The Court recalled the interlocutor of the Lord Ordinary, of new repelled the defences, and granted decree in terms of the conclusion of the summons.

Counsel for the Pursuers (Respondents)—D.-F. Scott Dickson, K.C.—Spens. Agents—Webster, Will, & Company, W.S.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Murray, K.C.—Mair. Agents—J. & J. Ross, W.S.

Friday, July 15.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

AULD AND ANOTHER (RODGER'S TRUSTEES) *v.* ALLFREY AND OTHERS.

Succession—Legacy—Conditional Legacy—Election—Clause of Forfeiture—Intimation by Trustees to Beneficiaries.

By his trust-disposition and settlement J. R. gave the residue of his estate in liferent to his brothers and sisters, and after the death of the last survivor thereof he bequeathed the fee in equal proportions to such of his nephews and nieces as might then be alive *per capita*. He further provided that, as his brother A. R. was then resident in America, the provisions made in favour of him and his children should only take effect "in the event of his and their returning to Scotland within the period of three years from the date of my decease and thereafter continuing to reside permanently in Scotland. . . . But declaring always that should the said A. R. and his children, or should his said children themselves in the event of his decease, fail to return to Scotland within the said period of three years from the date of my decease, and continue to reside permanently there as aforesaid, then and in that case he and they, or such of them as may so fail to return and remain as aforesaid, shall lose and forfeit the foresaid provisions hereinbefore conceived in their favour. . . ." J. R. died in 1873. A. R. returned to Scotland within the prescribed period of three years, and enjoyed his liferent provision till he died. His two sons did not so return. In a multiplepoinding raised by J. R.'s trustees in 1909, after the death of the last liferenter, A. R.'s sons claimed the shares of the estate conditionally bequeathed to them as aforesaid. They averred that they had no knowledge of their uncle's death and of the provisions in their favour until long after three years from the date of his death, and maintained accordingly that they had not incurred the forfeiture. The trustees and other claimants maintained that the clause of forfeiture had come into operation three years after the testator's death.

Held that A. R.'s sons were entitled within three years from the testator's death to elect whether they would remain in America or return to Scotland, and that as no opportunity had been given them of making such election they had not forfeited their right to their provisions.

Per Lord Ardwall—"The practice both of the Court and of the profession has been uniformly to the effect that it is part of the duty of trustees to intimate to beneficiaries that a bequest has been made to them."

William Auld, C.A., Glasgow, and another, trustees of the deceased James Rodger, who died 11th May 1873, acting under his trust-disposition and settlement, brought an action of multiplepoinding and exoneration dealing with the share of residue conditionally bequeathed to his brother Alexander Rodger and his children. In his settlement Mr Rodger, *inter alia*, directed—"In the seventh place, I direct and appoint that the whole rest, residue, and remainder of my means, estate, and effects . . . shall be held and applied by my trustees in manner following: that is to say, they shall hold and invest two parts or shares of said residue for behoof of each of my brothers Thomas Rodger and Alexander Rodger, and one part or share thereof for behoof of each of my sisters Mrs Philippa Rodger or Young and Mrs Margaret Eliza Rodger or Young, and the said Janet Smith or Rodger, my wife, but that only in liferent for their and each of their respective liferent alimentary uses allenarly: Declaring that in the event of the death of any of the said liferenters either before or after me, the liferent interest of such deceasers or deceaser in their said respective shares of said residue shall accresce and belong to the survivors in the same proportions as those hereinbefore specified, if more than one shall be alive at the time, or to the survivor if only one shall be alive at the time, and at the death of the last survivor of the said liferenters my trustees shall hold the capital of the said residue of my means and estate in equal proportions for behoof of such of my nephews and nieces as may then be alive *per capita*, and the surviving issue of any of my nephews and nieces who may have predeceased the last surviving liferenter *per stirpes*, that is, such issue being entitled equally among them, if more than one, to the share of said residue to which their father or mother would have been entitled had he or she survived. And whereas my brother Alexander Rodger is now resident in the United States of America, therefore I do hereby provide and declare that the provisions which I have now made in favour of him and his children shall only take effect in the event of his and their returning to Scotland within the period of three years from the date of my decease, and thereafter continuing to reside permanently in Scotland: Declaring that in case he shall intimate to my trustees, or to their agent or factor on their behalf, that he and his children

intend to return to Scotland, my trustees shall, out of the share of the residue provided to him in liferent as aforesaid, cause the sum of two hundred pounds sterling to be remitted to him to defray the expenses of their journey home, and after their arrival in Scotland, and as soon as he has fixed upon a place of residence there, they shall out of his said share of residue cause to be expended the further sum of three hundred pounds sterling in furnishing his house, but only upon his producing vouchers to show that he has incurred accounts for furniture for said house to that amount, and I direct and declare that the income of his said share of residue shall accumulate in the hands of my trustees until he and his children shall have returned to Scotland as aforesaid: But declaring always that should the said Alexander Rodger and his children, or should his said children themselves in the event of his decease, fail to return to Scotland within the said period of three years from the date of my decease, and continue to reside permanently there as aforesaid, then and in that case he and they, or such of them as may so fail to return and remain as aforesaid, shall lose and forfeit the foresaid provisions hereinbefore conceived in their favour, and the said forfeited provisions shall lapse into and form a part of the residue of my estate, and shall be dealt with in the same manner as if the said Alexander Rodger had predeceased me without lawful issue."

The testator's brother Alexander returned to Scotland in January 1876, but his sons did not come with him. Alexander Rodger enjoyed his liferent provision till his death in 1894. The last surviving liferenter died in 1908 and the residue of the estate then became divisible.

Claims were lodged for Mrs Allfrey and others, being nephews and nieces (or their representatives) of the testator. A claim was also lodged for Alexander Rodger, California, U.S.A., and for James Rodger, Arizona, U.S.A., the two sons of Alexander Rodger senior, who averred that they had no knowledge of the condition attached to the bequest.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (GUTHRIE) who, on 31st March 1910, pronounced this interlocutor—"Finds, on the just construction of the trust-disposition and settlement of the late James Rodger, that the condition annexed to the provision to the two sons of his brother Alexander Rodger was valid and effectual, and not having been complied with, the right of the said two sons, the claimants Alexander Rodger and James Rodger, thereto has been forfeited, and repels their claim accordingly, and decerns,' &c.

Opinion.—"The late James Rodger, 5 Park Gardens, Glasgow, died on 11th May 1873, leaving an estate worth between £50,000 and £60,000. The present question arises in regard to the share of that estate conditionally bequeathed to his brother Alexander Rodger and his children. Alexander died on 13th April 1894, and his . . . children . . . Alexander Rodger and James Rodger claim in this process the share of the estate of their uncle James Rodger, the testator, which was liferented by their father.

"The question turns on the construction of clause seven of James Rodger's trust-disposition and settlement. The claimants Alexander Rodger and James Rodger, the sons of the said Alexander Rodger, maintain that the forfeiture provided for in that clause only took effect in the event of knowledge on their part, within three years from their uncle's death, of his death and of the terms of the provision in their favour contained in his settlement. They aver that they were ignorant on both points until long after the expiry of the three years after their uncle's death, within which it was provided that they must return to Scotland, and thereafter reside there, if they were to become entitled to the fee of the share liferented by their father. They accordingly maintain that they have not incurred the said forfeiture, and they claim their proportion of their father's share. . . .

"The trustees of James Rodger and the other claimants do not dispute that Alexander Rodger and James Rodger were ignorant of their uncle's death and of the provisions of his will until after the expiry of the said three years after James Rodger's death, but they maintain that, notwithstanding, the clause of forfeiture came into operation as at 11th May 1876, and cannot now be purged. . . .

"In this state of the averments of parties I shall repel the claims of Alexander Rodger and James Rodger. . . .

"An elaborate argument was submitted to me as to whether by the law of Scotland an ordinary clause of forfeiture will operate in the absence of knowledge on the part of the person against whom it is pled. I do not find it necessary to determine that point, because I hold that the testator provided for intimation to his brother Alexander and his three children, and that such intimation was duly made. The settlement shows that the testator knew that his brother Alexander had children, and he treated Alexander as acting for them. He impliedly ordered intimation to Alexander as acting both for himself and his children, and directed that on that intimation being accepted by Alexander for himself and his children, a sum of £200 should be remitted to him to defray the expenses home of himself and his children. But the correspondence shows that the requisite intimation was made by the agents for the deceased trustees to Alexander Rodger on 2nd June 1873, three weeks after the deceased's death, and was accepted by Alexander Rodger by letter, dated 15th August 1873, in which he said—'According to the articles of agreement therein' (that is, in his brother's settlement), 'I hereby agree and submit to the same for myself and family. You will please therefore on receipt of this, at your convenience, send me the sum mentioned in his will to defray the expenses.' There-

upon, by letter dated 3rd November 1873, the trustees' agents remitted the said sum of £200 to Alexander Rodger 'to defray the expense of the journey home of yourself and family,' which sum was duly received by him. The obligation on the trustees being thus discharged, it does not seem to me to affect the question that Alexander Rodger misapplied the £200, and neither brought his children to Scotland nor gave them an opportunity of returning within the requisite time. When the only conditions precedent to the forfeiture, namely, (1) intimation to Alexander Rodger for himself and his children, and on his acceptance, remittance of the said sum of £200, and (2) lapse of the prescribed period of three years from the testator's death, were fulfilled, it seems to me that the forfeiture took effect.

"If this view is correct, I must repel the claims of Alexander and James Rodger. . ."

Alexander Rodger and James Rodger reclaimed and argued—They were entitled to a proof of their averments. They ought to have been put to their choice by the trustees. If they did not elect to return to Scotland they were not to get the provision. They got no information at all, and hence had no opportunity of making up their minds. The matter was not to be left to chance. The testator had used the words "fail to return." On a sound construction "fail" involved action on knowledge. The endeavour of the Court always was to find out the intention of the testator—*Wellwood's Trustees* v. *Boswell*, June 21, 1851, 13 D. 1211. It was the duty of the Court to consider the condition and the reasons that had led to its non-fulfilment and then to decide the matter *secundum bonum et æquum*—*Neilson* v. *Coutter*, July 27, 1710, 2 Fountainhall 1593, 4 Brown's Supp. 807. In that case opportunity was given to the legatee to prove that the condition in the will had not been complied with. The provision in this will, read fairly, meant that each beneficiary was entitled to intimation. Ignorance was always a relevant defence—*Hamilton* v. *Hamiltons*, February 23, 1681, M. 672 and 2970; *Laird of Fetterneer* v. *Lord Semple*, December 3, 1680, M. 2969; Bankton, i, 5, 30. In *Mackenzie* v. *Creditors of Kinminnity*, June 6, 1750, M. 2977, which was relied upon by the respondents, it was only in a note by the reporter that it was stated that ignorance was of no importance. This was quite contrary to the decisions above quoted. It had always been assumed in Scotland that it was the duty of trustees to intimate their provisions to beneficiaries in order to carry out the provisions of the will. It was true that there was no direct authority on the point in the law of Scotland, but that was because it was the universal practice of trustees to intimate. The rules of the Court of Chancery, which had been referred to on this matter, had no application in Scotland. Moreover, as far as Alexander Rodger's children were concerned, the condition was too indefinite to receive effect. Furthermore it imposed such restrictions on their personal liberty that the Court would not enforce it—M'Laren, Wills (3rd ed.), vol. i, 601; *Fillingham* v. *Bromley*, T. & R. 530 (Lord Eldon at 536); Jarman on Wills (5th ed.), vol. ii, p. 900. The condition, again, could be defeated by the beneficiaries at any time. They could have gone off to America the moment they got the money. Resolutive conditions could not be imposed upon a money payment. When the performance of a condition was not in the power of the legatee but of someone else, the condition was impossible. This condition was highly penal, and being a potestative condition fell by the law of Scotland to be construed most favourably to the beneficiaries—*Pirie* v. *Pirie*, July 19, 1873, 11 Macph. 941 (Ld. J.-C. Moncreiff at 947, and Ld. Benholme at 952), 10 S.L.R. 127; Digest, bk. xxviii, tit. vii, 1, 8, 11; Pothier on the Pandects, bk. xxxv, tit. i, sec. 106; Voet ad Pandectas, bk. xxviii, tit. vii, 9; Domat's Civil Law, iii, 8, 24; Stair i, 3, 7, and 8, iii, 8, 22; Erskine's Institutes, iii, 3, 85; Erskine's Prin. iii, 3, 35. The law of England on this subject was not the law of Scotland—*Sturrock* v. *Rankin's Trustees*, June 26, 1875, 2 R. 850 (Ld. J.-C. Moncreiff at 852). In our law there was no distinction between conditions precedent and subsequent. *Wilkinson* v. *Wilkinson*, (1871) L.R., 12 Eq. 604, was also referred to.

Argued for the trustees and the other claimants—The Lord Ordinary had rightly repelled the claim. The condition was good and enforceable in the circumstances that had occurred. None of the beneficiaries were entitled to any provision except on condition of surviving the last liferenter. The testator had merely attached an additional condition to the bequest to Alexander's children. The return to Scotland was in their case a condition precedent. It was not an irritancy or condition subsequent. Moreover, the testator was not bound to make any provision for his brother or his brother's children. Residing permanently in Scotland meant having their permanent domicile in Scotland—*In re Moir*, L.R., 1884, 25 Ch. D. 605. "Fail," was often used in the sense of "do not." It was said that English law was not applicable here, but it was laid down in Jarman on Wills (5th ed.), vol. ii, p. 852, that in respect of the law as to conditions English law followed the civil law. There was no rule of Scots law that trustees must intimate to legatees. In England it had been expressly decided that there was no duty on an executor to give notice of a legacy to a legatee—*In re Lewis*, [1904] 2 Ch. 656; *In re Hodge's Legacy*, (1873) L.R., 16 Eq. 92; *Powell* v. *Rawle*, (1874) L.R., 18 Eq. 243; *Astley* v. *Earl of Essex*, (1874) L.R., 18 Eq. 290; Roper on Legacies (4th ed.) p. 839. Ignorance of the bequest was no excuse—*Mackenzie* v. *Creditors of Kinminnity* (*sup. cit.*); *Douglas* v. *Trustees of Douglas*, February 7, 1792, M. 2985, *rev.* 3 Pat. App. 448; *Burgess* v. *Robinson*, 3 Mer. 7; *Horrigan* v. *Horrigan* [1904], I.R., vol. i (Ch. D.), 29. *Hamilton* v. *Hamiltons* (*sup. cit.*) was a very special

case. *Neilsons* v. *Coutter* was quite distinct from the present case. It was there definitely provided that information of the legacy should be brought home to the legatee. The passage quoted from *Bankton* (*sup. cit.*) did not apply here, as in it the author was dealing with marriage portions. A father was under a natural obligation to provide for his children. This could not be treated as an impossible condition. The most that could be said was that Alexander Rodger's two sons were ignorant of a benefit that might have induced them to come home—not that it was impossible for them to come. The condition should receive effect, as it was not *per se* impossible—Justinian's Institutes, bk. iii, tit. 19, 1 and 11; Gaius, iii, 97 and 98; Code vi, tit. 46, 4. The testator must have contemplated that intimation should only be made to Alexander Rodger and that payment for the journey should be sent to him alone.

At advising—

LORD ARDWALL—This is a case upon which we have had a luminous discussion and an interesting quotation of authorities from the Roman and English law; but in the present case I think the question at issue between the parties can be satisfactorily disposed of by reference to the words of the deed itself, and that it is unnecessary to decide many of the points of law that have been presented in the course of the debate.

Turning to the deed, we find that by the seventh purpose the residue of the testator's estate is given in liferent to his brothers and sisters, and after the death of the last survivor of these the fee is to go in equal proportions to such nephews and nieces as may then be alive *per capita*, and the surviving issue of any nephews and nieces who may have predeceased the last surviving liferenter *per stirpes*. On that clause I have two observations to make. In the first place, I think there is no vesting of the capital till the death of the last liferentrix. In the next place—and this is the important matter in the case—I think there was here a gift made to each and all of these children of a contingent interest in the capital of this estate. It did not vest but it was bestowed upon them. I think that is of great importance when we come to consider the scheme of the deed in relation to the subsequent part of the clause. I think the scheme of the deed was, first, to make a gift to all the relatives in a certain degree equally; but then with regard to certain of them there was to be forfeiture of the gift in certain events.

I now come to the latter part of the seventh purpose, which is as follows—"And whereas my brother Alexander Rodger is now resident in the United States of America, therefore I do hereby provide and declare that the provisions which I have now made in favour of him and his children shall only take effect in the event of his and their returning to Scotland within the period of three years from the date of my decease, and thereafter continuing to reside permanently in Scotland." It is here stated in the first place that the provisions which have been made are only to take effect in the event of his and their returning to Scotland within a period of three years. If the clause had stopped there I think there would be a great deal more to be said than can be said for the argument submitted by Mr Macfarlane to the effect that this is a simple case of a condition-precedent depending on the occurrence of a certain fact. When we go further on we find it is much more. The deed contemplates not merely the occurrence of a certain fact such as a person returning to this country, but it contemplates that the clause of forfeiture is to take effect in the event of an election having been made by the beneficiaries in a certain way, because it says—"But declaring always that should the said Alexander Rodger and his children, or should his said children themselves in the event of his decease, fail to return to Scotland within the said period of three years from the date of my decease and continue to reside permanently there as aforesaid, then and in that case he and they, or such of them as may so fail to return and remain as aforesaid, shall lose and forfeit the foresaid provisions hereinbefore conceived in their favour, and the said forfeited provisions shall lapse into and form a part of the residue of my estate and shall be dealt with in the same manner as if the said Alexander Rodger had predeceased me without lawful issue."

I think that this clause plainly implies that they are to have a choice either to remain where they were out of Scotland or to come back to Scotland and reside there. That is made very clear I think by the preceding declaration in the same clause which runs thus—"Declaring that in case he," that is, Alexander Rodger, "shall intimate to my trustees, or to their agent or factor on their behalf, that he and his children intend to return to Scotland, my trustees shall, out of the share of the residue provided to him in liferent as aforesaid, cause the sum of two hundred pounds sterling to be remitted to him to defray the expenses of their journey home, and after their arrival in Scotland"—and then follows a provision that he is to get £300 for the furnishing of a house as soon as he gets one.

In view of these provisions, I think it is very plain that what the testator meant was this—that there should be an offer made to Alexander and his family to come back to Scotland, and that this offer should be followed, if they accepted it, by a sum of £200 sterling being remitted to them to defray the expenses of their coming back. I think it further implies—and that is an alternative argument to which I shall afterwards refer—that the trustees should put themselves into communication with Alexander Rodger in order to give him an opportunity of "intimating" to the trustees what he was going to do. If I am right in holding that the forfeiture proceeds upon Alexander and his children or each and

any of them making an election between remaining in America and doing without the legacy, or coming home and getting the legacy, I think it follows that the forfeiture cannot take effect unless an election has been made in such a way as to incur the forfeiture.

Now no election can be made without knowledge of the alternatives between which the election is to be made. In order that a person may make a choice between two alternatives he must know what the election is that he is asked to exercise and what the alternatives are between which he is asked to choose. How it can be said that forfeiture has been incurred when not only no choice has been made, but the persons were ignorant that there was a choice to be made, and did not even know the alternatives between which they were to choose, I for my part cannot see. I am of opinion therefore upon this part of the case that there is no forfeiture imposed by the deed unless the beneficiaries elected not to return to Scotland but elected to stay in America; that in point of fact they never exercised such election, and indeed could not do so, because they did not know that an election was offered to them, still less did they know what the terms of the election were and what the consequences of it were to be. I think that is quite sufficient for the determination of the case. Forfeiture depends upon an election being made; there was no opportunity given to them to make an election; *de facto* they did not make a choice, and therefore forfeiture has not been incurred.

A good deal of argument was addressed to us regarding the duty of the trustees to intimate this bequest to the beneficiaries and to each and all of them, and it was maintained by the counsel for the other beneficiaries that at common law there was no duty on the trustees to inform the legatees of the bequest, and that still less was there any duty on them to inform the beneficiaries of the conditions of the bequest; and a number of English cases were quoted to us to that effect. I do not know whether that is the law of England or not, but of one thing I am certain, and that is that it is not the law of Scotland. We were told that there was no settled authority upon this matter. I am not surprised at that, because the practice both of the Court and of the profession has been uniformly to the effect that it is part of the duty of trustees to intimate to beneficiaries that a bequest has been made to them. I should think nobody has ever questioned this, and accordingly it is not surprising that it has never come up for decision, and I do not say that it is necessary to decide the question now. In the present case, whether there was such a duty or not at common law, my opinion is that there was a duty imposed on the trustees under this deed to intimate the bequest. I think that appears from the clause I have read regarding the intimation by Alexander Rodger to the trustees.

But be that as it may, the fact remains that these beneficiaries—the two sons of Alexander who are here—had no knowledge of this matter at all, and therefore did not make an election in the way which is provided for, and therefore did not incur the forfeiture of their provisions. Upon that ground I should propose that the interlocutor of the Lord Ordinary should be recalled and we should allow a proof of the averments of parties.

I only make one further remark. The Lord Ordinary has apparently decided the case on the footing that intimation to the father was intimation to the family; that the trustees have discharged their duty by intimating to the father; and that it does not matter whether the family came to know of it or not. I do not think that can be said with regard to the duty of the trustees, because it is plain from the clause that this forfeiture was to apply individually and not collectively to Alexander and his family. It is declared that "he and they, or such of them as may so fail to return," shall forfeit their provisions. That shows plainly that it was in the contemplation of the testator that one or more members of the family might incur the forfeiture of the provision and the others might not. That being so, I think the duty of the trustees was to intimate the bequest to one and all of them. Intimation to the father cannot be said to have been sufficient in view of the terms of the deed itself. Be that as it may, knowledge by the father is not knowledge by the children, and it is upon the want of knowledge of this bequest and of its conditions that I think judgment in this case must proceed.

LORD DUNDAS—I concur.

LORD JUSTICE-CLERK—I concur. It seems to me that the point in the case is that these parties got a contingent interest in this estate, the gift being subject to forfeiture only in certain circumstances. These circumstances turn on whether the legatees or some of them have chosen to take a particular course. They have a choice given to them to return and reside permanently in Scotland or to stay away from Scotland. If they take the latter course then they must suffer forfeiture of the legacy. That being so, I cannot hold that, without any opportunity for making an election, an election must be held to have been made from the bare fact that the legatees did not return from America. There was no opportunity given for considering the question of choice, for they never knew there was a legacy, or the amount of it, or the terms and conditions attached to it.

I agree with what Lord Ardwall has said on the question whether we should take it from the law of England that forfeiture holds good in such a case. I do not think there is any call on us to do so. It has never been decided by the House of Lords what the law of Scotland is on such a question as this, and I do not think that the opinion expressed by Lord Loughborough is very satisfactory upon its own statement of it, and it is plain that it was

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