THOMAS HALL, Merchant in Berwick-upon-Tweed, and CLAUD RUSSEL, Accountant in Edinburgh, Trustee upon the Sequestrated estate of the said Thomas Hall, } *Appellants;*

HERCULES Ross, Esq. of Rossie, *Respondent.*

House of Lords, 23d June 1813.

LANDLORD AND TENANT—WARRANTY IN LEASE—RETENTION OF RENT—DAMAGES.—In a lease of fishings, the tenant resisted payment of his rent, on the ground of alleged injury done to the fishings by the operations of the landlord in the river, and at the chief fishing station, and damages arising therefrom. Held him not entitled to retain the rent on account of such alleged damages. In the House of Lords, case remitted for reconsideration, with an opinion that damages were due, and that it fell on the Court of Session to ascertain and fix the damages.

A lease was entered into by the appellant of the fishings of Southesk, belonging to the respondent,—the appellant having appeared at a public roup of the same, and offered £600 of yearly rent for a twenty-one years' lease after Candlemas 1801.

This lease described the fishings as "All and whole the "salmon fisheries within the water of Montrose River of "Southesk, and on the sea coast belonging to the estate of "Rossie, together with the salting house at Rossie, *as the "said fishings and salting house were lately possessed by "John Richardson, Esq.*" And there was absolute warrandice of the lease, "*in so far as the different stations have "been hitherto fished or occupied.*"

There was no restraint in the lease against the landlord exercising any act of property which he might think proper, and accordingly, soon after the commencement of the lease, he erected a dock for the repairing of ships, upon the island of Rossie, being one of the principal fishing stations.

The appellant alleged that this erection had injured, in a very considerable degree, the yearly value of the fishings, and this was done, although the fishings were expressly let "*as lately possessed by John Richardson, Esq.*," and although they were warranted to him, "in so far as the "different stations have been hitherto fished or occupied "at all hands mortal."

A claim of damages having been preferred for Hall during the first year of the lease, this was referred to arbitration, and, after taking proof, the arbiter found, by his de-

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cree arbitral, that the operations connected with these erections had injured the fishings during the previous season, and awarded £133 of damages.

The injury during the succeeding seasons having been greater, he preferred a further claim, but this was resisted, coupled with a refusal to submit the matter to arbitration; and the respondent having threatened a charge for payment of the rent on the lease, the appellant brought a suspension. This being passed, and the letters expede, the question came to be discussed before Lord Balmuto, who was pleased to pronounce this interlocutor, ordering the suspender to lodge the bill for the sum of £600, consigned by him in the Montrose Bank, in process, being the year's rent due at Martinmas 1802, in order that the same may be delivered up to the landlord, without prejudice to his claim of damages.

When the rent fell due at Martinmas 1803, the appellant brought another suspension, which was conjoined with the former process.

The appellant having been ordered to give in a condescendence of damages incurred to the fishings, this was done, and a proof allowed and taken. In the meantime, a third suspension was brought, as to the year's rent due at Martinmas 1804, which was also conjoined. The Lord Ordinary then, upon advising the state of the whole cause, pro-

Nov. 12, 1805. nounced this interlocutor: "Having considered the mutual "memorials for the parties in the conjoined suspensions "offered against payment of the rents of Rossie fishings for "the years 1802, 1803, and 1804, payable at the term of "Martinmas each of these years, with the whole former "proceedings, repels the reasons of suspension, finds the "letters and charge orderly proceeded, under deduction of "the sum of £600, consigned by the suspender with the "branch of the Bank of Scotland at Montrose, as the year's "rent for 1802, and which was ordered to be paid up to the "charger, and decerns: Finds the suspender liable in ex-"penses, and ordains an account thereof to be given in, "and, when lodged, allows the suspender to see and object "to the same." On representation the Lord Ordinary ad-

Nov. 28, —— hered. On further representation, the Lord Ordinary found that he was entitled to credit for £400 admitted to have

Dec. 20, —— been paid, and *quoad ultra* adhered.

May 22, 1807. On reclaiming petition to the Court the Lords adhered.

Dec. 1, —— And, on further petition, they adhered.

This latter judgment having been pronounced by a narrow majority, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant, Mr. Hall, paid a high rent for the above mentioned fishings, and he was therefore entitled to expect he should be allowed to possess them without interruption or molestation from any quarter, and particularly without molestation or interruption occasioned by the respondent, to whom that high rent was to be paid. The contract of lease is a *bona fide* contract, which implies in its very nature that the tenant shall have a free and uninterrupted enjoyment of the subject let to him; and, consequently, if such enjoyment is prevented or interrupted by any operations of his landlord, he has a right to expect compensation for the damage that has ensued. Such claim of damage is founded in the very nature of the contract, without any express obligation undertaken by the landlord to that effect; but, in the present case, there is superadded an explicit obligation by the landlord, whereby he is bound to warrant the fishings in question to the appellant, in so far "as the different stations have been hitherto fished or oc- "cupied at all hands mortal." Warrandice at all hands imports not only that the use and possession of the subject shall be made good to the tenant, undisturbed by any operations of the lessor, but undisturbed by the operations of any person whatever.

The appellant has instructed by the clearest evidence, that his possession was interrupted in a variety of different ways, in consequence of operations carried on even by the respondent himself, or by those acting under authority from him, with a view to his profit and advantage. A dock was erected at one of the most valuable fishing stations let to the appellant, and the fishing there was interrupted and injured by the materials laid down in the bed of the river for constructing the dock; by foul water being poured into the river, which turned away the salmon; and from vessels being allowed to lie in the fishing stations so as to obstruct the fishery in a very great degree. In these various ways the respondent has incurred the warrandice of the lease, and the appellant is entitled to recover from him whatever loss and damage have been sustained from the respondent's breach of contract.

All the pretences set up by the respondent, in the view of

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avoiding implement of his obligation of warrandice to the appellant, are frivolous in the extreme. The interruption given to the fishings in the different ways above mentioned, is proved beyond dispute; and where a salmon fishing is interrupted there must unavoidably be damage. It is an absurdity to say, that a tenant suffers no damage although he proves that the fish were scared away, and that he is prevented from carrying on the fishing by obstructions of different kinds.

Pleaded for the Respondent.—The rents of the years in question have been long due to the respondent, in terms of the lease entered into between him and the appellant, Mr. Hall. This just and liquid debt is by no means compensated, nor ought payment of it to be held on account of claims of damages, which even the appellants seem to admit are of a trifling nature, more especially when it is considered that the chief subject of complaint is the erection of the dock on Rossie Island, of which Mr. Hall was perfectly aware before he took the lease of the fishings, and which his agent saw carrying on without making any objection. But, 2. Not only have the appellants completely failed in their endeavours to substantiate their allegations, but it is established by the clearest and most convincing evidence, that no damages whatever have been occasioned to the fishings by any operations which the respondent carried on, or for which he was answerable; and that Mr. Hall was in no degree prevented, during the years of his lease, from enjoying the full benefit of these fishings, in so far as they had been possessed by former tenants.

After hearing counsel,

LORD CHANCELLOR ELDON said,

"My Lords,

"This is an appeal against certain interlocutors of the Court of Session. The most material interlocutor of the Lord Ordinary, upon which the others are founded, is that of the 12th Nov. 1805. (Here his Lordship read the same).

"In this case, a lease was made by the respondent Ross to the appellant Hall of certain fishings. I lay entirely out of view the fact, which has been a good deal founded on, that Ross had, before this time, formed a plan for constructing a dry dock, and that the appellant knew of such his intention. Nothing can be more dangerous than our construing a contract by any thing out of the contract. The parties, in their contract, say nothing as to this dock;

we have nothing to do here with the intentions of the one party, or the knowledge of the other in regard to it. The only question for us to consider is, what Ross meant to give under the lease, and what Hall meant to hold?

"The lease lets to him the following subjects. (Here his Lordship read the description of the fishings in the lease, with the terms of the warranty, absolute and from fact and deed).

"Without any exception to what was said at the bar, as to the warranty that would, by the law of Scotland, have been implied in a lease like this, it appears to me to have been the clear intent of the parties, that this lease should contain two species of warranty, one as to the mode of fishing formerly practised against all the world,—the other, as to any improved modes of fishing from the acts and deeds of the lessor.

"The rent was £600 a-year, being, as was stated, a considerable increase over any former rent; and a great deal of argument was used upon this, that the fishings could not have been damaged by the respondent's operations in the present case, because the appellant's lease was disposed of to an advantage, a grassum of £250 having been obtained for it. But when we are to consider of this judicially, we must lay all this out of the case. Even though the fishings had been subset at £1200 a-year, if the appellant had suffered damage and injury in previous years, this would not have compensated him for such damage and injury.

"But it is true, you must prove such damage and injury. It was said, in the present case, that the evidence did not establish this. I shall show you how it appeared to the Court of Session, and how they dealt with it.

"There appear to have been fourteen of the Judges present at the last decision of this cause, according to the notes of their speeches, with which we have been furnished. Seven of the judges who spoke, were for altering the former judgment. Of course they must have been of opinion that the appellant had sustained damage.

"Lord Balmuto does not admit that he sustained any damage; but considers that there might have been an inconveniency, which the appellant might have obviated by adopting a new mode of fishing. But the landlord had no right to force the tenant to this.

"Lord Armadale, although his judgment was against the appellant, admits that he sustained damage to some amount; but, as he could not state the amount of such damage with precision, he decided against the suspender.

"Lord Craig thinks there might be damage; but that the amount of it was not to be ascertained. The Lord Justice Clerk thinks there might be damage, but that it was vague and uncertain; he mentions that salmon seemed to be capricious and whimsical in their nature and habits, and after giving damages for one year, in the next the fishing might be more productive than ever. But this principle will not

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do, the subsequent productiveness is no compensation for damages in former years.

" Lord Meadowbank alone says that no damage has been proved. Two of the judges, Lords Glenlee and Robertson, state no grounds for their opinion. Thus a great majority of the Court were of opinion that damage had been sustained.

" I have always found cases of salmon fishing of considerable difficulty, from the discussion entered into, as to temper and disposition of the salmon, and as to their smell and taste. On this I find great contrariety of opinion; so in the present case, I find it matter of dispute, if they are more or less *nice* and *delicate* in their habits, and if a muddy river is disagreeable to them or not. But when two men enter into a contract as to a salmon fishing, I think it is much more important to consider if they observed their contract, or have departed from it, than to enter into the discussions of philosophers on the world of fish.

" It was argued to-day, that even though the appellant had lost one fishing station, yet if he caught as many fish as before, at the remaining stations, then he had sustained no damage. But if he contracted for ten fishing stations, what right would the respondent have to reduce them to nine?

" In this country, when we get at a case of damage, we never hear of giving judgment against a party who has sustained the damage. We say, that when you arrive at the point of damage, by fixing whether liability attaches in the particular case, you may settle the *amount* to be given in one of two ways; if you can get persons of skill in such matters to give a distinct opinion thereon, the *amount* may be fixed in that way; if you cannot obtain this, then nominal damages are given.

"I see the Court below had difficulty as to the *amount* of the damage in this case. From the arguments urged at the bar, I had at first thought that the appellant had made no distinct averment on the subject; but I see that he lays his damages in his condescendence at £200 a-year. On the other hand, it was said that the decreet arbitral might enable me to fix the damages. It cannot do this; but it is evidence of damages of some amount being due, for the period to which it relates.

" The Lord President says, that there are a great many cases where the Court gives damages, by conjecturing as to their amount; and there are other judges of same opinion.

" As to the law of the case, one of the judges thought that no damages are due, because navigation is the primary use of all waters. He says, ' it is amusing to hear a complaint that fishers are interrupted ' in their employment by ships.' But when a party binds himself to pay £600 a-year for a salmon fishing, if the proprietor of the fishing thought fit to destroy it, in order to serve any purpose connected with navigation, the tenant might legitimately consider it far from

amusing to be still obliged to pay his rent. Upon the whole, therefore, as I consider that damage has been done to the tenant's fishing in this case, I think this ought to be declared by your Lordships' judgment, and that the cause ought to be remitted back to the Court of Session to review all their interlocutors, and, with this finding, to do as they shall see just, taking care always that the appellant be confined to the premises laid in his condescendence."

LORD REDESDALE said,

"My Lords,

"When one of two contracting parties to a contract alleges that he has received damage in the subject of the contract, it is not enough to say, that its produce on the whole has been as good as it was before. The party must answer for this damage on the contract. If ten fishing stations are contracted for, and one of them is injured, that is damage. Nay, that there was actual damage in this case, seems to be admitted. The chief difficulty is to ascertain the amount of the damage. This is a duty which falls upon the Court. I see they have done it in other cases, and that it was done in the case of Wight *v.* Dickson, decided this morning. On this case, and on others of a similar nature, there appears to be reason to lament that the Court of Session has not the same means of coming to a right decision that we possess in this country."

Dow, vol. i. p. 141.

The Lords find, That if the acts of the respondent complained of occasioned any damages to the tenant of the fishings demised, the amount of such damages ought to be paid by the respondent; and further find, that some damages were sustained by the tenant; And it is therefore ordered and adjudged, That the cause be remitted back to the Court of Session in Scotland, with an instruction to the Court to ascertain the amount of the damages, either by allowing the appellants to examine witnesses for the purpose of establishing that amount to or within the extent thereof limited in the condescendence, with liberty also for the respondent to examine witnesses touching the same, if he shall think fit, or to ascertain it in such other manner and proceeding as may be according to the practice of the Court, and thereupon the Court is to proceed as shall be just: And it is further ordered and adjudged, That, with these findings and directions, the Court of Session do review all parts of all the interlocutors complained of in the said appeal, and after such review to do therein what shall appear to the said Court to be just.

Journals of the House of Lords.

For Appellants, *Wm. Adam, Sir Samuel Romilly, Tho. W. Baird, W. G. Adam.*

For Respondent, *Wm. Murray, James Walker.*