absolutely unnecessary for the decision of the case with which he was dealing to go into the consideration of such a question. I agree that the interlocutor of the Lord Ordinary should be recalled as regards this claim.

LORD LOW was absent.

The Court recalled the Lord Ordinary's interlocutor, and allowed the reclaimers a proof before answer of their averments.

Counsel for the Claimants Alexander Rodger and James Rodger (Reclaimers)—Aitken, K.C.—Black. Agents—Smith & Watt, W.S.

Counsel for the Claimants Mrs Allfrey and Others (Respondents) — Macfarlane, K.C. — Brown. Agents — Drummond & Reid, W.S.

Counsel for the Claimants Mrs Hampton and Others (Respondents) — Henderson. Agents—W. & F. Haldane, W.S.

Counsel for the Trustees—W. J. Robertson. Agents—Forrester & Davidson, W.S.

Friday, February 25.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ABERDEEN HARBOUR COMMISSIONERS *v.* ADAM.

Ship—Bail Bond—Expenses of Action to Fix Liability for Damage—Construction.

To effect the release of a ship against which there was a claim of damages by Harbour Commissioners arising out of a collision with a swing bridge, A granted a bail bond in these terms—"I . . . do hereby bind myself . . . to pay to the Commissioners such sum, not exceeding One thousand pounds sterling, as may by any competent court of law be found due to the Commissioners for damages and costs in respect of said occurrence by the owners, master, or others having responsibility for said vessel."

The Commissioners, to fix the liability and assess the damages, brought an action against the owner and master, in which A and the owner's trustee in bankruptcy were called for any interest they might have; one joint defence on behalf of all the defenders was lodged; decree in favour of the pursuers was pronounced, and the owner, his trustee, and A were found, conjunctly and severally, liable in expenses; A paid the taxed amount of expenses.

In an action by the Commissioners against A to recover the sum of damages found due in the preceding action, *held* that A was entitled to impute against his obligation under the bail bond the amount of the expenses paid.

On 17th April 1909 the Aberdeen Harbour Commissioners brought an action to recover £900 and £32, 6s. of interest from Thomas Adam, shipowner, Aberdeen.

The defender had, on 4th March 1907, granted in favour of the pursuers a bail-bond, the material portion of which is quoted *supra in rubric*, for the purpose of obtaining the release of the s.s. "Andalusia" detained by them in connection with a claim of damages. The sum now sued for was the sum of damages which had in a preceding action been found due. In that preceding action the defender had, together with the owner and his trustee in bankruptcy, been found conjunctly and severally liable in expenses, and he had paid the taxed amount of these expenses, £402, 15s. 5d. He claimed to impute this sum against the obligation under the bail-bond, leaving due thereunder only £597, 4s. 7d.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (SALVESEN), who, on 28th October 1909, repelled the defences and decerned against the defender in terms of the conclusions of the summons.

Opinion—"This is a sequel to an action at the instance of the pursuers which arose out of a collision of the s.s. 'Andalusia' with a swing bridge in Aberdeen Harbour. The defenders in that action were the owner and master of the steamer, and the present defender was also called for his interest, but no operative conclusions were directed against him, except that expenses were asked in the event of his appearing and opposing the conclusions. Defences were lodged on behalf of all the defenders, and eventually I granted decree against the owner's estate for a sum of £900 and found his trustee in bankruptcy and Mr Adam liable conjunctly and severally to the pursuers in expenses. My recollection is that a decree was not sought against the master, as he alleged that defences had been lodged for him without his authority.

"The present defender's only connection with the matter was that he had granted a bail bond to obtain the release of the vessel pending the ascertainment of the ship's liability. The question in this case relates to the construction of the bail bond. The defender maintains that he is entitled to impute towards extinction of his liability under the bond the sum of £402, 15s. 5d. which he paid to the pursuers under the decree for expenses already referred to.

"The obligation in the bail bond is as follows:—'I, the said Thomas Adam, do hereby bind myself . . . to pay to the Commissioners such sum, not exceeding One thousand pounds sterling, as may by any competent court of law be found due to the Commissioners for damages and costs in respect of said occurrence by the owner, master, or others having responsibility for said vessel'; and he argued that the costs incurred by the pursuers in obtaining the decree of a competent court were part of the sum for which he was liable under this obligation, and in so far as paid must be imputed towards its extinction. I think this would have been so if he had not intervened in the suit at all, in which case the taxed costs decerned

for against the owner or master, so far as not recovered from them or their estates, would have been recoverable from the defender under the same limitations as the ascertained damages. He chose, however, to contest the action and so rendered himself personally liable in expenses. The decree against him for these expenses had no connection with the sum which he undertook to pay in the bail bond, although no doubt it was his ultimate liability under the bail bond that gave him an interest in resisting the ship's liability for damages or in endeavouring to minimise the claim. For all that appears the whole defence may have been instigated by Mr Adam, and indeed this appears very probable, as the master did not authorise it and the owner had become bankrupt. It would therefore seem inequitable that he should be entitled to reduce the pursuers' claim for reimbursement from him by the expenses which he caused them to incur by what proved to be an unfounded defence. Of course this would be no answer if the words relied on clearly provided for such a contingency. In my opinion, however, the costs referred to in the bail bond being 'costs found due to the Commissioners by the owner, master, or others having responsibility for the vessel,' do not include costs caused by the defender personally intervening in the action against the owner. I am therefore of opinion that the defences fall to be repelled, and that the pursuers are entitled to decree as concluded for."

The defender reclaimed.

LORD KINNEAR—The decision of this case turns upon the construction of a bail bond granted by the defender to the pursuers in order to the release of the s.s. "Andalusia," which had been in collision with a swing bridge in Aberdeen Harbour. I am sorry to say that I cannot agree with the Lord Ordinary. I think upon the plain construction of the bail bond that the defender undertook to pay the damages which might be due to the pursuers in consequence of the collision, and the costs which might be found due to them in respect of the same occurrence up to the limit of £1000. The pursuers in the first instance brought their action against the owner and master of the ship, and they called the defender as a defender in that action for his interest. As I understand it, one joint defence was put in by all the defenders called. The result was that the Lord Ordinary granted a decree. Ultimately the Lord Ordinary found that the damage caused to the pursuers amounted to £900, and found that that sum was due to them by the owner; that it formed a true, just, and lawful debt due and resting owing to the pursuers by the owner, and that they were creditors of his in respect of that sum, and then he found the defenders—the owner, the trustee, and the present defender the cautioner—liable conjunctly and severally to the pursuers in expenses. The defender having paid the taxed amount of expenses found due by the owner and himself conjunctly and severally, the pursuers raised this action against him concluding for the said sum of £900 with interest as being still due and resting owing in terms of the bail bond. The defender maintains that since his liability for damages and costs is limited to £1000, he is liable only to that extent after taking into account the sum that he has already paid. I must say that I think that the defence is founded upon a perfectly true construction of the bail bond. The ground of the Lord Ordinary's judgment seems to be that by appearing in the action the defender rendered himself personally liable in expenses, and therefore that the expenses which he has to pay are something quite distinct and severable from the expenses for which he had given security to the pursuers in the bail bond.

Now I quite agree that the cautioner is not one of the persons having responsibility for the ship in the sense in which the owner and master have responsibility for it, and therefore if there were any separate case of expenses incurred by him in the proceeding against himself he would not have any ground for the claim that they fell within the clause of limitation in this bail bond. But then the expenses which have been actually found due, and which he has been required to pay, are the expenses of defending the ship. There was an action brought against the owner in which the pursuers chose to conjoin the defender as cautioner for his interests. There was one defence put in and the result was a decree for expenses against all the defenders, the owner (or rather against his trustee as he was bankrupt) the master, and the cautioner jointly and severally. Accordingly I am clearly of opinion that the defence here is good and that the defender is entitled to deduct what he has paid in a question of liability for the whole amount.

LORD ARDWALL—I agree. As to the justice and good sense of the case, I think it is quite apparent that these expenses should be dealt with as part of the sums which are covered by the bail bond, and that all that the defender now remains liable for is the balance of the £1000 over and above these expenses. But taking the matter as a technical question also, I have no difficulty in arriving at the same conclusion as your Lordship. The action was brought against the owner of the s.s. "Andalusia" and the master—who did not appear, and who seems to have been allowed to drop out of it by common consent,—the owner's trustee, and the defender, who was called as cautioner for his interest. These defenders put in a joint defence as I understand. No extra cost was caused by this, and the whole case from beginning to end was just such a case as was contemplated in the bail bond—a case by the Aberdeen Harbour Commissioners against those representing the ship. In that case the Lord Ordinary on 22nd November 1908 pronounced an interlocutor finding that the collision and resulting damage was caused entirely by the fault of those in charge of the ship, and that the owner was

responsible for the consequences of that fault. That interlocutor was reclaimed against and the note was refused, and the case having gone back to the Lord Ordinary he eventually granted decree for the sum of £900 in name of damages against the owner, and found the owner's trustee (the owner being bankrupt) and the cautioner liable in expenses conjunctly and severally.

I think these expenses were truly expenses of the action against the ship, and that, the pursuers in the present action having enforced payment of them against the cautioner, it must be held that they are part of the expenses for which he is liable under his bail bond. I therefore agree that the defender is entitled to impute the expenses which he has paid to the amount for which he has undertaken liability by the bail bond.

LORD JOHNSTON — I agree with your Lordships. It seems to me that the Lord Ordinary has misled himself by the idea that this defence to the original action was instigated by Mr Adam, and that, having been improperly instigated by Mr Adam, in respect that the defence failed he had no business to interpose. He chose—I think his Lordship's words are—"to contest the action and so rendered himself personally liable in expenses." I think that under the circumstances of a bail bond being granted for the damage due by a ship which has come into collision with harbour works, in order to the release of the ship the cautioner is entitled to have his liability constituted. Here the owner's estate is bankrupt. It may well be that that bankrupt estate is hopelessly bankrupt, no assets and no means of defending an action, and that if the cautioner is not in some form or another entitled to have the debt constituted he must simply sit down under a liability for the full sum claimed however random a claim may be made. Under these circumstances would the cautioner not be entitled to say—for he has rights as well as obligations under the bail bond—"If you cannot defend this action yourself you must at least give me your name to enable me to defend it and have this liability properly constituted"? If that course had been followed here, and the costs involved are nothing more than the costs which would have been incurred by the ship, I can see no reason whatever for disallowing these costs, although incurred in the interests of the cautioner, as costs to be imputed to the obligation which he has undertaken.

But we are not even in that case. We are here in a case in which the owner through his trustee in bankruptcy does defend, and although the cautioner concurs in that defence his doing so has occasioned no additional expense, and therefore I cannot see any reason for the Lord Ordinary grounding his judgment, as apparently he does, on a view of equitable consideration, which equitable consideration appears to me, if it is involved in the case at all, to be really applicable on the cautioner's side rather more than on the side of the Commissioners. I concur, therefore, in the judgment your Lordship proposes.

The LORD PRESIDENT and LORD M'LAREN were not present.

The Court recalled the Lord Ordinary's interlocutor and decerned against the defender for £597, 4s. 7d. in full of the conclusions of the summons, finding the pursuers liable in expenses.

Counsel for the Pursuers (Respondents)—Sandeman, K.C.—Dunbar. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender (Reclaimer)—Hunter, K.C. — Spens. Agents — Boyd, Jameson, & Young, W.S.

Wednesday, July 20.

FIRST DIVISION.

(SINGLE BILLS.)

CRUM EWING'S TRUSTEES *v.* BAYLY'S TRUSTEES AND OTHERS.

(Reported *ante*, January 28, 1910, p. 423.)

Appeal to the House of Lords—Judicial Factor—Curator ad litem—Special Case—Expenses.

In a Special Case submitted to the Court to determine certain questions arising under a trust-disposition and settlement certain interests of parents and children were opposed. The judgment of the Court having been by a majority in favour of the parents, the curator *ad litem* to the minor children presented a note in which he craved an order on the trustees ordaining them to make payment to him of a sufficient sum to enable him to appeal to the House of Lords. The Court, after consultation with the Judges of the Second Division, and in view of the fact that there was a dissent from the judgment to be appealed against, *granted* the crave.

James C. Pitman, Esq., advocate, curator *ad litem* to Mildred Jean Douglas and others, grandchildren of Mrs Jane Coventry Ewing Crum or Bayly in the Special Case (*Crum Ewing's Trustees* v. *Bayly's Trustees and Others*, 47 S.L.R. 423) submitted for the opinion and judgment of the Court on certain questions arising out of her trust-disposition and settlement, presented a note to the Lord President.

The note stated that at the advising of the Special Case on 28th January 1910 "the questions in the case were answered in a sense contrary to the contentions of the wards represented by the curator *ad litem*, Lord Johnston dissenting in favour of the contentions of the curator's wards on question 5 (*a*). The curator *ad litem* has been advised by counsel that the answer of the majority of your Lord-