a reclaiming note presented before the whole cause has been decided in the Outer House may be lodged within ten days from the date of the interlocutor granting leave." I cannot read this otherwise than as enacting that a reclaiming note, presented at *any* time before the whole cause is decided, shall be competent if presented within ten days of obtaining leave. I think the words import this, and nothing else. And I think the fairly presumable policy of the statute infers the same result. Generally, the statute provides that no interlocutor can be brought under review prior to the termination of the cause. But a case may obviously occur, in the after progress of which it may be found necessary or expedient towards its satisfactory decision that an interlocutor previously pronounced should be brought under review, notwithstanding the lapse of the reclaiming days; in other words, that the power of reclaiming at the termination of the cause should be anticipated in the case of that interlocutor. It was for this case, I think, that the statute intended to provide. And it provided for it, as it appears to me, by enacting that such an interlocutor might

be reclaimed against at any time, provided the leave of the Lord Ordinary was given, and the reclaiming note was presented within ten days thereafter.

I cannot, on any other supposition, account satisfactorily for the introduction of the enactment declaring that the period of reclaiming should be ten days from the date of the interlocutor granting leave to reclaim. If the time of reclaiming was still to be reckoned from the date of the interlocutor to be reclaimed against, this seems to me a meaningless enactment. I cannot conceive the Legislature intending a double expression of the time for reclaiming—viz., that it shall be the usual period of so many days from the date of the interlocutor, and also that it shall be ten days from the interlocutor granting leave. Nor would such a supposition admit of any sound practical working out of the enactment. By the eleventh section of the Act 13 and 14 Vict., c. 36, it was declared that all interlocutors must be reclaimed against within ten days, except interlocutors disposing, in whole or in part, of the merits of the cause; and, except in so far as affected by the general declaration in sect. 54 of the recent statute, this enactment still subsists as to all other than interlocutors provided for in sect. 28. The result is, that in regard to all such interlocutors as are final in ten days, the leave would require to be obtained at the very same time with the interlocutor being pronounced, which, in the greater number of cases, is practically impossible, and could not be intended. As to those interlocutors, again, which are not final till the lapse of twenty-one days, the leave would require to be obtained not later than the eleventh day after the date of the interlocutor; and there seems no good reason for inferring such a cessation of the power to make the application. I cannot, in these circumstances, form any other conclusion than that the words were intended to introduce a new period of reclaiming in the case of all interlocutors allowed to be brought under review before the whole cause is decided. The period runs from the date of granting leave, just because it was intended that there should be a power to reclaim after the usual reclaiming days had expired. In that event the period runs, from the necessity of the case, from the date of the interlocutor granting leave. This, I think, gives to the enactment a satisfactory and consistent meaning, not otherwise attainable.

With regard to the provision in sect. 94 of the recent statute, giving power to obtain the necessary leave during the vacation, either from the Lord Ordinary in the cause, or the Lord Ordinary on the Bills, I think its object is merely to facilitate the progress of the cause, by enabling the party to reclaim at a box-day or on the first sederunt-day, in place of having to wait for the meeting of the Court, before he can apply for leave. This seems to me sufficiently to satisfy the presumable intendment of this clause, and to make it work in harmony with the 54th, construed as I have ventured to construe it.

Agent for Pursuers—W. K. Thwaites, S.S.C.
Agents for Defender—A. & A. Campbell, W.S.

Tuesday, May 25.

GILPIN *v.* MARTIN AND OTHERS.

Trust—Irrevocable Deed—Parent and Child—Reduction—Heritage. Terms of disposition which *held* to constitute the disponee a disponee in trust for his children, and so to render invalid a disposition by him of the property to another party twenty-seven years after.

In 1839 Thomas Jardine, proprietor of a heritable subject in Lochinavar, "in consideration of a sum of £30 paid to him by Christopher Smyth, writer in Dumfries, for behoof of the party aftermentioned, as the price of the said subject, of which price I hereby grant the receipt, and discharge the same for ever; have sold and disponed, as I hereby sell, alienate, and dispone from me, my heirs and successors, to and in favour of John M'Vitie, for behoof of Agnes, Sarah, and David M'Vitie, three of his children, and to their heirs and should any of them decease without lawfu heirs of their own body, the survivors or survivor shall succeed to the deceased's part, share and share alike; and as the purpose of making the purchase is to build upon the ground purchased, which will require advance of money, with power to the said John M'Vitie, so long as the youngest of his said three children is a minor, but not afterwards without their consent, to borrow money and grant bond and security over said property for meeting the expense of the buildings intended, and under the other conditions after-mentioned, all and whole," &c., "and I hereby make and constitute the said John M'Vitie, for behoof of his children foresaid, and them and their heirs and successors, my cessioners and assignees, not only in and to the whole writs, evidents, and titles, and securities of the said subjects, with all that has followed, or competent to follow thereon, and without prejudice to the said generality; in and to a disposition," &c., "that in virtue thereof infeftment may take place to and in favour of the said John M'Vitie for behoof of his said children, or in names and favour of the children themselves, are in both their names, the one without prejudice of the other, as use is; but also in and to the rents and profits thereof, from and after the said term of entry, declaring further that the purchase so made for behoof of the minors, notwithstanding the power of management and negotiation of the father, and this further condition, that if needful for his own personal sustenance the free annual produce of the said subject during all the days of his natural life, or so long as he may require the same, the said rents and profits not being attachable by any of his personal creditors by arrestment, or otherwise; and having herewith delivered the said deeds to the said John M'Vitie, I consent to the registration thereof," &c.

John M'Vitie erected various buildings on the said property, and during his lifetime he collected the rents and took the full management of the property. He died in 1866. Shortly before his death he disponed the property above-mentioned to John M'Vitie Martin.

Sarah M'Vitie or Gilpin, one of the persons named in the disposition of 1839, now brought this reduction of the disposition of 1866, pleading that "John M'Vitie not being the proprietor of the inclosure of ground conveyed by him in said disposition and settlement, but merely trustee for the female pursuer and the other disponees, he was not entitled to convey, dispose of, or in any way affect her share or interest in said inclosure."

The defender contended that the deed of 1839 was revocable and had been revoked.

The Lord Ordinary (MANOR) assoilzied the defender, holding that, notwithstanding the terms