view proceeds on a fallacy. This is not liability in course of administration. It is outside and not within the course of administration.

Lord Gifford—I am of the same opinion, and I concur in the grounds of your Lordship's opinion. I have great respect for the Lord Ordinary, but still I cannot help concluding that he mistakes the real nature of the case. What he does is to limit a security and make it not so broad as the statute makes it. The power given to the Commissioners in the statute is "to assign and make over the rates and duties" authorised to be taken as a security. Turning to the bond, I find that they have just done that—for sums borrowed by them they have assigned the rates. That is the nature of the mortgages. What the mortgagees have is a right to levy the rates. They may take the subject given as security. What their obligations might be if they did so is another question, as I do not need to say. What, then, is asked in this action—[*His Lordship here read the fifth conclusion of the summons, quoted above*].

The meaning of that is to have it found that the rates assigned are not really assigned, but only assigned after the Commissioners shall pay a particular debt. That is unwarrantable. Here we have a personal creditor who says—"You are not to part with these rates till you pay me." The meaning of the security is that the mortgagee may take the rates and has nothing to do with the prior debts. I think this bondholder may go to the ships and levy the dues under this assignation, and I do not see how he is liable for debt incurred years ago. It is, I agree with your Lordship, a strong thing to say that to administer and to mal-administer are the same thing, and on that as well as on the other ground I am of the same opinion as your Lordship.

Lord Young—I am of the same opinion. The rates which constitute the whole estate of these Commissioners are mortgaged to Lord Herries. The proposition which has been accepted by the Lord Ordinary is that the common law pledges these rates preferably for claims of damage. That proposition has no reason in it, as I think. The action is founded on that proposition, and therefore I think it is ill-founded.

Lord Ormidale was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuers against Lord Curriehill's interlocutors of 4th and 13th March 1880, Recal the said interlocutors, and assoilzie the defenders from the whole conclusions of the action, and decern: Find the defenders other than the defenders Thomas Shortridge and others—for whom the defences No. 14 of pro. were lodged—entitled to expenses, and remit to the Auditor," &c.

Counsel for Pursuers — Solicitor-General (Balfour)—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Commissioners—M'Kie. Agent—John Macara, S.S.C.

Counsel for Commissioners of 1876—R. Johnstone. Agent—J. C. & A. Stewart, W.S.

Counsel for Lord Herries' Executors and Mr Witham—Dean of Faculty (Fraser)—Jameson. Agents—Mackenzie & Kermack, W.S.

Thursday, June 10

SECOND DIVISION.

[Lord Curriehill, Ordinary.

WALLACE *v.* WALLACE'S TRUSTEES.

Entail—Irritant Clause—Construction of Entails.

The prohibitory clause of a deed of entail prohibited alienation, alteration of the order of succession, and contraction of debt. The irritant clause declared that should the institute or any of the heirs of entail "do in the contrary, then all such facts or deeds done or performed by them, and debts contracted, are hereby declared to be void and null.—*Held (rev.* judgment of Lord Curriehill) that this was not an attempted enumeration, and deed of entail *sustained.*

Remarks (per Lord Justice-Clerk) on *Lang* v. *Lang* (M'L. and Rob. App. 871).

This was an action of declarator and reduction raised by James Clerk Wallace, W.S., against Margaret Isabella Wallace and others, trustees acting under the trust-disposition and settlement of the late William Wallace of Auchinvole in the county of Dumbarton, and also against one of the trustees, William Burt Wright, as an individual. The pursuer concluded for declarator that a deed of entail executed 11th March 1793 by Dr James Wallace of Auchinvole was a valid and subsisting deed of entail, and that he was the person entitled under that entail to the lands. The summons also contained a conclusion for reduction of a fee-simple title which had been made up in 1844 by William Wallace, the last heir of entail. The facts of the case are explained in the following passage from the note of the Lord Ordinary (Curriehill):—"The deceased Dr James Wallace, by deed of entail dated 11th March 1793, entailed his lands of Auchinvole upon a series of heirs, to one of whom, the now deceased William Wallace, the succession opened in 1821. While he was still in pupillarity a title under the entail was made up in his favour as heir of tailzie and provision to his brother Alexander Wallace by precept of *clare constat* from the Honourable Charles Fleming, the superior, dated 12th January 1822, and by sasine thereon dated 15th and recorded 16th January in the same year. In 1844, after he had attained majority, William Wallace made up a fee-simple title to the estate as heir of line of the entailer by precept of *clare constat* from the commissioners of John Fleming, Esq., then the superior, dated 21st and 22d March 1844, and sasine thereon, dated 8th and recorded 30th July 1844. William Wallace died in 1879 leaving a trust-disposition and settlement, dated 6th April 1874, in favour of the defenders Mrs Wright and others as trustees, who completed their title to the estate by notarial instrument, and thereafter by disposition dated 6th and 7th October 1879 they conveyed the estate to the defender William Burt Wright, a nephew of the truster, whose title was completed by recording the disposition in the Register of Sasines on 13th October 1879. William Burt Wright thus stands infeft as fee-simple proprietor of the estate of Auchinvole, and the pursuer, who is the heir entitled to succeed to William Wallace under the tailzied destination, has brought the present action to have the

fee-simple titles reduced, as being in violation of the entail, to have it declared that he himself, as the next heir of entail, has the only good and undoubted right to the lands, and to complete the titles thereto as heir of entail; and to have the defender William Burt Wright, and the trustees of William Wallace, the deceased heir of entail, removed from the possession of the estate."

The prohibitory and irritant clauses of the entail were as follows:—"It shall not be in the power of the said George Wallace, nor any of the other heirs succeeding to the lands before disponed, to alter the foresaid order and course of succession, or to sell, alienate, wadset, impignorate, or dispone the said lands, or any part thereof, either irredeemably or under reversion, or to burden or affect the same in whole or in part with debts or sums of money, infeftments of annual-rent, or any other burden or servitude whatever, or to do any act or grant any deed whereby the said lands or any part thereof may be affected, apprised, adjudged, forfeited, confiscated, or any manner of way evicted from the said George Wallace, or any other of the said heirs or substitutes, or the order of succession hereby established, prejudged, hurt, or changed; neither shall it be in their power to set tacks of the said lands, or any part thereof, for any longer space than two nineteen years, or nineteen years and a lifetime, or to set any tack with a diminution of the former rent, except the same be set by way of public roup, to the highest bidder thereat, by reason that a tenant cannot be found at the time who will give the former rent." "And if the said George Wallace, or any of the other heirs before specified, shall do in the contrary, then all such facts and deeds done and performed by them, and debts contracted, are hereby declared to be void and null, and of no force, strength, or effect whatever."

The defenders pleaded, *inter alia*—"(3) There being no valid and subsisting entail of the lands in question, the defenders should be assoilzied."

On 11th March 1880 the Lord Ordinary sustained this plea and assoilzied the defenders, adding this note:—

"*Note.*—[*After the narrative given above*]—The objection taken by the defenders to the irritant clause is, that it does not strike at alteration of the order of succession, or at sales or alienation. If the irritant clause had omitted the words 'and debts contracted,' I should have had no hesitation in repelling the objection, as the clause would then have applied to the whole prohibitory clause, and would have struck at every contravention of all or any part thereof; and the case would in all substantial points have been identical with the case of *Craigmillar* (*Little Gilmour* v. *Gordon*, 15 D. 587). But it appears to me that the insertion of the words 'debts contracted' in the irritant clause, after the words 'all such facts and deeds done and performed by them,' is an attempt to enumerate the prohibited things which are to be annulled, and has the effect of limiting the application of the clause to the things enumerated. The antecedent to the words 'such facts and deeds' is thus not the whole prohibitory clause, but only that part of it which prohibits 'facts [or acts] and deeds,' whereby the estate may be affected, adjudged, or evicted. The clause appears to me to resemble in all substantial particulars the corresponding clause in the *Overtoun* case (*Lang* v. *Lang*, M'L. & Rob. App. 871). In that case the entail declared that it should not be lawful for the heirs 'to sell off or dispose upon any part of the lands and subjects before transmitted, nor to contract debt, or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded; and if they do in the contrary, it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null, and of no force, strength, or effect.'

"It was held that these words were insufficient to strike at sales and alienations, the principal ground of judgment being that the irritant clause was framed on the theory of enumerating the acts prohibited which it was intended to annul, and that the enumeration being incomplete, the clause was defective. In deciding the latter case of *Craigmillar*, Lord Fullerton contrasted it with the *Overtoun* case, as to which he said:—'In *Lang's* case the word "deed" was coupled, not with "acts," but with the word "debts," and that was very bad company for the word "deeds," because these two words were the very words of the last member of the prohibitory clause relating to deeds of the nature of encumbrances.'

"Now, I think that in the present case 'all such facts and deeds done and performed,' read in connection with the words 'debts contracted,' immediately following in the irritant clause, must be held to refer back to that part of the prohibitory clause which prohibits contraction of debt, and declares it to be illegal to 'do any act or grant any deed whereby the said lands, or any part thereof, may be affected,' &c.; and that it does not extend to sales and alienations, which are expressly prohibited in different language, and in an earlier part of the prohibitory clause. The entail is therefore defective as regards at least one of the cardinal prohibitions; and under sec. 43 of the Entail Amendment Act of 1848 it is wholly invalid and ineffectual.

"Another question was raised which it is not necessary to decide, viz., Whether the entail, assuming the fetters to have been all well imposed, is binding to any effect upon the heirs of entail, seeing that it is still unrecorded? I shall merely say that prior to 1848 it had been well settled by many decisions that an unrecorded entail, though ineffectual against onerous creditors or purchasers, was binding *inter hæredes;* and, as at present advised, I am not prepared to hold that the Act of 1848 has altered that rule.

"As the entail, however, is, in my opinion, defective as regards the fetters, the result is that the late William Wallace was truly fee-simple proprietor of the estate, and was therefore entitled to dispose of it, onerously or gratuitously; and that the defenders, to whom he has transmitted the estate, are entitled to be assoilzied with expenses."

The pursuer reclaimed, and argued—Entails ought to receive a fair though a strict construction. The present case was distinguished from *Lang's* (*Overtoun* case). The words "and debts contracted" did not form an attempt at enumeration, but were intended to annul debts in the creditor as well as the act of contraction?

The defender supported the interlocutor of the Lord Ordinary.

Authorities—*Lang* v. *Lang* (*Overtoun* case), Nov. 23, 1838, 1 D. 98, and H. of L. Aug. 16, 1839, M'L. & Rob. App. 871; *Little Gilmour* v. *Gordon* (*Craigmillar* case), March 24, 1853, 15 D. 587; *Earl of Airlie* v. *Ogilvy*, Dec. 16, 1852, 15 D. 252, H. of L. March 27, 1855, 2 Macq. 260; *Sinclair* v. *Sinclair*, Feb. 26, 1841, 3 D. 636.

At advising—

Lord Justice-Clerk—I look upon the *Overtoun* case (*Lang* v. *Lang*) as the culmination of what was called the strict construction of entails. It went as far as it was possible for judicial astuteness to go in the way of detecting oversights. It met with little respect at the time, and notwithstanding some faint approval in subsequent cases, is certainly not to be stretched.

I think the clause here called in question is quite good. The prohibitory clause is complete, and contains the three cardinal prohibitions essential to entails against alienating, altering the succession, and contracting debt. It then prohibits the setting of tacks beyond specified terms, and the diminution of rents except after a public roup. Then follows the irritant clause, which is here assailed as ineffectual, which provides—if the institute or substitute heirs "shall do in the contrary, then all such facts and deeds done and performed by them, and debts contracted, are hereby declared to be void and null and of no force," &c. "In the contrary" must mean in the contrary to all the various prohibitions in the previous clause, and "all such facts and deeds" refers back to facts and deeds done in the contrary, and to nothing else. If this clause is read by itself it seems to be quite complete. It is true the entailer says that the debts contracted shall be themselves null in the hands of the creditors as well as the mere acts of contracting them; but I do not see how that can affect the operation of the clause. It was urged that, following the *Overtoun* case, these words "all such facts," &c., carry us back to the prohibition of a like nature in the prohibitory clause—the prohibition, that is, against contracting debt, and to that alone. I think that would be following the *Overtoun* case a great deal too far, and would lead to mere absurdity. The words "acts and deeds" in the prohibition cannot by any stretch of perversity be what "facts and deeds" in the irritant clause refer to. These are facts and deeds done in the contrary of all the prohibition, and cannot have any other meaning.

I do not see any reason for applying such a strict construction to the words here. I think they are amply sufficient. So when we come to the resolutive clause we find the words are "acts, debts, or deeds."

I can quite appreciate the view taken by the Lord Ordinary, and with his mind imbued with the spirit of the *Overtoun* case I am not surprised at the conclusion he has come to.

I think, however, there is here no reasonable ambiguity, and we should be stretching the meaning of these words unduly in putting the construction contended for on them.

It is on these short grounds that I cannot concur with the Lord Ordinary.

Lord Gifford—I am of the same opinion. I have great sympathy with the view that the reason for the judaical construction of entails now fails, and when the reason fails the rule should be relaxed. I think I may go so far as to say that in my opinion we should not go further than the cases have gone, and that we should not follow any further the so-called principle of these cases. I think that if we were to do so here we would be adopting a construction more strict than in any of the cases, for this would be a step further than the *Overtoun* case, which went far enough. The reason of such cases has failed because the law of entail has been so much relaxed that lands which are entailed, &c., are not now put *extra commercium*. Now, the contention here is that the irritant clause makes an attempt at enumeration, and that that attempt fails. But when we read the irritant clause we find that it says—[*reads the clause*]. If it had said "everything done in the contrary shall be void and null" it would have been all right. But it is more specific. It says—"If the said George Wallace, or any of the other heirs before specified, shall do in the contrary, then all such facts and deeds done and performed by them, and debts contracted, are hereby declared to be void and null, and of no force, strength, or effect whatever."

That is a fair enumeration of what is prohibited. The words "facts and deeds" do not occur in the prohibitory clause. "Acts and deeds" does occur, but it is followed by an enumeration in these words—"whereby the said lands or any part thereof may be affected, apprized, adjudged, forfeited, confiscated, or any manner of way evicted from the said George Wallace, or any other of the said heirs or substitutes, or the order of succession hereby established prejudged, hurt, or changed; neither shall it be in their power to set tacks of the said lands, or any part thereof, for any longer space than two nineteen years, or nineteen years and a lifetime, or to set any tack with a diminution of the former rent."

The mention of debts is natural enough, for the framer of the clause had them most in view, and he wished them to be null in the hands of the creditors. But I think that the enumeration is complete even viewing it as an enumeration, and that to annul this entail would be going further than has been done in any previous case.

Lord Young—The only question is whether the irritant clause applies to all the prohibitions. I agree with your Lordships in thinking that on a reasonable and even a strict construction it does, and I differ from the Lord Ordinary in thinking that the *Overtoun* case has no application.

Lord Ormidale was absent.

The Court pronounced this interlocutor:—

"Recal interlocutor complained of: Find that the deed of tailzie contains a valid prohibitory clause, duly fenced by irritant and resolutive clauses; and remit the cause to the Lord Ordinary," &c. &c.

Counsel for Reclaimer (Pursuer)—Mackintosh—Guthrie. Agent—R. R. Simpson, W.S.

Counsel for Respondents (Defenders)—Solicitor-General (Balfour)—Dickson—A. J. Mitchell. Agents—Graham, Johnston, & Fleming, W.S.