

many years to run. But it has been considered that rental means actual rental under a continuing contract of location. It is, I think, demonstrably clear that this rule applies to a lease in perpetuity or feu-contract, where the price of the subject takes the form of a fixed annual return. Now, if in this case the feu had come to an end through the inability of the tenant to perform his obligations to the superior, or if the superior had instituted, or declared his intention of instituting an action of declarator of irritancy, your Lordships would, I think, have held that the rule of the statute was displaced, and that there was a case for inquiring as to the actual annual value of the lands at the death of the limited owner who exercised the power. But no such proceedings were instituted, and the land was in fact let on a feu-contract at the death of the late proprietor, and I am unable to admit that the right of the pursuer can be affected by a variation of the value of the subject or of the opinions which have been formed as to its value subsequent to that period. I may add that even at the present moment the feu is a subsisting contract, and it is not impossible that by an arrangement between the superior and the liquidator the land may be sold upon terms which will compensate the superior for the loss of his feu-duty.

The question on which I have stated my opinion is considered in the note to Lord Low's interlocutor in the petition process, to which we were referred as expressing his Lordship's view on this question. In that view I entirely concur.

The other points brought under our notice are dealt with in the note to the interlocutor under review. They relate to the ascertainment of the annual value or annual return from compensation money payable for land taken under the powers of the Lands Clauses Consolidation Acts. I concur with the Lord Ordinary on all the points considered in his judgment (for the reasons given by his Lordship), including the question of expenses in the Outer House, and if your Lordships agree with me, adhere to the interlocutor under review.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer—Lord Adv. Balfour, Q.C.—Rankine—Pitman. Agents—Cooper & Brodie, W.S.

Counsel for the Defender—H. Johnston—Howden. Agents—J. & F. Anderson, W.S.

Saturday, January 19.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

M'GEE v. ANDERSON.

Reparation—Joint-Adventure—Liability of One Joint-Adventurer for Wrongful Act of Another—Ship—Herring Boat—Share System.

A herring boat was given out by its owner to another "in deal," according to a system common among herring fishermen, under which the net proceeds were divided into fifteen half shares, of which two went to the owner, seven to the crew, and six to the nets.

Held that the position of parties was one of joint-adventure, and that the owner of the boat was liable for damage wrongfully caused by the master and crew to a third party for the protection of the interests of the joint-adventure.

George M'Gee, master of the herring boat, the "Family's Pride," brought an action in the Sheriff Court at Peterhead against Alexander Watson, the master, and Thomas Anderson, the owner, of the herring boat, the "Good Hope," conjunctly and severally.

The circumstances giving rise to the action were thus narrated by the Sheriff-Substitute (ROBERTSON)—"This action arises out of injury done to herring-nets, &c., belonging to pursuer and others of the crew of the 'Family's Pride' of Peterhead on the morning of 15th August last.

"The facts as regards how the injury was done and who did it are really not questioned in this action.

"The pursuer's boat was drifting south, the crew being at the time engaged in hauling the nets. They came down on top of the defenders' boat and nets, the defenders' nets having gone to the bottom from weight of fish in them, and their boat being thus stationary and anchored to the nets. As the pursuer's boat came on, those in the defenders' boat, fearing injury to their own nets from the pursuer's nets fouling, cut the pursuer's bush-rope or messenger to which the nets are attached without obtaining pursuer's permission to do so, and 37 nets, with the accompanying buoys, rope, and fish were lost. The pursuer is now suing the defenders for the recovery of the value for these. I should say in passing that, according to my view, the pursuer was not entitled to sue as representing the crew (or those of them who were joint-owners of the nets) without an assignation, which he had not got, and therefore the claim in the action, so far as I am concerned, is confined to the pursuer's own share.

"The action is brought against Alexander Watson as master of and representing the owners of the boat 'Good Hope' (who was on board and in command at the time), and also against Watson and Thomas Anderson as individual owners of the boat, conjunctly and severally.

“Watson allowed decree to pass against but he is impecunious, and the question in the present action is, whether Anderson is liable to make good the loss in respect of his ownership of the boat.

“There is no doubt upon the evidence that Anderson is the sole owner of the boat; he was also owner of another boat in which he fished himself, and the boat that did the damage was given out in ‘deal’ to Watson, in accordance with a practice and on terms apparently well-known on the coast. It should be said that Watson is Anderson’s son-in-law, and that one of his (Anderson’s) sons is a member of the crew.

“The arrangements when a boat is given out ‘on deal’ is as follows:—The proceeds are divided into 15 half-shares; two of these half-shares go to the owner of the boat, seven of them to the crew, and six to the nets. The nets, of course, might belong to the owner of the boat or to the crew; in the present instance it is alleged, and strongly hinted at, that Anderson was owner of some of the nets, but I cannot say that I think that is proved, and in my view it does not affect the result.” . . .

The comparing defender, Thomas Anderson, pleaded—“(3) Assuming that the damage in question were caused by the other defender or his crew in the manner stated, this defender, as the owner of the chartered or hired boat, is not responsible therefor, and should be assolized, with costs. (5) The damage claimed having, in accordance with the pursuer’s statements, been caused through the delict of the defender Watson, this defender is not legally responsible therefor, and should be assolized.”

Article 20 of the Convention attached to the Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22) provides that “when nets belonging to different fishermen get foul of one another, they shall not be cut without the consent of both parties. All responsibility shall cease if the impossibility of disengaging the nets by any other means is found.” Section 20, sub-sec. 2, of the said Act provides that “any fine or compensation adjudged under this Act may be recovered . . . if the Court think fit so to order, by distress or pouncing or sale of the fishing boat.” . . .

After hearing proof the Sheriff-Substitute on 24th April 1894 pronounced the following interlocutor:—“Finds in point of fact (1) that upon the morning of 15th August 1893 the boats ‘Family’s Pride’ and ‘Good Hope,’ the latter being a vessel 25 tons burden, were engaged at the herring fishing near Peterhead; (2) that pursuer was joint-owner with three others of the ‘Family’s Pride’ and nets therein, and defender Thomas Anderson was owner of the ‘Good Hope;’ (3) that on the morning in question the nets of the ‘Good Hope’ got so full of fish that they went to the ground, and they and the boat which was attached to them thus became stationary; (4) that the ‘Family’s Pride’ came drifting with the tide on to the ‘Good Hope,’ the crew of the ‘Family’s Pride’ being at the time engaged in haul-

ing their nets; and the crew of the ‘Good Hope’ being apprehensive that their nets would be fouled, and in order to save them, cut the messenger or head rope of the ‘Family’s Pride’s’ nets, with the result that a portion of the rope, with 37 nets and the accompanying buoys and fish, were lost, and a loss to the pursuer to the amount of £25 sterling was caused; (5) that this was so done without the consent of the crew of the ‘Family’s Pride’ being obtained, and was thus contrary to the provisions of Article 20 of the Convention attached to the Sea Fisheries Act of 1883 (46 and 47 Vict. cap. 22), it not having been proved that it was impossible otherwise to clear the nets; (6) that the defender Watson was at the time skipper of the said boat ‘Good Hope,’ she having been given to him by the defender Anderson on the ‘deal’ or share system, and that Anderson was interested in the success of the boat to the extent of two-fifteenth shares of her gross earnings, after the expense of men’s food and the pier dues had been met; Finds in law (1) That in these circumstances defender Anderson, as owner of the boat, is liable for damage done by the boat or those in charge of her in the prosecution of the fishing for which he had given her out—at all events to the extent of the value of the boat, limited to £8 per ton; (2) that the cutting away of the rope and nets was a wrongful act, entitling the pursuer to compensation therefor; (3) that defender Anderson is liable, jointly and severally, along with the other defender, to pay this compensation amounting as above stated to £25: Therefore decerns against the defender Thomas Anderson, jointly and severally, with the defender Alexander Watson, for said sum of £25, with interest thereon as craved.”

The defender Thomas Anderson appealed to the Sheriff (GUTHRIE SMITH), who on 2nd November 1894 dismissed the appeal.

The defender Thomas Anderson appealed to the Court of Session, and argued—(1) This was not a joint-adventure; it was a contract of hire. The boat had been given over to Watson for the herring season, the hire to be paid to the owner being a proportion of the profits. There was here a demise of the boat by Anderson to Watson, and the latter had the sole control of the boat. The master engaged the crew, the owner having no voice in this or any other matter connected with the boat. This defender was therefore not liable for the act of the master or his crew—*Bernard and Aaron v. Sharpley*, 1862, 31 L.J., C.P. 334; *Baumvöll Manufactur von Carl Schiebler v. Furness*, 1892, L.R., 1893 App. Cas. 8; *Fraser v. Marsh*, 1811, 13 East. 238. (2) Even if this was a quasi-joint-adventure, this cutting of the nets related to the nets alone. The owner of one set of nets cut the nets of another in order to save his own; this was not an act for which the defender as owner of the boat was liable. The statute made a question of this sort one between the owners of the nets. (3) The act was a delict, and therefore the person who did it was alone liable. It was a personal wrong

which made the person performing it alone liable. The defender had not authorised, and was therefore not liable.

Argued for the pursuer—The judgment of the Sheriff was right. This was a joint-adventure, and as the act had been performed for the benefit of the defender, and he had benefited by it he must be held responsible—*Steel v. Tester*, 1877, L.R., 3 C.P.D. 121; *Currie v. Allan*, July 17, 1894, 21 R. 1004.

At advising—

LORD TRAYNER—The facts of this case have been so fully and accurately stated by the Sheriff-Substitute in the note appended to his interlocutor that it is not necessary here to repeat them. Taking the facts as so stated, the question is, Is the defender liable to the pursuer in the damages which have been decerned for?

The first and main defence stated for the compearing defender Anderson is, that on the occurrence in question his vessel, the "Good Hope," was under charter by him to the other defender Watson, who had the absolute control thereof; that the "Good Hope" was for the time being demised to Watson. Had this been the state of the facts the defence would have been unanswerable. The case of *Schiebler* referred to by the appellant's counsel is an authority to that effect, and the decision in the case of *Bernard*, rightly understood, proceeds upon the same principle. But the facts here do not admit of the application of that principle. The contract or agreement under which Watson had the use of the "Good Hope" was not of the nature of a charter or demise. He had it under an agreement by which the defender Anderson contributed the use of his vessel to Watson and others with whom Watson might agree, in the pursuit of a joint-adventure, under which Anderson was to receive a certain proportion of the net profits or proceeds of a fishing expedition. In the course of that expedition, and for the benefit of Anderson as much as any, the wrong was done for which compensation is now claimed. I agree with the Sheriff in thinking that it would not be a good or sufficient ground on which to base the defender's liability merely to hold that he was the owner of the boat, the crew of which did the wrong. Liability for damages never arises simply *ex domino*. But that is not the kind of case presented here. Anderson, Watson, and the men who worked the boat were all engaged in a joint-adventure for joint behoof, although their proportions or shares of the net proceeds of the adventure were different. The act which was done (which, I take it, was beyond question wrongful) was done, as I have said, for the benefit of all concerned, and all concerned shared that benefit, according to the terms of their joint bargain. It was said, further, that the defender Anderson could not in any view be liable for the delict or wrong of his joint-adventurers because he had not authorised it. But then the thing done was in pursuance of the joint-adventure; it was done to

protect the joint interest, and to enhance the joint profit, and all profited by it more or less. Anderson cannot take the benefit of the act by which profit was earned or secured (as he has done in point of fact), and then repudiate the act or means by which that profit was gained.

I think, therefore, that the interlocutor appealed against should be affirmed, and the appeal dismissed.

LORD YOUNG, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—C. S. Dickson—Younger. Agent—W. Croft Gray, S.S.C.

Counsel for the Defender—Jameson—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, January 18

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

ANDERSON v. ANDERSON'S TRUSTEES.

Succession—Heritable or Moveable—Conversion—Direction to Pay Mixed Estate to Children.

A testator directed his trustees to pay to his widow one-third of his moveable estate and one-third of the income of his heritable estate during her life, and to hold the residue or remainder of his estate, heritable and moveable, for behoof of his five existing children, and of any other children that might be born to him, "equally share and share alike, and pay the same to my said children as they severally attain the age of majority, or if daughters when married, whichever of these events shall first happen under the burden of the foresaid provisions to theirsaid mother." The deed contained no direction to sell but the trustees were given "powers of sale for the disposal of my said estates . . . and in general to do everything necessary for the execution of the trust hereby created."

The testator was survived by his widow and five children. He left heritable to the value of £6000 and a small amount of moveable property. All the children were in majority when their father died.

Held that there was no conversion, as the exercise of the powers of sale was not necessary for the execution of the trust.

James Anderson, died upon 27th August 1884, survived by his widow, three sons, and two daughters. All his children were in majority at the time of his death. He left a trust-disposition and settlement dated 12th March 1860, by which he conveyed his whole moveable and heritable estate to trustees, for, *inter alia*, the following purposes—(1) Payment of debts, (2) Pay-