Wednesday, June 9.

FIRST DIVISION.

[Sheriff of Lanarkshire.

FORSYTH *v.* HEATHERYKNOWE COAL COMPANY.

Master and Servant — Colliery Manager — Dismissal—Notice— Wages.

The manager of a colliery company, whose salary was £3, 15s. per week, was discharged in consequence of the discontinuance of the colliery. His employers offered him a fortnight's salary in lieu of notice. *Held*, looking to the nature of the relation between a colliery manager and his employer, and the practice in the neighbourhood, that three months' notice on either side was what was reasonable.

Thursday, June 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

YOUNG AND OTHERS *v.* FERGUSSON SMITH AND OTHERS (COMMISSIONERS OF HARBOUR OF DUMFRIES AND NAVIGATION OF THE RIVER NITH).

Process — Extract—Expenses—Separate Action—Litigation by Trustees.

It is incompetent where a decree reserving questions of personal liability for expenses against statutory trustees has been extracted, to raise the question of their personal liability in a supplementary action — the proper course being that the question should be decided in the same process and by the same Judges.

Statute — Bond and Assignation of Rates — Liquidated Damages.

A body of statutory commissioners were authorised by their Act to borrow money, and to assign and make over the rates and duties authorised by this Act to be taken and levied as a security for repayment of the money so borrowed. Money having been borrowed and the rates assigned in terms of the statute, *held* (*rev.* judgment of Lord Curriehill) that a sum subsequently found due by the trustees in name of damages for a breach of their Act was not preferable to the security held by the assignees of the rates.

On 1st February 1876 Lord Shand (Ordinary) pronounced decree in favour of the pursuer in an action at the instance of Robert Young and Others, owners of the steam-tug "Arabian" against Thomas Fergusson Smith, Provost of Dumfries, and others, Commissioners of the harbour of Dumfries and the river Nith, acting under the Statute 51 Geo. III. c. 147 (a local and personal Act, but declared to be public and to be judicially noticed), and Thomas Anderson, their clerk. The ground of action was injury sustained to the "Arabian" by having struck against a stone dyke erected by the defenders in the channel of the river Nith, and covered at high-water, and which they had failed to mark by a buoy. His Lordship, besides finding the pursuers entitled to damages, which he estimated at £150, found the defenders "as Commissioners and clerk foresaid, and also the defenders, Commissioners foresaid, personally liable in expenses." On a reclaiming note the Second Division on 6th July 1876, while adhering to this interlocutor on the merits, pronounced this interlocutor—"Recal the finding as to expenses: Find the pursuers entitled to expenses against the defenders *qua* Commissioners, reserving all questions of personal liability in the event of the funds of the trust being insufficient to implement this decree." The expenses in the action were taxed at £171, 2s. 11d. The pursuer on 20th July 1876 extracted the decree, and in the months of December and January following charged the defenders thereon, and in the former month used arrestments in the hands of the collector of the Commissioners.

The Commissioners had no funds wherewith to meet the demand of the pursuers. They represented to them that besides their claim they were indebted to the representatives of Lord Herries in a sum of £3300, with interest as at July 1876 to £1138, and to Mr Maxwell Witham in a sum of £2200, with interest amounting at that date to £848.

These sums had been lent to the Commissioners, who were engaged in carrying out operations authorised by their Act, by Lord Herries and by Mr Maxwell Witham in 1861 and 1863 respectively, and bonds had been granted for them by the Commissioners with assignations in security of the rates and duties leviable by them. The 55th section of the Act is as follows—"And be it enacted that it shall and may be lawful to and for the said Commissioners to borrow and take up, at a rate of interest not exceeding five pounds per centum per annum, any sum or sums of money not exceeding Sixteen thousand pounds in the whole; and to assign and make over the rates and duties authorised by this Act to be taken and levied as a security for the repayment of the money so borrowed; and upon the repayment of the said money, or any part thereof, again to borrow and assign as aforesaid, so that the said debt does not at any time exceed the said sum of Sixteen thousand pounds." The assignations contained in these bonds were in the following terms—"And for the said William Lord Herries and Robert Maxwell Witham and their foresaids, their further security and more certain payment of the said sums of money—principal, interest, and penalty — above specified, we, as Commissioners foresaid, and authorised and empowered as aforesaid, hereby assign, convey, and make over to and in favour of the said William Lord Herries and Robert Maxwell Witham and their foresaids the rates and duties authorised by the said Act to be taken and levied, with power to demand and receive the same from the parties liable therefor; and also with power to demand and receive from the person or persons who may for the time be appointed and in exercise of the offices of collector and treasurer of the said rates and duties leviable under the said Act, or other person receiving the same, and to call them to

account for their intromissions, and to receive from them the sum or sums of money that may from time to time come into their hands, to whom the receipts or acknowledgments of the said William Lord Herries and Robert Maxwell Witham or their foresaids shall be a sufficient discharge for the sums they may receive from them, and that until the said William Lord Herries and Robert Maxwell Witham or their foresaids shall be fully paid and satisfied of the whole sums above specified, and the expense of recovering payment, as the same shall be ascertained by the writ or oath of them or their foresaids."

In these circumstances Young and others raised the present action of declarator, payment, and interdict, calling as defenders (1) the existing Commissioners and their clerk; (2) the Commissioners at the date of the decree in the former action, and the representatives of some of them who were deceased; (3) Mr Maxwell Witham and the executors of Lord Herries as holders of the bonds above referred to. The conclusions were as narrated in the note of the Lord Ordinary—"(1) to have it declared that the principal sum of damages is, and has been from 1st February 1876, a debt due and payable, with interest, out of the funds and estate of the commission 'as an expense of administration,' and must first be paid with interest before any part of the said funds and estate is applied in repayment to the bondholders of the sums contained in their bonds, or of interest thereon. (2) To have it declared, alternatively, that the said debt falls to be paid to the pursuers *pari passu* with the debt due to the bondholders. (3) To have the past Commissioners and the representatives of deceased Commissioners decerned and ordained to pay as individuals, conjunctly and severally, the amount of expenses found due to the pursuers in the original action. (4) To have it declared as an alternative to the third conclusion that the foresaid expenses are a debt due and payable to the pursuers out of the funds and estate of the commission *pari passu* with the principal sum of damages, in terms of one or other of the first and second conclusions of the summons; and (5) To have the defenders, the present Commissioners, interdicted from paying any of the funds of the commission to the bondholders preferably over the pursuers, or otherwise than in terms of the decree of declarator to be pronounced in the declaratory conclusions of this action."

The pursuers did not admit the averments of the Commissioners that they had no funds in their hands wherewith to pay the damages found due in the former action. They alleged that the deficit in the accounts of the Commissioners was due to their charging against the funds and estate under their management the expenses of defending that action, which expenses fell to be paid by the Commissioners at the date of that action as individuals, as having been improperly incurred in conducting a rash and nimious defence.

On this last point they pleaded, *inter alia*—"(4) The defenders called personally and as representing deceased parties to the said action are liable personally in the said expenses, because the said defenders in the former action undertook by the said litigation personal liability to the pursuers."

All the defenders appeared and lodged defences. The existing Commissioners alleged that they were willing to pay to the pursuers the sum found due so soon as they should have funds wherewith to make payment. In these circumstances they pleaded that the action as regarded them was unnecessary and incompetent.

The defenders personally called, the past Commissioners, pleaded, *inter alia*—"(1) The action is incompetent in so far as it is directed against the defenders called as individuals, in respect the question of their personal liability for the pursuers' expenses of the original action can only be determined in that action."

The Lord Ordinary (CURRIEHILL) on 4th March 1880 pronounced this interlocutor:—"The Lord Ordinary having considered the cause, . . . Finds, decerns, and declares against all the compearing defenders, in terms of the first declaratory conclusion of the summons, with the omission of the words 'as an expense of administration:' Finds, decerns, and declares against the said defenders, in terms of the fourth declaratory conclusion of the summons, to the effect that the sums of £171, 2s. 11d. sterling and £1, 3s. 8d. sterling therein mentioned are, with interest as concluded for, due and payable to the pursuers out of the funds and estate of the commission therein mentioned *pari passu* with the sum of £150 sterling, in terms of the first declaratory conclusion of the summons; and under the fifth conclusion of the summons interdicts, prohibits, and discharges the defenders, the Commissioners of the Harbour of Dumfries and of the Navigation of the river Nith, from paying any of the funds of the said commission to the representatives of the deceased Lord Herries, or to the defender Robert Maxwell Witham, whether in name of principal or interest, preferably over the pursuers, or otherwise than in terms of the decree of declarator pronounced under the first and fourth conclusions of this action, and decerns: Dismisses the third conclusion of the action, and decerns." He added this note:—

"*Note.*—In the former action at the instance of the present pursuers against the Nith Commissioners, the Lord Ordinary (Lord Shand) on 1st February 1876 found the Commissioners liable in damages to the pursuers to the extent of £150, for which sum he gave decree against them as Commissioners only, but he found them liable to the pursuers in expenses not only as Commissioners but also conjunctly and severally as individuals. On a reclaiming-note to the Inner House the Lords of the Second Division on 6th July 1876 adhered to Lord Shand's interlocutor on the merits, but recalled his interlocutor as to expenses, and found 'the pursuers entitled to expenses against the defenders *qua* Commissioners, reserving all questions of personal liability in the event of the funds being insufficient to implement this decree.' It appears that the pursuers in place of extracting the decree *ad interim*, which they might have done, chose to have it extracted as a final decree, upon which they charged the Commissioners in their official capacity to pay the damages decerned for, along with the taxed expenses, amounting to £171, 2s. 11d., and £1, 3s. 8d., with interest on these several sums from 20th July 1876.

"Payment having been refused by the Commissioners on the ground that they had no funds

to meet the claim, the pursuers have brought the present action, in which they call as defenders—[*His Lordship here mentioned the three classes of defenders, and explained the nature of the conclusions as above narrated*].

"As regards the third conclusion, the defenders interested maintain that it is incompetent to raise or decide in this action the question of their personal liability for the expenses of the former action. The competency of dealing with that question in this action depends upon the meaning of the reservation in the interlocutor of the Inner House. Had it been in my power I would have reported the point to the Second Division, but I cannot do so because the original action is now no longer in dependence, and the pursuers have made the present action a First Division cause.* I must therefore construe the reservation for myself, and my opinion is that the Court did not mean to reserve the question of personal liability to be raised and decided in another action, but merely as one the determination of which it was convenient to postpone to a later stage of the original action, and until it should be seen whether the funds of the commission were or were not sufficient to meet the expenses, and I think it would be *pessimi exempli* to allow the pursuers to raise the question in the present process. The personal liability of persons litigating in a fiduciary or representative character for the expenses of a litigation in which they have been unsuccessful must always depend very much upon the opinion which the judge or judges before whom the case has depended may have formed of the manner in which the entire litigation has been conducted, and in the present case I do not see how the question could be satisfactorily determined by other judges without virtually reopening the inquiry into the whole circumstances out of which the original action arose, and the whole conduct of the cause on the part of the original defenders. I think, moreover, that it would be contrary to the spirit of the Judicature Act, and to the practice of the Court during the last 50 years, to allow a new action to be raised for settling a question of expenses which might have been settled, and which ought to have been settled, in the original action. If the pursuers have rendered that course impossible by having taken the original action finally out of Court, *sibi imputent*. I am therefore for dismissing the third conclusion.

"The expenses therefore of the former action, as well as the sum awarded therein as damages, must now be dealt with as a debt due by the funds and estate of the commission; and the important question raised by this action is, Whether that debt is to be paid preferably to the bonds granted several years ago to the late Lord Herries and Mr Witham by the Commissioners, in pursuance of the powers conferred upon them by statute?

"It is alleged by the pursuers that these bonds, though ostensibly granted in pursuance and for the purposes of the statute, were truly granted for money advanced, not for the purposes of the Act, but for the purpose of being applied in improving the river beyond the limits within which the statute confines the operations of the Commissioners, and for the private benefit of Lord Herries and Mr Witham, and their respective estates bounded by the river; and it is argued that in these circumstances the bondholders cannot be allowed to insist upon their bonds being paid preferably to the pursuers' claim. It appears to me, however, that the allegation is irrelevant and the argument untenable so long, at all events, as the bonds, which are admittedly of old standing and in proper statutory form, remain unreduced.

"The question of priority must therefore be determined on its own merits, and on the assumption that the claims of both the pursuers and the bondholders are valid. The bondholders maintain that they are entitled to a preference in respect that the rates were long ago mortgaged to them in security of their debt; that the assignation has been duly intimated to all concerned; that the collector virtually holds the rates for their behoof, after paying the necessary expenses of management and maintenance of the navigation; and that the pursuers' claim is that of an ordinary debtor, and being later in date and unsecured must be postponed to their statutory bonds; but I do not think that this is a case in which, on the one hand, the maxim *prior tempore potior jure* can be held to apply, or, on the other hand, the fact of the assignation of the rates having been completed by intimation, necessarily or naturally excludes the claim of the pursuers. The pursuers are not ordinary or voluntary creditors of the Commissioners. Their position is this—As shipowners they were using the Nith as a navigable river for the passage of their vessels from the sea to the port of Dumfries. The Commissioners exist and act solely in virtue of the Act 51 Geo. III. c. 147, passed in 1811 'for improving the harbour of Dumfries and the navigation of the river Nith.' By section 37 of the statute part of the duties of the Commissioners was 'to place buoys on the banks of the said river, and to make and keep the said river navigable from Glencaple Quay to the caul of Dumfries, so as there may be at least six feet water at neap-tides in every part of the said river within the limits aforesaid when the same is practicable, and in case the funds shall admit of the expense thereof, for ships, vessels, barges, and lighters to come to and go from the said town; and for that end to alter, direct, and make, or cause to be altered, directed, and made, the channel of the said river,' &c., and, in short, to do everything necessary for the better carrying on and improving the navigation of the river. By section 11 they are authorised to collect rates on all ships entering the river, and on goods and merchandise imported or exported, 'all which duties so to be paid shall be applied by the said Commissioners, after defraying the charges of collection and management, to the improvement of the navigation of the said river, harbour, and ports thereof, and roads thereto, and for erecting lighthouses and affixing lights on both sides of the said river where necessary, and for placing buoys upon the banks, fixing cranes upon the quays, and for performing every other thing necessary for the safety of the shipping and goods belonging to the said port, and for no other end or purpose whatever.'

"It is true that by section 55 the Commissioners are empowered to borrow, at 5 per cent., any sum

* This action was transferred from the Roll of the First Division to that of the Second Division by order of the Lord President, in terms of the Act 20 and 21 Vict. c. 56.

or sums of money not exceeding £16,000 in all, 'and to assign and make over the rates and duties authorised by this Act to be taken and levied as a security for the repayment of the money so borrowed.' But it appears to me that this borrowing power and the power to assign the rates were not intended to give the bondholders a preference in a case like the present. The primary purposes of the rates, after defraying the charges of collection and management, are—the performance of everything necessary to secure the safety of ships and property navigating the river; and the owners of vessels using the river and liable for rates are entitled to rely upon the rates being applied by the Commissioners in the first instance in securing the safe passage of their vessels between Dumfries and the sea. Now, as damage has been held to have been sustained by the pursuers in consequence of the fault of the Commissioners in placing an obstruction in the bed of the river, and failing to apply the rates in erecting buoys or beacons to point out the obstruction, it appears to me that the pursuers must be indemnified out of the rates after paying the necessary expenses of collection and management, and of keeping the river and works in proper order. I think it would be a monstrous proposition to maintain that the rates may be carried off by the parties holding the bonds of the Commissioners until claims like the present are satisfied. The assignation to the rates which these parties hold is necessarily subject to the burden of the primary purposes to which the statute directs the rates to be applied. And in my opinion the insurance of the safety of the navigation is the primary purpose, to be effected either by the construction of all necessary works or by providing compensation for loss or damage caused by failure to make such works.

"It may be said that if the statute had contemplated claims of compensation like the present being paid preferably to the principal or interest of borrowed money, the statute would have contained an enactment to that effect, seeing that by section 44 it is expressly provided that compensation for any damage that may be done to salmon-fishings in the river within the limits of the commission by any operation of the statute is to be satisfied and paid 'out of any sum or sums of money subscribed or borrowed for the purpose of this Act, or out of the rates and duties hereby granted, and no part of the said rates and duties shall be applied to the repayment of the principal sum subscribed or the interest thereof, or to the payment of any part of the principal money so borrowed, until such damages shall be satisfied and paid.' That clause, however, does not necessarily raise the inference drawn by the defenders, nor does it throw any light upon the present question. Damage done to the salmon-fishings by the Commissioners acting in the execution of their Act, and as a necessary or probable consequence of their operations, falls under a different category from damage like the present. It more nearly resembles damage done to land taken or injured by the Commissioners in executing the purposes of the Act, but as the nature and extent of the damage could not be ascertained until the completion of the works, it was a proper precaution to provide for the payment of compensation in such cases as preferable to the payment of money borrowed for the purposes of the Act, and thereby to obviate all question as to preference. But I believe that it has invariably been the practice of all public companies that claims of compensation for loss and damage caused by the negligence of the company, or those for whom they are responsible, are paid out of the gross revenue, and before the interest of mortgages or dividends upon the stock are declared. Indeed, the practice is so obviously equitable and expedient, and has become so universal, that it is sanctioned by the forms of railway accounts prescribed by the schedules appended to 'The Regulation of Railways Act 1868.'

"I am therefore of opinion that the damages and expenses to which the pursuers have been found entitled must be paid out of the funds and estate of the commission, not so much as being an expense of administration, but as being one of the primary charges upon the rates. Decree will accordingly be given substantially in terms of the 1st, 4th, and 5th conclusions of the summons.

"The case is appointed to be enrolled to have the question of expenses disposed of."

The pursuers reclaimed, and argued—The Lord Ordinary's ground of judgment was highly technical. It was that the effect of the judgment in the Second Division in the previous action was that the pursuers required to take interim extract. The effect of the Lord Ordinary's interlocutor was to render it impossible for the pursuers to make effectual their decree. In a case where trustees had failed in an action they had conducted, the beneficiaries might try the question of their liability for expenses in a separate action, and that was a parallel case.

Counsel for the defenders were not called on.

At advising—

Lord Justice-Clerk—On the first question which has been raised here, which is the only question that has been argued to us by Mr Robertson—whether it is competent in this action to make the expenses of the previous action a personal charge against the individual Commissioners?—I am of opinion that it is entirely incompetent. The reservation in the former judgment was intended to suspend the trial of this question against the trustees till it should be seen whether there were enough funds of the trust to satisfy the decree. If, on the one hand, personal liability was within the former action, it was not there decided; if, on the other hand, personal liability was not within the conclusions of that action, it was impossible in this or in any other action to make the expenses of the previous action available. That is well settled. Therefore, without going further into the matter, I am satisfied that this is not a competent mode of raising the question. Whether or not the previous action is now exhausted I do not know, and I express no opinion.

Lord Gifford—I concur in the result at which your Lordship has arrived, although I have felt some difficulty, because in the first action the whole question of expenses was not disposed of, and I am not prepared to say that there may not be cases where it is competent to raise such an ulterior question as we have here. But in the present case I agree that the pursuer cannot get the expenses which he claims. For it is obvious that what is being done now should have been done in the the case which lately took place. I am of opinion,

therefore, that we should adhere on this point to the judgment of the Lord Ordinary. We have no more light in this new action than in the former action.

Lord Young—I also concur. I understand that we are not now considering the interlocutor of the Lord Ordinary with the view of deciding on anything but the competency of this action for personal liability of the Commissioners for the expenses of the former action, and I have not applied my mind to anything else. The question of expenses is always a question eminently incidental to the cause in which the expenses are incurred. So much is that the general rule that in the House of Lords their Lordships always decide the question of the expenses at the moment of deciding on the merits, expressing their opinions on that matter at the same time as their opinions on the merits, and the practice which formerly prevailed of discussion after judgment as to expenses was put an end to because the question of expenses was eminently incidental to the cause. Here the question was decided in the former action, though with a reservation. The defenders were found liable in the only capacity in which they were sued—that is, as public statutory trustees. The question was one of personal liability in the event of there being insufficient funds to implement the decree. The only party who maintained that there were sufficient funds was the pursuer. The defenders said, all along—"We have no funds;" but the pursuers said—"I can make payment forthcoming by diligence;" and the Court said to him—"You may try to do so, and if the defender turns out to be right you may make a motion here." That was to be in the cause itself, and no reason has been given by the pursuer for not making it in the cause itself. There is this emphatic reason, I think, for adhering to the Lord Ordinary's interlocutor here, that a personal decree against these statutory trustees would have partaken of the character of a censure of their conduct in the litigation, and no such decree should be granted except by the Court before whom the litigation has been conducted. I should like to say that there is the clearest distinction between a statutory body like this and ordinary trustees such as a trustee in bankruptcy, or testamentary trustees, or the executors of a person deceased. These persons are all sued in a representative capacity, but they are made personally liable because before litigating it is for them to consider the state of the funds or to consult their constituents who are behind them. Therefore the general rule applied to them is different from the rule acted on in this case.

I think the pursuer would have taken very little advantage in the former action on a renewed motion to make the defenders personally liable. The Judges would be very unwilling to grant such a decree unless on some very strong ground. Now, the impropriety averred here is that the defenders did not sufficiently warn the pursuers that the trust had no funds. These trustees were protecting the future rates, and so were compelled to come into Court. Altogether, by putting the former action out of Court I do not think the pursuers lost any substantial advantage.

Counsel for Lord Herries' executors then took advantage of the reclaiming-note, which had brought the case before the Inner House, to reclaim against that part of the interlocutor of the Lord Ordinary which was pronounced under the fifth conclusion of the summons.

Argued for them—By the terms of this bond they were preferable to an unsecured debt due by the Commissioners to the pursuers.

Argued for pursuers—Mistakes and accidents must always occur in such an undertaking, and expense incurred through them must be held to be expenses of management. The pursuers were not voluntary creditors, but came into the river invited by the Commissioners, and paid for security from such accident as befel them those rates on which the bondholders were secured. The bond only provides against debts *ejusdem generis*.

Authorities—*Ames* v. *Trustees of Birkenhead Docks*, April 23, 1855, L.J., Ch. 540; *Panama Mail Company*, Feb. 14, 1870, L.R., 5 Ch. 318; *Mersey Dock Trustees* v. *Gibbs*, June 5, 1866, L.R., 1 E. and I. App. 91; *Virtue* v. *Police Commissioners of Alloa*, Dec. 12, 1873, 1 R. 285.

At advising—

Lord Justice-Clerk—This case has been ably argued, but I am not able to appreciate the grounds on which the Lord Ordinary held this debt to be preferable. The Commission pledges in security of advances by Lord Herries "the rates and duties authorised by the said Act to be taken." It seems that in December 1876 a change in the collectorship took place, and Mr Anderson bound himself as treasurer to pay out of the rates and duties the interest due to Lord Herries and Mr Witham. "The statute allows the Commissioners to assign and make over the rates and duties authorised by this Act to be levied as a security for the repayment of the money so borrowed," and that has been done. Therefore as regards the pledging of the rates to this bondholder, the bondholder was acting in conformity with the statute, and validly attached the rates, and it might be considered that the treasurer was holding the rates in the first instance as mandatory of Lord Herries. In these circumstances the Commissioners commit a breach of their Act. They place an obstruction in the way of the due administration of their trust, and the owner of a ship in the channel suffers a loss. He gets damages, and the question is, Whether that liability by the trustees incurred in the direct violation of their duty is to stand as preferable to this bond. The fallacy, as I think, in the view of the Lord Ordinary, arises when he says that in the management of a concern such as a railway company the claims for "loss and damage caused by the negligence of the company, or those for whom they are responsible, are paid out of gross revenue, and before the interest of mortgages and dividends on the stock are declared." Now, that is merely a mode of keeping the account. I do not see that the profits of such an undertaking bear any analogy to the statutory rate levied under this Act. It does not seem that there is any contention that a debenture-holder should be postponed to a claim of damage. In this matter I do not think the case referred to has any analogy to the present. Again, it is said those mistakes are so certain to occur that what is contrary to good management must be held to be due administration. I cannot accept that view. Therefore, on these short grounds, I think the Lord Ordinary's

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