

that you have no alternative but to bring in a verdict of guilty as libelled, though it is open to you to add such recommendation as you think proper.

The jury found the panel guilty as libelled, with a recommendation to mercy. He was sentenced to death.

Counsel for the Crown—The Lord Advocate (Ure, K.C.)—W. Mitchell, A.-D. Agent—Sir W. S. Haldane, W.S., Crown Agent.

Counsel for the Panel—Kemp. Agent—T. E. Gilbert Taylor, Solicitor.

COURT OF SESSION.

Tuesday, September 23.

BILL CHAMBER.

[Lord Johnston.

SCOTT PLUMMER v. BOARD OF AGRICULTURE FOR SCOTLAND.

Landlord and Tenant—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7 (11)—Compensation to Landlord—Application for Appointment of Arbitrator to Fix Compensation where Order Constituting New Small Holdings has not Fixed Fair Rent.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), enacts—section 7 (9)—that where in pursuance of a scheme for the formation of new holdings the Board of Agriculture fail to agree with the landlord, the Board may apply to the Land Court “to make an order or orders for the constitution of one or more new holdings on the land in accordance with such scheme,” and that—section 7 (10)—after giving “all parties having a right or interest in the land an opportunity of being heard”—section 7 (11)—“The Land Court shall thereafter determine, with due regard to the provisions of the Landholders Acts, and by order or orders declare—(a) in respect of what land, if any, specified in the scheme, one or more holdings for new holders may respectively be constituted, and up to what date the power to constitute them otherwise than by agreement may be exercised; (b) what is the fair rent of each new holding. . . .” Section 7 (11) further provides that the Land Court may require the Board to pay compensation to the landlord or tenant of the land which is to be taken for new holdings, if they are of opinion that thereby damage or injury will be done to the letting value of such land: “Provided always that where, within twenty-one days after receipt from the Land Court of an order under this subsection, a landlord or a tenant, as the case may be, intimates to the Land Court and to the Board that he claims compensation to an amount exceeding

£300, and that he desires to have the question whether damage or injury entitling him to compensation as aforesaid will be done, together with the amount of such compensation (if any) to be settled by arbitration instead of by the Land Court, the same shall be settled accordingly; and, at any time within fourteen days after the said intimation, failing agreement with the Board as to the appointment of an arbiter, it shall be lawful for him to apply to the Lord Ordinary on the Bills for such appointment. . . .”

In accordance with a scheme put forward by the Board of Agriculture, the Land Court made an order which authorised the constitution of certain new holdings on a farm belonging to A, and further authorised the Board to enter into possession thereof and to execute all necessary works thereon, but did not fix the “fair rent” for the new holdings.

Held (per Lord Johnston) that an application by A for the appointment of an arbiter to determine the amount of compensation due to him by the Board was premature until the fair rent of the holdings had been fixed by the Land Court, and petition *dismissed*.

Observations as to the duties imposed by the Act on the Land Court and the Board of Agriculture with regard to the constitution of new holdings.

The provisions of the Small Landholders (Scotland) Act 1911 material to the case, other than those quoted in the rubric, are sufficiently set forth in the opinion of the Lord Ordinary (*infra*).

This was a petition presented in the Bill Chamber by Charles Scott Plummer, proprietor of Sunderland Hall, Selkirkshire, which includes, *inter alia*, the farm of Lindean, for the appointment of an arbiter under section 7 (11) of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49).

The petition set forth—“That on or about 27th January 1913 the Board of Agriculture for Scotland applied to the Scottish Land Court for the approval of a scheme for dividing up the said farm of Lindean into small holdings, in terms of the Small Landholders (Scotland) Acts 1886-1911. That the petitioner lodged answers and appeared before the said Court and opposed the said scheme. That on 18th April 1913 the said Court pronounced an order whereby, after excepting certain parts of the said farm, they approved of the taking of the remainder of said farm for the purpose of forming small holdings and pronounced certain consequential findings. That the said order was intimated to the petitioner on 23rd April 1913, and on 10th May 1913 the petitioner’s agents intimated to the said Board of Agriculture that he claimed a sum in excess of £300 as compensation in respect of the formation of said small holdings. That the petitioner and the said Board have failed to agree as to the nomination of an arbiter to decide the amount of compensation due to the petitioner.”

The order of the Land Court authorised the constitution of thirteen new holdings on the farm, and empowered the Board to enter on the land and to execute all works requisite to the erection or adaptation of buildings, or for division, preparation, or adaptation of the land, or the provision of drainage or water supply, with a view to the constitution of new holdings thereon and the registration of new holders in respect thereof. The order, however, contained no determination fixing the fair rent of the proposed new holdings.

LORD JOHNSTON—It is much to be regretted that the procedure in this, which I believe to be the first, case, or at least the first to which public notice has been drawn, of compulsory taking of land for the purpose of constituting new land holdings of the class contemplated by the Small Landholders Act 1911, has miscarried, with results which must be serious either to the owner of the land proposed to be taken or to the Board of Agriculture, and most probably to both.

The responsibility unfortunately rests with the Land Court, to which the execution of the Act is committed, and which in pronouncing an order (of 16th April 1913) authorising the constitution of new holdings on the farm of Lindean belonging to the petitioner in the county of Selkirk in accordance with an approved scheme, under section 7 *et seq.* of the Act, has omitted to perform one or more of the essential duties imposed upon it by the Act, and though apparently urged to take the matter up so as to remedy the defect, has for six months refused or at least delayed to do so.

So far as I am concerned with the Act of 1911 in regard to the present question, it may be described as an engine for the creation of new small holdings, which, subject to a system of registration provided by the Act, shall be held on a statutory tenure, in many respects approaching that of crofting holdings in the Highlands and adjoining counties under the former Crofters Acts. It is not so expressed, but is I think tacitly and of necessity contemplated, that such new holdings are in the main to be carved out of lands at present let on lease or otherwise devoted to agriculture. And therefore their creation must, at any rate where the compulsory powers of the Act are resorted to, involve a grave interference with estate management, and cannot be effected without the destruction of capital sunk in years past by the owner or his predecessors to secure the present beneficial occupation of the land. I desire to say that I am not concerned with any criticism of the object of the Act and the expectations of its framers. I am only concerned with its provisions for the attainment of its objects, which are both difficult of application, or rather of correlation, and are, I am afraid, likely to be found somewhat insufficient. Such new holdings may be created by agreement, but provision is also made for their being created compulsorily. The initiative lies with the Board of Agriculture, with whom

also is to a large extent the administration. But the executive is with the Land Court, without whose intervention the Board of Agriculture is powerless. Now where an existing and going farm is to be broken up for the purpose of constituting new holdings on an approved scheme—and this is the general conception of a compulsory constitution under the Act—inevitably the interests of the owner of the land are affected, and very possibly injuriously affected, for it is seldom that an existing system that has cost money to create can be replaced by a totally different system also costing money to create without the loss of some of the capital already sunk, and without affecting the value of the original product of that capital. And, moreover, there are special provisions relating to the new holdings when constituted under the Act, viz., those relating to the vacating of holdings and the resumption of holdings, sections 17-19, imposing heavy obligations on the landowner, involving the payment of compensation, in the event of a scheme for constitution of new holdings breaking down after having been put in motion, for works, &c. executed in pursuance of the Act which on their face makes the change intended to be affected under the Act a very serious thing to the owner of the land. It is therefore not to be supposed that the Act does not make some provision for protection of the owner's interests, though that these provisions are as difficult to work as they are to construe is forcibly illustrated in the present case. The root of the difficulty is in the correlating, in point of order and of time, what has to be done by the Board of Agriculture, by the Land Court, and by the landowner in order to give effect to the apparent intention, so far as it goes, of the statute to protect and compensate the last mentioned.

The machinery provided by the Act is this. Under the heading "powers to facilitate the constitution of new holdings," which are practically all comprised in one section, section 7 with its various subsections, the Act (section 7 (2)) imposes on the commissioner for small holdings the duty to report to his Board the demand for small holdings in any district, the land available to meet the demand, the conditions under which the land is presently cultivated, and the employment which it affords. He is then (section 7 (3)) to negotiate with the owners of such land with a view to the adjustment of a scheme, and, (section 7 (4)) failing agreement such land may be made available for the registration of new holders, compulsorily, as prescribed in the after sub-sections.

There follows a provision of some practical importance (section 7 (7)), viz., where with a view to or as incidental to the registration of a new holder or holders in respect of any land the Board are of opinion that assistance should be provided "for the purpose of dividing, fencing, or otherwise preparing or adapting the land, making occupation roads, or executing other works . . . or erecting or adapting a dwelling-house or

dwelling-houses or other buildings, or for any similar purpose, the Board may provide such assistance by way of loan or (except as regards dwelling-houses or other buildings) by way of gift and subject to such conditions as they may prescribe."

Then section 7 (9) proceeds to provide the compulsory powers. After submitting to the landowner a scheme for constitution of new holdings, if the landowner does not agree with him the commissioner is to report to the Board, and the Board may, after notice and hearing parties, intimate to the landowner that it is in the public interest that new holdings should be constituted on his land in accordance with the scheme, and that they propose to apply to the Court "to make an order or orders for the constitution of one or more new holdings on the land in accordance with such scheme, to be occupied by new holders at a fair rent and upon such terms and conditions not inconsistent with the Landholders Acts as the Land Court consider just; and thereafter to apply accordingly."

It will be noted that the fair rent and the terms and conditions are essential features of the order. Accordingly section 7 (11) says that the Land Court shall determine "and by order or orders declare" four things—(a) In respect of what land specified in the scheme new holdings may be constituted, and up to what date the power to constitute them compulsorily may be exercised; (b) the fair rent for each new holding; (c) what land embraced in the scheme should be excluded; and (d) whatever else may be necessary for the purpose of making the scheme effective, and of adjusting the rights of parties.

But the order or orders for the constitution of one or more new holdings, while it or they must determine these four things, is and are subject to this proviso, viz., that where the Land Court "are of opinion that damage or injury will be done to the letting value of the land to be occupied by a new holder or new holders, or of any farm of which such land forms part, . . . or to any landlord . . . in respect of any depreciation in the value of the estate of which the land forms part, in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such an amount as the Land Court determine," with right to the landowner to demand arbitration if his claim exceeds £300.

Now this right conferred upon the landowner is severely hedged about, and it is the time limitations imposed which to a large extent create the difficulty in this case and will equally do so in future cases. Before any claim can arise to the landowner the Court must have pronounced an order under sub-section (11) determining the four matters enumerated, for it is made incumbent on him within twenty-one days of receipt of such an order to intimate to the Court and to the Board that his claim exceeds £300, and his demand for arbitration, and it is impossible that he should do

so until he knows at least the determination of the Court upon these four matters and all of them. Again, he is limited to fourteen days to agree with the Board on an arbiter, and failing that to apply to the Lord Ordinary on the Bills for the appointment of one, but whose award is only to be binding on the Board in the event of the scheme being proceeded with, that is to say, the Board are to be free to accept or reject the award, the landowner is bound by it.

And, again, the arbiter is limited to three months from his nomination for the issue of his award, failing which the matter reverts to the Land Court. Such drastic limitations of time bear hardly on the landowner in any case, when the complication of elements, statutory and otherwise, bearing upon his claim of compensation is kept in mind, and make it at least essential that every item of these elements is clearly determined and ascertainable before the order of the Court, which is the starting-point of these limitations, is issued.

Lastly, so far as section 7 is concerned, it is provided (sub-section 13) that upon an order providing for the constitution of new holdings being issued, the Board may proceed to make it effective by entering on the land, carrying out works, and otherwise as may be required (due compensation to such an amount as may be agreed, or as, in case of dispute, may be determined by the Land Court, being made for surface damage), and may negotiate with one or more duly qualified applicants with a view to their registration as new holders in respect of the land." It will be noted that the power or right of entry arises automatically on the issue of the Court's order and requires no intervention of the Land Court.

Now one thing which the Act wholly omits to do—and this complicates the landlord's position when he comes to formulate his claim—is to make any direct provision for what is to happen during the transition from, as is the case here, a single holding fully equipped to a state of parcel holdings for which new holders are to be found, and which have got to be equipped when they have been found. I say that the Act wholly omits to make any such direct provision; but, in self-defence, inasmuch as the Small Landholders Act of 1911 not only creates an entirely new departure but incorporates by reference, and codifies with amendment but without re-enactment, that is to say, codifies by reference, the whole crofter legislation of the last twenty-five years, contained in six Acts of Parliament, I must disclaim any certainty that such indirect provision may not exist embedded somewhere in some of the Acts. I can only say that I have not found, and that my attention has not been directed to, any such. And there is another thing which acts, and that seriously, in the same direction, namely, the doubt that there must be in the minds of all concerned until the arbiter pronounces his award, and I am inclined to think possibly much longer, as to whether the scheme is to proceed.

The registration of new holders is provided for by section 15.

I shall subsequently refer to section 17, which provides for the amendment of the law as to vacant holdings.

Now in these provisions there are, as I think I have already indicated, a great many points which act and react upon one another. They must all pretty well get through the gate abreast. And this I think has been inadequately appreciated by the Land Court.

The situation created by the Act is this. The Board apply for a compulsory order. In granting it the Court must, *inter alia*, fix a fair rent and fix conditions of let. The Court cannot do this without knowing a great deal more than merely what area is proposed to be affected and how it is proposed to be divided. They must have the details of a fully prepared scheme, showing what the Board propose to do in the way of preparing and developing the land for new holdings, and particularly in the way of adapting existing buildings, and possibly also what they propose to do under section 7 (7) in the way of assisting new holders.

If the Court grant an order, three things immediately follow—*First*, the Board may at once enter on possession to make effective their scheme by carrying out necessary works, &c. *Second*, the landowner is put, under very drastic limitations, to make and prosecute his claims for compensation. *Third*, the Board, if the proposal is to be worked out in a business-like way, must at once begin to negotiate with tenants.

It is, in the first place, impossible that the landowner can proceed to state and prosecute his claim for compensation, even so far as the potential damage to him is realised by the statute, unless he has before him at least all that the Court has had before it when it came to pronounce its order.

In the second place, it is, I think, essential that the Board, though the statute contemplates that they will at once on the issue of the Court's order enter on possession, have before them before they do so the arbiter's award of compensation to the landowner. For they can hardly enter on such possession to make their scheme effective until they have determined to proceed with it, and they have *locus poenitentiae* at least until the issue of the award, nay, further.

And in the last place, unless it be assumed that the Board enter on their scheme with a fasciculus of willing tenants on lease, the Board cannot begin to negotiate with applicants until all the data for determining whether they are to proceed with the scheme are not only before them but before such applicants.

Now in this relation there is one matter which is left indefinite, viz.—What amounts to proceeding with the scheme, and therein in what the constitution of a new holding consists, and presumably there is some relation between such constitution and the Board "proceeding" with the scheme. The order of the Court does not constitute the holding. It is merely an order for, which must mean empowering,

the constitution. Section 7, subsection (11) (a), clearly shows that it is the Board who are to constitute the holding or holdings, for the time to be allowed them to do so is to be limited. But what amounts to constitution is left indeterminate. The statute jumps over constitution and passes to registration, and it is not clear whether the constitution is the Board's determining to proceed with the scheme or the act of the Board in entering on possession of the land, or an agreement with an applicant (as to which the Act is throughout silent) or the registration of an accepted applicant. This is of importance, for the Act makes no direct provision for the compensation of the landlord for loss of the use of his land while the Board is making up its mind whether it is to proceed with its scheme, is executing works, and is negotiating with tenants. Further, it is not made clear whether the Board, if it constitute one holding, must constitute all *unico contextu*, or whether it can constitute one or more holdings and abandon its scheme *quoad* the rest; and if it does, what redress the landowner has whose compensation is *ex hypothesi* already fixed on the footing that the whole scheme is to come to maturity. For I cannot see that section 17 would be applicable. These last considerations may not be directly germane to the present question. But they at least give point to the conclusion that everything is to be included in the landowner's claim and the arbiter's award for which the statute provided that the landowner is to be compensated.

The least, however, that the Act contemplates to that end is, I think, that the compensation to the landowner must be settled before the Board can determine whether it will proceed with its scheme; that before the landowner can be called on to claim or the arbiter to award, however hypothetical the situation may be, both must know not merely the four things which by section 7 (11) the Court are called on to include in their order, but the whole details of a comprehensive scheme which cannot be altered after the issue of the Court's order, or at any rate without abandoning and beginning again.

I have no full information about the scheme of the Board and how far it is complete. But I do know that the excuse of the Land Court for stopping short was stated to be that the fair rent cannot be fixed until the Board either settle or do something, I am not sure which or what. I also know that the Board, though they have unfortunately ousted the landowner and taken possession, say that they can do nothing either in the way of developing the holdings or dealing with applicants until they know the fair rent, the conditions, and the amount of compensation. And the landowner justly says that he cannot proceed to arbitration until everything is settled between the Board and the Court. And there the *impasse* has arisen and has remained now for six months. The Court having visited the estate has laid its hand on the land and has approved a scheme of division—for that is all that its

order ostensibly does—has assumed to give authority to the Board to enter, and has gone to other work and makes no further move. The Board by way of avoiding the *impasse* asks that, as the landowner, impelled by the statutory limitations on him, has presented *ob majorem cautelam*, on 22nd May 1913, a petition for nomination of an arbiter, on which, however, in the circumstances no step has yet been taken, I should at once make an appointment, even *invito* the landowner. I think that that would not clear the ground even if it was competent, and that it is at present wholly incompetent.

The Land Court must return and complete its duty under the statute, and then it will be time for the landowner to apply for the appointment of an arbiter.

When the Land Court pronounces the statutory order, and not till then, will the Board be automatically and legally entitled to enter into possession and will not require such an order as that on which they have acted, but which the Land Court had no statutory authority to pronounce. A perusal of that portion of the order of 18th April 1913, viz., "And further find and declare that the applicants (*i.e.*, the Board of Agriculture) are entitled, as from the date of intimation of this order by the sheriff-clerk, to make this order effective by entering on the said farm of Lindean other than the portions thereof above expressly excluded, and executing and carrying on all works which may in their judgment be required for the erection or adaptation of dwelling-houses, steadings, offices, or other buildings thereon, or for the division, preparation, or adaptation of the land or for the provision of drainage or water supply or for similar purposes, with a view to the constitution of new holdings thereon, and the registration of new holders in respect thereof, reserving all claims of damage or compensation competent to the respondents or any of them," shows how entirely the situation has been misapprehended, while what follows, viz., "Appoint the applicants to lodge with the principal clerk within fifteen days after intimation of this order (1) an amended plan showing the number of holdings and the boundaries and acreage of each holding which they propose should be constituted on the said farm of Lindean other than the portions thereof above expressly excluded; and also (2) a statement specifying such terms and conditions, if any, as they desire shall be made by the Court terms and conditions of the tenure of the said holdings, and allow the respondent C. H. Scott Plummer, Esq., to lodge a statement with regard to these matters, if so advised, within ten days thereafter, and with these findings continue the application for further procedure"—shows how inchoate the matter was even in the face of the order.

I have some difficulty as to how best to deal with the petition—to continue or to dismiss it.

It is premature at present—though looking to the terms of the Land Court's order I think it was justified—and I think it

better to dismiss it. There is no knowing how the position may develop meanwhile, and whether or not a similar petition will ultimately be Mr Scott Plummer's proper course. But the situation having been created, in consequence of the action of one public body, by another public body, I think that the private individual is entitled in the circumstances, and in this the first case in which it has been necessary to consider the compulsory provisions of the Act, to his expenses against the former. It might have been otherwise if the respondents had not sought to take advantage of the petition in their own interest.

An interlocutor was pronounced dismissing the petition but finding the respondents the Board of Agriculture liable in expenses.

Counsel for Petitioner—J. A. Christie.
Agents—Myrne & Campbell, W.S.

Agent for Respondents—Sir Henry Cook, W.S.

Thursday, October 30.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

GAUNT v. M'INTYRE.

Reparation — Negligence — Property — Defective Condition of Premises—Lighting of Common Stair—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxviii), sec. 361—Relevancy.

The Glasgow Police Act 1866, sec. 361, enacts—"The proprietor or proprietors of every land or heritage having an access by a common stair shall provide and maintain suitable gaspipes and brackets, lamps and burners, in such common stair to the satisfaction of the inspector of lighting . . . and placed as the said inspector . . . may direct, . . . and the Magistrates and Council shall cause them to be supplied with gas and lighted during the same hours as the public street lamps, and for each burner the proprietor or proprietors shall pay to the Magistrates and Council such sum not exceeding ten shillings per annum as the Magistrates and Council shall from time to time direct, and the said sum shall be recoverable by the proprietor from the occupiers in proportion to their respective rents, and be deemed to be a debt recoverable as and in the same way as rent."

An action by the visitor of one of the tenants of a tenement house in Glasgow against the owner of the tenement for personal injuries alleged to have been caused by the defective lighting of a common stair, held *irrelevant*, on the ground that, there being at common law no duty on the owner of a tenement to light a common stair, the pursuer did not aver that the owner had failed to fulfil the statutory duty