

policeman, in the discharge of his duties, having discharged one of them, went back to discharge another of them, namely, the duty of acting as policeman at Ayr station. In doing so he was seen last in Kyle Street about 10.20, and at 10.30, unfortunately, he was run over at a siding. I think it is perfectly evident from these facts—so much so that I may say it is proved—that in returning from his duty of depositing the cash-boxes and going back to his duty as a policeman at the station he took a route which led him across the said siding, and in doing so was run over in the way narrated in the case. Now he had a right to be on the siding; and, furthermore, we can readily imagine, as has been said by your Lordship in the chair, that one reason why he may very reasonably be supposed to have taken this route was that he could take a look round the sidings at the end of the passenger platform to see that no evil-disposed persons or mischievous boys were loitering about. That would be essentially in the discharge of his duty as a policeman; and, accordingly, I think it is proved, or if not directly proved it is a clear inference from the facts which have been held to be proved, that when this accident happened he was in the course of his employment as a station policeman. Now, the Sheriff-Substitute has put in a clause in the second question which I do not think it was necessary or proper to put in when he says “that it was not proved why he came to be at that spot at the time of the accident, or for what purpose he had gone there.” In addition to what Lord Low has said in regard to the *onus* shifting, I think a very proper observation was made by Mr Menzies that while in the general case it would be incumbent upon the claimant in an arbitration of this sort to prove why a deceased person was at a particular place, and to prove that the purpose he had gone there for was a purpose necessarily in the course of his employment, yet that in the case of a policeman the matter is really very different. Of course, every case must be taken upon its own facts. A railway policeman's duties are to go anywhere about a station for the purpose of seeing whether there are evil-disposed or mischievous persons loitering about, ready either to pilfer articles from carriages or trucks, or damage the company's property; and it might be absolutely impossible in many cases for those claiming on the death of a railway policeman to tell what was in his mind in being at a particular place. He would keep that to himself. He might have been drawn anywhere about the station premises in the discharge of his duty, but nobody could tell after his death what was the particular purpose that took him there. I therefore think this case, which is the case of a policeman, cannot be decided on the same footing as an ordinary case would be, and that the same kind and amount of proof is therefore not required, provided the deceased was in a place where he had a right to be, and where it may be reasonably supposed that he would not have gone except in the discharge of his

duties as a policeman. I therefore agree with the judgment proposed by your Lordship.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

“Answer the two questions of law therein stated by declaring that the accident arose out of and in the course of the deceased's employment with the appellants; therefore affirm the award of the arbitrator.”

Counsel for the Appellants—Macmillan—Garson. Agents—J. C. Brodie & Sons, W.S.

Counsel for the Respondents—G. Watt, K.C.—T. A. Menzies. Agents—Hutton & Jack, Solicitors.

Wednesday, November 20.

## SECOND DIVISION.

[Lord Ardwall, Ordinary.]

DOUGALL v. DUNFERMLINE TOWN COUNCIL.

*Lease—Warrantice—Landlord and Tenant—Eviction—Breach of Warrantice—Damages—Expenses of Tenant in an Unsuccessful Action to Vindicate his Right to Full Possession of Subjects Let—Liability of Grantor of Warrantice.*

A town council let to a tenant a farm, part of the common good, bounded by a burn and by a loch into which the burn flowed, reserving the right of sporting and fishing by themselves or others having written authority from them. They bound themselves and their successors in office to warrant the lease from fact and deed, and the burgh and community at all hands. The tenant on challenging certain persons for coming on the subjects let without written permission, was met by the answer that they as inhabitants of the burgh had a right to fish in the loch and burn, and to have access to the banks thereof for that purpose. The tenant complained of his partial eviction to the town council, who would neither admit nor deny the right claimed. He thereupon raised an action against the alleged trespassers, in which he called the town council for their interest, in order to vindicate his right to full and peaceable possession of the subjects let, but it was held that the inhabitants of the burgh were entitled to the right claimed by them.

*Held*, in an action by the tenant against the town council, that the defenders were liable to pay to the pursuer the expenses incurred by him and those for which he had been found liable in the former action.

On 1st May 1906 William Dougall, farmer,

Highholm, near Dunfermline, raised an action against the Provost, Magistrates, and Councillors of the royal burgh of Dunfermline. The pursuer sought to have it found and declared that he had been evicted from the full and peaceable possession of a portion of a farm let by the defenders to him, and that he was accordingly entitled to an abatement of £30 per annum from the rent stipulated in the lease. He further sought decree for the following sums:—(1) Of £66, being the amount of abatements to which he claimed he was entitled from rents already paid; of £100 in name of damages for trespass [*this claim was subsequently abandoned by minute*]; and (3) of £450, 18s. 7d. in relief of the expenses of a previous action unsuccessfully raised by him as after mentioned to vindicate his right to full and peaceable possession of the subjects let to him by the defenders.

The following narrative is taken from the opinion of Lord Ardwall:—"By lease dated 29th November and 8th December 1904 the defenders let to the pursuer the farm of Highholm, near Dunfermline, for nineteen years from and after Martinmas 1903 at the rent of £150. The farm forms part of the common good of the burgh, and is bounded on the north partly by the Loch Fitty Burn and partly by Loch Fitty, into which the burn flows. The lease contains a clause reserving to the 'proprietors,' which word is therein defined as meaning 'the Provost, Magistrates, and Town Council for themselves and as representing the whole body and community of the said Burgh,' the whole game and fishings on the lands let, 'with the privilege of fowling, hunting, sporting, and fishing on the lands hereby let by themselves or others having written authority from them.' It is matter of admission that the fishings in the said burn and loch are the only fishings to which the above reservation can refer. The lease contains the usual clause of absolute warrandice.

"Shortly after the pursuer entered the farm he found that members of the community of Dunfermline, and the public generally, were in the habit of entering upon the subjects let for the purpose of fishing in the said burn and loch. He challenged them, but was met with the contention that they were entitled as members of the community of Dunfermline to fish there, and to enter on his lands for that purpose. The pursuer complained about the trespassers to the defenders about March 1904, and there have been produced in process a number of minutes and correspondence, the effect of which is very clearly set forth by the Lord Ordinary in the opinion delivered by him on 8th January 1907 (*v. infra*). I entirely agree with the conclusion at which the Lord Ordinary has arrived that the pursuer was justified in reading the Town Clerk's letter of 2nd May 1905 as an intimation that the defenders were not to take any action either to establish or to negative the existence of a right in the public which 'they were not disposed to question,' or as to the matter of trespass,

and that he must take such steps as were necessary to defend himself. The pursuer accordingly raised an action on 8th June 1905 craving interdict against certain individuals molesting or interfering with him in the peaceable possession and enjoyment of his lands, and from entering and trespassing on the same or injuring and destroying his crops. To this action the present defenders were also called for their interest. A proof was led in that action, and upon considering the same the Lord Ordinary, by interlocutor dated 3rd February 1906, found, *inter alia*, (3) that the compearing defenders as "members of the said community and ratepayers in the said Burgh are entitled to enter upon and use the banks of the said burn and loch respectively so far as aforesaid (that is, so far as lying within the farm of Highholm) for the said purpose of angling; and (4) that the pursuer has failed to prove that the said defenders or any of them have trespassed on the said farm and lands or have broken down, injured, or in any way interfered with the gates and fences upon and surrounding the same, or have injured or destroyed the pursuer's crops upon the same.' He accordingly assolizied the defenders and found them entitled to expenses.

"Besides having called the present defenders for their interest in that action, the pursuer's agent on 8th July 1905 wrote to the Town Clerk enclosing a print of the open record, drawing special attention to the defenders' averments to the effect that they had enjoyed an immemorial right and privilege of fishing in the loch and burn on the town lands, and of using the banks thereof for that purpose, and desiring to be informed whether or not these statements were substantially true. He further intimated that if the defences were sustained the pursuer would look to the town to recompense him for all loss and damage he might suffer or had suffered, and that if in the course of the process it should appear that the Town Council had done anything to derogate from their lease to him he would hold them liable to pay all the expenses incurred by him in that action and those for which he might be found liable. This was a very plain intimation that if the pursuer failed in that action he would make the claims which he does in the present against the Town Council. On 12th June 1905 the Property Committee of the Town Council had agreed to recommend that the Town Council should not enter appearance to defend the action, and on 11th July the Town Clerk replied to the pursuer's agent that 'the Town Council have not at any time conferred right on the inhabitants of Townhill or others to fish in the loch and burn, but they took no steps to prevent fishing.' This was a very evasive answer, and left the pursuer without any knowledge as to how long the public had been in use to fish, or whether they had or had not a legal right to do so. Again on 2nd November 1905 the pursuer's agent wrote to the Town Clerk intimating that a proof had been allowed in the action

as to the alleged right of fishing, that the pursuer did not intend to reclaim against the interlocutor allowing the proof, but would do so if the Town Council so desired, at their expense. The Town Clerk answered practically that they did not intend to do anything in the matter, and subsequently they declined to reclaim against the interlocutor of the Lord Ordinary of 3rd February 1906 already referred to, which has become final, and which the defenders, for the purposes of this action, admitted must be held to be well founded in fact and in law.

"After intimating his claims to the Town Council, who refused to recognise them, the pursuer raised the present action. . . . [His Lordship gave the conclusions of the summons.] . . ."

The pursuer pleaded—" (1) The pursuer having been evicted from the peaceable enjoyment of a material part of the subjects let to him by the defenders is entitled to a corresponding abatement of rent in terms of the declaratory conclusion of the summons. (2) The defenders being in breach of the warrandice granted by them in the said lease in favour of the pursuer, are bound to indemnify the pursuer for the loss which he has in consequence sustained. (3) The pursuer having made payment to the defenders of the full amount of the rent stipulated for under the said lease, and having been justly entitled to an abatement therefrom to the extent specified, decree should be pronounced in terms of the first head of the petitory conclusion of the summons. (4) The pursuer having suffered loss and damage through the defenders' breach of warrandice is entitled to decree in terms of the second head of the petitory conclusion of the summons. (5) The pursuer having incurred the legal expenses condescended on in vindication of the subjects let to him by the defenders, and in consequence of the defenders' said breach of warrandice, is entitled to payment thereof from the defenders as concluded for in the third head of the petitory conclusion of the summons."

On 25th July 1906 the Lord Ordinary (DUNDAS), before answer, allowed to the parties a proof of their respective averments, and to the pursuer a conjunct probation. In doing so he stated—"The defenders' counsel maintained, in the procedure roll discussion, that the action was radically irrelevant, and ought to be thrown out *de plano*, and without any inquiry. They contended in the first place, that upon a sound construction of the lease, and especially of the reservation of fishings, &c., the pursuer was contractually barred from objecting to any of the 'proprietors'—including, as they maintain, the whole members of the community—coming upon his farm for the purpose of angling in the loch and burn, and using the banks of both or either, so far as might be necessary or proper, in the legitimate pursuit of angling. I am not disposed to accept this view as matter of construction, and having regard especially to the words, which occur in the clause of reservation—'by themselves or others having

written authority from them.' The defenders further argued that the pursuer's present claim cannot be maintained, because he has only himself to blame if before accepting the lease he failed to make inquiries either from the lessors or the previous tenants or otherwise, which would have certified him of the use and custom, if not of the legal right, of the local public to resort to the banks of loch and burn for angling. They also contended that in no case could the pursuer recover rent already paid by him without, so far as appears, reservation or protest at the time. Now, it seems to me that, at all events as regards the second and third of the arguments thus summarised, a satisfactory decision cannot be arrived at without a more accurate knowledge of the whole facts than I can at present command."

On 8th January 1907 the Lord Ordinary found, declared, and decreed that the pursuer had been evicted from the full and peaceable possession of a portion of the subjects let to him by the defenders, and that he was entitled accordingly to an abatement of the sum of £5 per annum from the rent stipulated for in the lease during all the years of the currency thereof, and with regard to the petitory conclusions of the summons (first) decreed against the defenders for payment to the pursuer of the sum of £10 with interest in full of head (1) of the petitory conclusions; (second) in respect of the minute for the pursuer assolized the defenders from head (2); (third) with regard to head (3) found the defenders liable to pay to the pursuer the taxed amount of the expenses incurred by him in the former action and those in which he had been found liable.

*Opinion*—"The proof allowed by my interlocutor of 25th July 1906 has now been led. By minute the pursuer departed from his conclusion for £10 in name of damages and that matter is out of the case. The first question for decision is whether or not the pursuer is entitled to an abatement of his rent upon the ground that he has been evicted from or never been put in possession of a material portion of the subjects let to him by the defenders. The portion referred to is that definite or definable part of the farm (the farm being included in the common good of the burgh) which I held in *Dougall v. Lowe and Others* to have been dedicated by immemorial usage to the inhabitants of the burgh for the purpose of angling in Loch Fitty and the Fitty Burn. I adhere to and need not repeat the observations which I made when I allowed proof on 25th July as to the construction of the pursuer's lease, and particularly of the clause reserving the fishings (*v. sup.*). That clause has in my opinion no reference to the public right above mentioned, and affords no defence to the pursuer's claim for abatement of rent upon the grounds indicated.

"It appears from the proof that nothing was said in the conditions of let about any public right. The pursuer was not informed by the lessors that the inhabitants had any legal right of fishing in the loch or burn,

nor even that they were in fact in the habit of resorting to these waters in considerable numbers during the fishing season. Information of this sort would in my opinion have been very material to an intending offerer for the farm. The pursuer entered at Martinmas 1903. The fishing season had then been over for a month or more, and I do not think that he was in a position to discover by observation that the public had (whether as matter of right or otherwise) been in the habit of fishing in the burn and loch. It was only in the spring of 1904 that the pursuer discovered that numbers of persons came to fish who declined to desist, alleging a legal right. It is I think established by the evidence that members of the community did and still do come upon the pursuer's farm in large numbers for the purpose of angling; that he has sustained loss and injury by their presence to a material though not to a very large extent, owing to his exclusion *pro tanto* from the ground adjoining the water, damage to crops, and disturbance to cattle and sheep, and that he is therefore entitled to some abatement of his rent. In arriving at the amount of this abatement I consider (1) that I ought to keep in view that the pursuer must under his lease have permitted fishing by the Town Council themselves, and a reasonable number of persons having written permits from them; (2) that I must wholly disregard damage done by mere trespassers, holiday-makers, and the like as distinguished from anglers having a right to angle; and (3) that I must have some regard to the fact that the matter of access by the inhabitants to angle in the burn and loch has never been defined or regulated, and that they assert right to use and do use at least one mode of access for that purpose by a service road over the pursuer's fields, as well as access by the Craigduckie public road to the burn. So viewing the problem I consider that the pursuer is entitled to have an abatement of £5 per annum during the remaining currency of his lease. I think that he is also entitled to recover a similar amount in respect of each of the years 1904 and 1905. This is a very small matter; but the defenders argued, though they do not specifically plead upon record, that this part of the pursuer's claim is barred by the fact that he paid his rent in full at the terms of Whitsunday and Martinmas 1904 and Whitsunday and Martinmas 1905 respectively, without express reservation of any claim to abatement; and they relied upon cases of which *Broadwood*, 1855, 17 D. 340, is a leading example, and *Hamilton*, 1906, 8 F. 1026, is I think the latest instance. I do not, however, consider that the rule laid down in these cases applies here. This is not a case of payment of rent by a tenant without reservation in full knowledge of the facts. The pursuer made complaints from March 1904 onwards as to the presence of 'trespassers,' but he was in complete ignorance as to whether or not any of these persons had a legal right to fish, and the defenders

did not know, or did not admit, that such right existed. The pursuer's letters in 1905 at all events do contain claims which seem to be as specific as the circumstances would permit of. Further, I do not think the defenders can say that their case has been prejudiced by loss of evidence, which was an important consideration in the class of cases to which I have referred. The remaining question to be decided involves a considerable amount of money, and is not unattended with difficulty. The pursuer seeks to recover from the defenders as specific damages the expenses which he incurred in the action *Dougall v. Lowe and Others*, already referred to. In order to arrive at a decision one must, in the first place, examine the defenders' attitude and conduct towards the pursuer prior to the raising of that action, as shown by their minutes and correspondence. It is clear enough that, for years before, the Town Council had been divided in opinion as to whether or not the public had a legal right to fish in this loch and burn. The minutes, however, of 13th and 22nd September 1897, and of 3rd February 1898, show that at that time they had gone far towards conceding the existence of such a right. The pursuer's complaints about 'trespassers' began, as I have said, about March 1904. The defenders took up the position that upon proper and sufficient evidence being submitted to them by him they would prosecute offenders. Investigation was made in several cases, but no prosecution followed, for the reason, as appears from the minutes of 6th October and 10th November 1904, that it seemed doubtful 'whether the persons alleged to have trespassed did more than fish along the banks of Loch Fitty Burn,' and that this was 'a privilege claimed as having been exercised for many years, and apparently conceded by the Town Council as owners of the land. (See minutes of Council of 13th September 1897, and of the Property Committee of 3rd February 1898).' This reason does not appear to have been made known to the pursuer. On 18th March 1905 the Town Clerk, in answer to a complaint by the pursuer's agent, replied that the Town Council had not 'granted the ratepayers and others in the district any permission to fish in the Loch Fitty Burn.' On 20th April the pursuer's agent wrote that 'it seems to have got abroad that the public have a right to fish in the Loch Fitty Burn, and to trespass upon his' (the pursuer's) 'farm in doing so, and he suggests that you, as Town Clerk, should insert a notice in the local papers that all trespassers will be prosecuted, as they have no right to go upon his farm as stated. Mr Dougall is willing to pay the cost of the advertisements.' At a meeting of the Property Committee on 1st May 'the Town Clerk was instructed to reply that the Committee are not disposed to take any action in the matter, and that Mr Dougall must himself take such action as he may consider necessary to protect himself against damage by trespassers.' The Town Clerk in his letter of 2nd May somewhat amplified the terms of the above

instruction. He wrote that 'the Committee are not disposed to question the right of the public to fish in the Loch Fitty Burn, but such right does not imply any right to trespass on the farm lands, fishers being restricted to walk along the banks of the burn. The Committee do not propose to take any action in the matter, and Mr Dougall must just take such steps as he may consider necessary to protect himself against damage by trespassers.' It might perhaps have been better if the pursuer's agent had pressed the Town Clerk more closely as to this rather ambiguous reply, but it seems, to say the least, highly improbable, looking to subsequent events, that the Town Clerk, if so pressed, would have admitted that the public had a legal right of fishing. Be this as it may, the pursuer was, I think, justified under the circumstances in reading the Town Clerk's letter as an intimation that the defenders were not to take any action either to establish or to negative the existence of a right in the public which they were 'not disposed to question,' or as to the matter of trespass, and that he must expiscate the whole affair for himself. He accordingly raised an action on 8th June 1905 for this purpose. The summons was not, I think, framed in the most artistic manner, but it had at least this effect, that the individual defenders against whom interdict was craved as 'trespassers,' distinctly raised in their answers the case that the 'farm forms part of the common good of the burgh of Dunfermline, and that the inhabitants of Dunfermline and the villagers of the town's lands of Townhill and Kingsseat have enjoyed the right and privilege of fishing in the said loch and burn, and of using the banks thereof for that purpose from time immemorial without let or hindrance. The said right and privilege has been expressly recognised and conceded by the Provost, Magistrates, and Town Council of Dunfermline, as their minutes bear, and the said farm was let by them to the pursuer subject to this existing right on the part of the community.' The pursuer's agent forthwith, on 8th July 1905, wrote to the Town Clerk, enclosing a print of the open record, drawing special attention to the defenders' averments above quoted, and desiring to be informed whether or not the latter were substantially true. He further intimated that if the defence in question was sustained, the pursuer would 'look to the town to recompense him for all loss and damage he may suffer or has suffered,' and that if in the course of that process it should appear that the Town Council had done anything to derogate from their lease to him, he would hold them liable to pay all the expenses incurred by him in that action and those for which he might be found liable. This was, I think, a very plain intimation to the Town Council that if the alleged public dedication,—which they had never admitted, although they 'were not disposed to question' it,—should be established, as it was by my interlocutor of 3rd July 1906, the pursuer would (a) claim an abatement of his rent, as he is now doing, and also (b)

seek payment from the town of all expenses incurred by him in the action then pending. On 12th June 1905 the Property Committee 'agreed to recommend that the council do not enter appearance to defend the action'; and on 11th July the Town Clerk replied to the pursuer's agent that 'the Town Council have not at any time conferred right on the inhabitants of Townhill or others to fish in the loch and burn; . . . but they took no steps to prevent fishing.' This non-committal reply did not, as it appears to me, fairly meet the pursuer's request to be informed whether or not the defenders' averments were, to the Town Council's knowledge, well founded. The pursuer was still left without any knowledge as to how long the public had been in use to fish, or any means of knowing whether they had or had not a legal right to do so. On 2nd November 1905 the pursuer's agent again wrote to the Town Clerk, intimating that a proof had been allowed by the Lord Ordinary as to the alleged right of fishing, and that the pursuer did not intend to reclaim against the interlocutor, but that he would do so if the Town Council so desired, at their expense; and repeating in clear language the position taken up in his earlier letter of 8th July. The answer of the Town Council was to the effect that they did not intend to do anything in the matter. The proof in the action was led, and judgment pronounced by me on 3rd February 1906, adversely to the pursuer. On 7th February the pursuer's agent sent to the Town Clerk a copy of the interlocutor and relative opinion, intimated once more his claim in respect of eviction, and added that 'the pursuer does not at his own hand propose to reclaim the judgment, and if the town desire to appear in the process now, or if they wish my client to proceed further at the town's expense, I shall be glad to hear from you within the next few days.' On 13th February the Town Clerk replied that 'the council decided to take no action in the matter.' The interlocutor of 3rd February was accordingly allowed to become final. The present action was raised on 1st May 1906. In this state of matters I think that the pursuer has a good claim against the defenders for the taxed amount of the expenses incurred by him in the former action. Two of the accounts which have not been taxed, must, of course, be remitted for taxation. The pursuer's account for the expenses of the defenders in *Dougall v. Lowe and Others* has been taxed. There were, so far as I am aware, no additional or separable expenses incurred by the pursuer's unsuccessful attempt to prove that the individual defenders were in fact trespassing upon his farm, even on the assumption that they were entitled by law to fish in a legitimate and proper manner; and I see no reason for incurring further expense by remitting that account for retaxation. Subject to these observations, the pursuer's claim upon this head of the case appears to me, as I have said, to be well founded. I think that, looking to the defenders' attitude towards him, he was

entitled at their expense, to attempt to vindicate his rights when these were challenged by third parties; and it seems plain that his claim for abatement of rent, which I have held to be well founded in principle, is based upon, and could only be decided after a determination as to the alleged right by the inhabitants to fish in the loch and burn. The subject-matter of the first action appears to me to lie at the very root of the present case; and both actions arise out of the fact that the pursuer has not obtained full possession of the subjects let to him by the defenders. The defenders relied upon the case of *Ovington*, 1864, 2 Macph. 1066, and the earlier decision in *Colt*, 1859, 21 D. 1108, *rev.* 1860, 3 Macq. 833. I do not think that these cases apply here at all. In *Ovington*, for example, the pursuers had settled a claim of damages against them by the representatives of a deceased employee, and then sued the defenders for relief upon the ground that the chain supplied by the latter—through the breaking of which the deceased had been killed—was defectively made. The Court held the action to be irrelevant. A sufficient ground for that judgment was afforded by the fact that the payment made by the pursuers in the first instance was one which they were not under any legal obligation to make; but it was also pointed out by the Court that 'the original claim and the claim of relief must be, to a certain extent at least, commensurate and must be founded upon the same kind of liability.' I do not think that there is anything in the law so laid down to prevent the present pursuer from recovering as specific damages the expenses to which he was put in the former action. He was, in my opinion, entitled to fight that action to an issue, because the present defenders would neither do it for him nor distinctly admit or deny the existence of the public right in question. I therefore think that the former case was a logical and necessary prelude to his claim in this action."

The defenders reclaimed, and argued—(1) The pursuer was not entitled to recover from the defenders the expenses incurred by him in the former action, because there had been no repudiation or denial by them of the claim as there was in *Straiton Estate Company, Limited v. Stephens*, December 16, 1880, 8 R. 299, at 317-318, 18 S.L.R. 187; *Hammond & Company v. Bussey*, 1887, L.R., 20 Q.B.D. 79; *Agius v. Great Western Colliery Company*, [1899] 1 Q.B. 413. Moreover, the action was not laid on breach of the contract of lease but on breach of warrandice; and accordingly the pursuer could not obtain as damages the expenses of the former litigation, because the principle of *Hadley v. Baxendale*, 1854, 9 Ex. (W. H. & G.) 341, which was applied in the cases cited above and in *Kincaid & Company v. Neilson & Sons*, 29th July 1903 (decided by Lord Low, not reported), had no application to a case of warrandice, but could merely obtain indemnification for eviction—*Welsh v. Russell*, May 19, 1894, 21 R. 769, 31 S.L.R.

611. The pursuer was not bound to bring the former action and to resist the claim made, and having chosen to undertake that risk without any special bargain he was not entitled to recover the expenses so incurred—*Bell's Prin.*, sec. 895; *Inglis v. Anstruther*, February 26, 1771, M. 16,633; *Stephen v. The Lord Advocate*, November 30, 1878, 6 R. 282, 16 S.L.R. 195. (2) The pursuer had in the former action raised two questions, the one concerning the right of the public of Dunfermline to fish with its accompanying right of access, and the other concerning ordinary trespass unnecessarily committed. The present defenders had no liability in the latter question, and as they could not have been called upon to take pursuer's place in the former action the claim of relief now made was incompetent. At any rate it was incompetent as regards the expenses incurred in the latter question—*Caledonian Railway Company v. Colt*, August 3, 1860, 3 Macq. 833, *per* Lord Chelmsford at p. 848; *Ovington and Others v. M'Vicar*, May 12, 1864, 2 Macph. 1066.

Argued for the respondent—As the Town Council would neither affirm nor deny the rights claimed by the public, merely stating they had not given the fishers permission, the pursuer as tenant, especially as the only reservation was where written permission had been given to fish, was entitled to protect himself. The issue in the former action had really been whether the defenders in that action were entitled to fish and to have access for that purpose, or whether they were trespassers. The pursuer having been evicted was entitled to repayment of his expenses in his unsuccessful action as damages for eviction in breach of the contract of warrandice—*Agius v. Great Western Colliery Company (cit. sup.)*, *Hammond & Company v. Bussey (cit. sup.)*, *Kincaid & Company v. Neilson & Sons*, July 29, 1903, *per* Lord Low (not reported); *Bell's Lectures*, 3rd ed., vol. i, p. 217-219. The doctrine relied on in *Bell's Principles*, sec. 895, was not supported by the case there cited for it, *viz.*, *Inglis v. Anstruther (cit. sup.)*. The pursuer could not until there had been judicial eviction have proceeded against the Town Council—*Bell's Prin.*, sec. 895; *Ersk. Ins.*, ii, 3, 30 and 32.

At advising—

LORD ARDWALL—... [After narrative quoted *supra*, and after stating the gist of the Lord Ordinary's interlocutor] ...—It is against the Lord Ordinary's findings with regard to the third of the petitory conclusions, namely, that for the defenders' and pursuer's expenses in the former action, that the defenders reclaim.

I entirely agree with the view that the Lord Ordinary has taken of this matter. The lands were let to the pursuer with no other reservation as regards fishing except of the right of the defenders and those having written authority from them. When he discovered that great numbers of the community of Dunfermline without any such written authority trespassed over

his lands in pursuance of this alleged right of fishing, he naturally considered this a derogation from his rights under the lease and a partial eviction from the peaceable enjoyment of the subjects let. But on his complaining to the defenders they would neither admit nor deny the right of members of the community to fish in the said burn and loch, and as I have above explained, under reference to the Lord Ordinary's opinion and to the minutes and correspondence, they practically told him that he must defend himself. He did so, and in my opinion he was entitled to do so with the view of vindicating his rights which were challenged by third parties. It was necessary for him to do so if he were to make a claim for abatement of rent, because, as I shall afterwards point out, he could not make such a claim successfully unless it had been judicially determined that he had suffered eviction. If the defenders had frankly admitted—and it was a fact which was within their knowledge or ought to have been—that the community had exercised from time immemorial a right of fishing in the said burn and loch, the pursuer could then have brought his action directly against them, but I do not think he was safe to do so, looking to the attitude they adopted, without first endeavouring to protect himself against eviction. If he had been successful in that attempt he would have had no claim against the Town Council, because there would in that event have been no eviction, but having failed in the action without any fault on his part in the conduct of the process or otherwise, he is in the position of a person who has suffered eviction, and who is therefore entitled to recompense.

The Court had the benefit of an able argument on both sides with regard to the law applicable to this claim for expenses in the former action, and I propose shortly to examine the authorities on the point.

There is no doubt of the general principle, that where there has been a breach of contract the party who suffers from such breach of contract is entitled to damages against the party responsible for it, and such damages include not only the actual damage immediately and directly caused by the breach of contract, but also all damage arising out of it which might have been expected by the parties to the contract naturally to arise out of a breach, and such damage has been held to include, *inter alia*, legal expenses reasonably incurred in consequence of the breach of contract. (See the case of *Straiton Estate Co., Limited v. Stephens*, 1880, 8 R. 299; *Hammond*, 1887, L.R., 20 Q.B.D. 79; and *Agius v. Great Western Colliery Co.*, [1899] 1 Q.B. 413.)

But it was maintained that where an action was founded on warrandice the expenses incurred in unsuccessfully defending a claim involving total or partial eviction from the subject warranted are not recoverable from the granter of the warrandice. For this proposition the defenders relied almost entirely upon certain dicta contained in section 895 of Bell's

Principles. That passage begins with stating that "Warrandice is not an obligation to protect, but only to indemnify in case of eviction." Taken by itself this would seem to imply that the indemnification must include expenses reasonably incurred in defending the claim; but then the author goes on to say—"Thus there is no action of warrandice till judicial eviction, unless the ground of demand be unquestionable and proceeding from the fault of the seller." This passage, again, would seem in doubtful cases, such as the present, to justify judicial resistance to the claim, as until that was settled the obligation of warrandice would not arise. But further on the author continues thus—"The person bound in warrandice is entitled to have notice of the claim or attempt to evict, but the buyer is not bound to enter into a litigation in defence of the right provided he give due notice. If he undertake the defence without notice and omit the proper plea the seller will be free. The seller is not bound to defend against the claim, and if the buyer choose to do so while the seller declines it, and fails, he is not entitled to the expense of litigation."

It is the last clause that is founded on by the defenders. But the authority cited by Professor Bell for the clause is the case of *Inglis*, 1771, M. 16,633. Now in that case the action concluded for reimbursement of expenses incurred in defending a commission to a certain office. The challenge was unsuccessful, so there was no eviction, and it was held that eviction is the sole foundation for an action upon warrandice, and that the pursuer had no claim for reimbursement of expenses, as there had been no eviction. It is manifest that this decision does not support the doctrine laid down in the text. But the doctrine laid down in the decision is, I think, quite undoubted, and is supported by other decisions, the reason of it being that if an unfounded claim is made against the subject warranted, that is not a matter for which the granter of the warrandice is in any way to blame; it is only the misfortune of the person who is in possession of the subject that a third party has preferred an unfounded claim against such possession, and he has no recourse for expenses except against the person who attacked him, in the usual way. This doctrine was also laid down in the case of *Stephen v. The Lord Advocate*, 1878, 6 R. 282, where the Crown having by a separate action of declarator succeeded in having its right to the use of certain piers and accesses sustained, was held not responsible for the expenses of an unsuccessful defence which its tenant had maintained in the Small Debt Court in answer to a claim for the use of these piers and accesses, the ratio of this decision also being that the Crown having given the tenant possession of a subject from no part of which he had been legally evicted, they were not liable for the loss caused to him by a groundless but successful action having been brought against him and wrongly decided in the Small Debt Court. Neither of these de-

cisions militates against the pursuer's claim for expenses in the present action; indeed, they seem in a negative sense to support it, because the ground of refusing expenses in both cases was that there was no eviction, and therefore no loss for which the granter of the warrandice could be held in any way to blame. In the case of *Welsh v. Russell*, 1894, 21 R. 769, it was held that there was a case of partial eviction similar in some respects to what occurred in the present case, the eviction there consisting in the imposition of a right-of-way upon a heritable subject purchased by the pursuer, but otherwise the case does not seem to have much bearing on the present, the pursuer's case being there thrown out because he claimed compensation for total eviction and not damages for partial eviction.

In Erskine's Institutes, ii, 3, 32, in dealing with the question of warrandice, the following passage occurs—"Yet intimation of distress is not precisely necessary, for the purchaser's right of recourse continues competent to him without such intimation, if evidence is not brought that in the action of eviction he had submitted to some irrelevant defence or subjected himself to an incompetent means of proof" (*Clerk*, 23rd June, 1681, M. 16,605); and the same author in his Principles, ii, 3, 13, states the law as follows—"Regularly the grantee, when the eviction is threatened, ought to intimate his distress to the granter that he may defend the right granted by himself; but though such intimation should not be made, the grantee does not lose his right of recourse, unless it shall appear that in the process of eviction he has omitted a relevant defence or subjected himself to an incompetent means of proof."

The last passage quoted from Bell's Principles, it seems to me, is itself obscure, is not supported by the decision on which it professes to be founded, is at variance with the doctrine that warrandice is a contract of indemnity, and with the general doctrine applicable to breaches of all contracts.

It falls, however, to be noticed that the passage quoted from Professor Bell comes under the general head of "sale of land." His doctrine of warrandice as regards leases is to be found in sections 1208 and 1253 of the Principles, where he deals with the implied warrandice contained in the contract of lease, the warrandice being that the subject exists, shall be made effectual to the tenant and fit for its purpose, and, so far as I know, an action of damages for breach of such warrandice in leases covers all loss caused by the breach, unless it be indirect and consequential.

A passage from Professor Montgomerie Bell's Lectures on Conveyancing, 3rd edition, pp. 217 and 219, and in the first edition at p. 207, was quoted by the counsel for the pursuer to show that in the view of that able and experienced practitioner the party evicted was entitled to the expenses of an unsuccessful defence. He says—"It will be observed that the party against whom eviction is threatened has in some views a

better claim if he is unsuccessful than if he prevails, because though unsuccessful in defending the subject he will get his expenses, besides the value of the subject evicted, from the granter of the obligation of absolute warrandice, whereas if successful he indeed preserves to himself the subject but does get his expenses;" he then proceeds to give some very good advice as to what the granter of the warrandice should do in such a case.

It appears to me that the true result of the authorities is that if an action of eviction be properly defended, and if, notwithstanding such defence, eviction follows, the granter of the warrandice will be liable, not only for the direct loss caused by the breach of warrandice, but for all expenses properly and reasonably incurred in defending the rights which he and the grantee alike had an interest to defend.

It was strongly contended by counsel for the defenders that at all events full expenses in the other action should not be allowed because it was said there were two branches of that action, one concerning the right of the public to fish, and their presence on the pursuer's farm in pursuance of that right, and the other concerning ordinary trespass unnecessarily committed by persons founding on their fishing rights, but which trespass was not necessary for the exercise of these rights; and it was maintained that according to the Lord Ordinary's judgment the pursuer had not made out a case of damage by trespass, and therefore that all the expenses applicable to that part of the case should be disallowed, and that this should be done by way of modification of the total expense.

The Lord Ordinary disregarded this argument, and I think he has done rightly. In the first place, the witnesses who spoke to the latter branch of the case were necessary to the former part, and indeed it is no easy matter, as a question of fact, to say when what may be called legitimate trespass ended and illegitimate trespass began; and in the second place it is certain that both kinds of trespass arose from the alleged right of fishing which the Lord Ordinary has found to exist.

For these reasons I do not think that any useful distinction can be drawn between the one part of the expenses and the other, and having regard to what was the origin of the whole proceedings I do not think the pursuer should be deprived of any part of his expenses.

I accordingly propose that the Court should adhere to the Lord Ordinary's interlocutor of 8th January 1907 reclaimed against, and find the defenders liable to the pursuer in expenses since the date of the said interlocutor, and remit the account thereof to the Auditor to tax and report to the Lord Ordinary, with power to the Lord Ordinary to decern for the taxed amount thereof, and remit the cause to the Lord Ordinary to proceed therewith.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD STORMONTH DARLING was absent.



The Court adhered to the interlocutor of 8th January 1907 reclaimed against.

Counsel for the Pursuer (Respondent)—  
 M'Clure, K.C.—A. M. Anderson. Agent—  
 John Stewart, S.S.C.

Counsel for the Defenders (Reclaimers)—  
 Scott Dickson, K.C.—Murray. Agents—  
 Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 23.

SECOND DIVISION.

[Lord Salvesen, Ordinary.]

MACKENZIE v. CLUNY HILL HYDRO-  
 PATHIC COMPANY, LIMITED.

*Reparation—Master and Servant—Liability of Master for Wrongful Act of Servant—Relevancy of Averments—Hydro-pathic Company—Manager—Forcible Detention of Guest without Good Reason.*

A lady brought an action of damages against a hydro-pathic company, averring that following upon a dispute between her and another lady staying in the establishment, the company's manager requested her to come to his private room, where the other lady and her husband were, and having got her there refused to allow her to leave until she had apologised to the lady, and forcibly detained her for a period of fifteen minutes against her will.

Held that a relevant ground of action had been stated against the hydro-pathic company.

This statement of law approved by Lord Lindley in *Citizens Life Assurance Co. v. Brown*, [1904] A.C. 423, at pp. 427-428, adopted by the Lord Justice-Clerk and Lord Stormonth Darling:—“Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.”

Mrs Martha G. Breeze or Mackenzie brought this action against the Cluny Hill Hydro-pathic Company, Limited, in which she sued for £400 damages. (At the same time she raised a separate action against Mr Robertson, mentioned *infra*, in which the Lord Ordinary allowed an issue in which she obtained an award of damages.)

She averred—“(Cond. 2) On or about 19th August 1906 the pursuer was residing at the defenders' hydro-pathic, Forres, owned by the defenders, who are a limited company. The manager thereof at said date was Thomas M'Nair, who was entrusted by the defenders with the management of the hydro-pathic, and the supervision of the comfort of the guests in the defenders' hydro-pathic. (Cond. 3) Late in the evening of the date in question the defenders' said manager went to the recreation room, where pursuer was, and requested her pres-

ence in his private room, saying that a lady who was ill wished to see her, and in accordance with the said request the pursuer went to the said private room. The pursuer went to the said room by request of the said Thomas M'Nair, believing, as was the fact, that in making the said request he was acting as the defenders' manager. (Cond. 4) When the pursuer arrived in the said private room she found there a Mr and Mrs Robertson, of 2 Lily-bank Gardens, Hillhead, Glasgow, who were her fellow-guests in the Hydro-pathic. The said Mrs Robertson had for some reason or another unknown to the pursuer conceived an ill-will against her. There were also present Mrs M'Nair, wife of the said Thomas M'Nair, and the said Thomas M'Nair. The pursuer was detained for a considerable period against her will in the said private room, and an assault was committed upon her by the said Alexander Robertson. The said Alexander Robertson also slandered her by calling her a low woman, and alleging she had previously caused disturbances 'here.' The pursuer endeavoured to leave the manager's room. She put her hand on the handle of the door, and the said Alexander Robertson then stepped between her and the door, and struck her hand from the handle. Mr and Mrs Robertson then both placed themselves against the door to keep it shut. The pursuer then pointed out to the defenders' manager that she was being forcibly detained in the said room, and asked him to see that she was allowed to leave, but this the said manager refused to do. The said manager, for some fifteen minutes, then aided and abetted the Robertsons in preventing the pursuer from leaving the said room in manner aforesaid. The said manager neither ordered nor even requested the Robertsons to let the pursuer out, nor did he ring the bell or take any other steps open to him to have the pursuer's detention ended. Had the defenders' manager requested the Robertsons to allow the pursuer to leave the room the pursuer believes and avers they would have done so. Had the manager summoned assistance by ringing the bell, or in any other way, assistance would have been forthcoming and the pursuer's detention ended. Although the pursuer was anxious to leave the said room, and so expressed herself to the defenders' manager, she was nevertheless detained and prevented from leaving the said room for a considerable period (about fifteen minutes) by the said manager, who said he would not allow her to leave the room till she had apologised to Mrs Robertson for slamming a door in her face, a thing she, the pursuer, had never done. . . . (Cond. 5) In asking pursuer to go to his private room, and in detaining her there against her will as aforesaid the defenders' manager was acting within the scope of his employment, and in the supposed furtherance of the defenders' interests. He had no right in the circumstances to induce the pursuer to go to his room when he knew as he did that the Robertsons had an ill-will towards