

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 decreed 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-

ship's Court to the said question 5 (a) is not well founded in law, and that it is his duty to do all he can to prosecute an appeal to the House of Lords. The other parties to the case are averse from any appeal being taken, and desire that the judgment already pronounced should be accepted as final. One of the curator's wards Miss Isobel Jane Denroche Smith has come of age since the judgment was pronounced and concurs with the other parties in not desiring an appeal to be presented to the House of Lords. The curator *ad litem* has no funds wherewith to defray the expenses of an appeal to the House of Lords, and the trustees of the late Mr Crum Ewing, the first parties to the case, decline to furnish him with the necessary funds to do so. In these circumstances the curator *ad litem* conceives it to be his duty to bring the position of matters before your Lordship with a view to obtaining an order on Mr Crum Ewing's trustees to supply him with the necessary funds to appeal to the House of Lords, or such other directions as your Lordship may deem it right to give." The curator *ad litem* craved the Lord President to move the Court "to pronounce an order ordaining the first parties to the case to make payment to the curator *ad litem* of the sum of £500, or such other sum as your Lordship may think proper, to enable him to present and prosecute an appeal to the House of Lords on behalf of his wards against the said judgment of your Lordship's Court to the extent above indicated, or otherwise to give such directions for the guidance of the curator *ad litem* in the matter as your Lordship may deem fit."

On the note being called in Single Bills counsel for the curator *ad litem* argued—It was recognised that where there was a proper question to try arising out of a trust-deed the expense of an appeal to the ultimate Court was a proper charge on the trust estate. Where the difficulty was really created by the testator, the expenses should come out of his trust funds. If it were not competent in such circumstances for a curator *ad litem* to be put in a position to go to the House of Lords it would always be for the advantage of the major beneficiaries to get such questions decided in a special case during the minority of those having opposite interests. It was true that there was no precedent for this application, but the Court had intervened in the converse case. In *Studd v. Cook*, May 8, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566, where a father appealed to the House of Lords against a judgment in favour of the curator *ad litem* to his pupil children, the House stayed proceedings until the father put the curator in funds to defend the appeal.

Argued for Crum Ewing's trustees and the Rev. Paget Lambart Bayly (the third party in the special case)—There was no precedent for the granting of the crave of this application. The curator *ad litem* had stated a case rather for his own protection

than in the interest of the wards. The trust funds had been already allotted under the Special Case, and when the curator *ad litem* was made in his official capacity a party to the contract of the Case he ought to be bound by the decision of the Court. While it might be said he had a right to appeal, it could not be said he had a duty to appeal. The difficulty did not arise on the trust-deed which these trustees had to carry out but on that of Bayly's trustees.

Argued for the successful parties (the parents of the children)—In the special circumstances of this case the practical benefit to the children if the judgment of the Court of Session were overturned on appeal would be very small, if indeed there would be any. The children would in ordinary course succeed eventually, through their parents, to the funds in question. It was therefore not a case for granting the unprecedented crave of this application, and no encouragement should be given to further litigation.

At advising, the judgment of the Court (the LORD PRESIDENT, LORD JOHNSTON, and LORD SALVESEN) was delivered by

LORD PRESIDENT—In this case we have consulted with the Judges of the other Division, and the conclusion to which the Court has come is that facilities for appeal ought to be given. The case is a Special Case in which certain interests of parents and of children which are divergent are disclosed. There are three families concerned. The judgment of the Court was by a majority in favour of the parents, but there was a dissent from that judgment. The curator *ad litem* having taken the advice of eminent counsel, is advised that there is at least a very good chance of the House of Lords taking the view of the dissentient judge. The curator *ad litem*, of course, has no funds, and therefore unless he is put in funds he cannot proceed further. The result would be that the judgment of the majority of this Court would become irrevocably final against the minor children.

Now, had there been no dissent I think we could not have listened to this motion. It is not to be understood that curators *ad litem* are to take appeals to the House of Lords against unanimous judgments of this Court. But where there is a dissent the situation is different; and when an opinion is given by counsel, as is the case here, which favours the view taken by the dissentient judge, one must recognise that it is quite likely that the House of Lords may take his view also.

Another matter which seems to me to be of importance is that the minor children in this case are put in the position in which they find themselves through no action of their own but through the action of their parents. Had there been no such process as a Special Case, the parents, if they had raised the question by ordinary action, in which the minor children were called as defenders and did not appear to defend, could only have got a decree in absence. The fact that there was such a

process as a Special Case enabled the parents to get a decree *in foro*, because having as guardians of their minor children compelled them to be parties to the Special Case, as soon as the dissentient interest emerged to the cognisance of the Court a curator *ad litem* was of course appointed. Accordingly I think it is not in the parents' mouths to complain if he is put in funds to fight the case to the end.

So far I have had no difficulty. The only difficulty I have had has been one of form. It is a mere accident that we have anything before us on which to write. Had decree been extracted we should not have had anything, but as it is, the process being still before us, I think it is within our power to pronounce an order upon the trustees. I propose that the order should be framed rather thus—to order the trustees to advance a sum of money to the curator. What I mean is that we wish to leave it to the House of Lords, after they have heard the case, to decide whether the expenses should come out of the general fund or out of a portion of the fund, and, if out of a portion, which portion? That is a question which may be affected by the ultimate decision of the case, and which ought not to be concluded by any order of this Court.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

“Ordain the first parties to the case to make payment to the *curator ad litem* of the sum of £300 to enable him to present and prosecute an appeal to the House of Lords on behalf of his wards against the judgment of this Court, the beneficial interest against which the said sum may be ultimately charged being subject to the direction of the House of Lords under appeal.”

Counsel for the Curator *ad litem*—Macmillan. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Trustees and the Rev. Paget Lambert Bayly—Moncrieff. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Successful Parties—Leadbetter. Agents—W. & J. Cook, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Lord Dewar, Ordinary
on the Bills.

PAULL v. SMITH.

Bankruptcy—Husband and Wife—Statute—Notour Bankruptcy—Constitution of Notour Bankruptcy of Married Woman—Expiry of Charge without Payment—Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 6.

Held (diss. Lord Johnston) that the mode of constituting notour bankruptcy

given in the Debtors (Scotland) Act 1880, sec. 6, applied to every individual, even although exempt from imprisonment prior to the Act, and applied therefore to a married woman.

Harvie v. Smith, 1908 S.C. 474, 45 S.L.R. 387, followed and approved; *Stewart's Trustees v. Salvesen & Company*, June 12, 1900, 2 F. 983, 37 S.L.R. 772, distinguished.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), enacts, sec. 4—“With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. . . .”

Section 6—“In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by expiry of the days of charge without payment. . . .”

Mrs Matilda Edwards or Paull, wife of Alexander Paull, both residing at Torphichen Street, Edinburgh, with her husband's consent and concurrence as her curator and administrator-in-law, presented a petition to the Lord Ordinary on the Bills for recal of sequestration awarded on the petition of Sir James Brown Smith of Clifford Park, Stirling.

The petition stated that the petitioner since her marriage had resided in Edinburgh with her husband without intermission, and had not at any time entered into or carried on business. On 11th July 1908 the petitioner, with her husband's consent and concurrence, raised an action in the Sheriff Court at Stirling against the respondent in which she claimed the sum of £100 as damages in respect of the sequestration by the respondent of “the household furniture and plenishings belonging to the pursuer in the house occupied by her at No. 2 Newhouse, Stirling, in security of the rent due by her to defender at Whitsunday 1908.” This action was finally decided against the petitioner, and she was found liable to the respondent in expenses, which were taxed at £70, 8s. 5d. The petitioner averred that on 5th March 1910 the respondent charged her on this decree to pay the same within seven days, and that on 7th March he executed an arrestment in the hands of William Forbes, the tenant of a house in Edinburgh, the rent of which she averred was due to her husband and not to her, and that therefore the arrestment attached nothing. The respondent thereafter presented a petition for sequestration, which was awarded on 5th May 1910.

On 11th June 1910 the Lord Ordinary on the Bills (DEWAR) refused the prayer of the petition.

The petitioner reclaimed, and argued—Notour bankruptcy had not been validly constituted. The petitioner was a married woman, and therefore to render her notour bankrupt the procedure to be followed must be that prescribed by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 7, and not by the Debtors (Scotland) Act