COURT OF SESSION.

Thursday, June 11.

FIRST DIVISION.

[Lord Anderson, Ordinary.

M'MARTIN AND OTHERS *v.* ROBERTSON.

Landlord and Tenant—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49)—"*Landholder*"—"*Holding*"—*Right to Exclusive Use of Holding.*

Certain yearly tenants whose holdings were let during part of the year to the tenant of an adjacent farm for wintering his sheep, applied to the Land Court to be declared landholders in the sense of the Small Landholders (Scotland) Act 1911. The Land Court having pronounced decree as craved, they brought an action against the grazing tenant to have him interdicted from grazing his sheep on the land in question on the ground that their registration as "landholders" entitled them to exclusive possession of the holdings.

Held that they were not entitled to exclusive possession, and interdict *refused.*

Malcolm M'Martin and others, landholders, Cuiltrannoch, Lawers, Perthshire, *complainers,* brought a note of suspension and interdict against Alexander Robertson, Lawers Hotel, Lawers, *respondent,* in which they craved the Court to interdict the respondent from placing sheep or other stock, or pasturing sheep or other stock, upon (1) certain portions of the lands known as the Cuiltrannoch Crofts, in the parish of Kenmore, Perthshire, of which the complainers were in occupation as landholders registered in the books of the Land Court, or (2) the common grazing lands appertaining to said Cuiltrannoch Crofts.

The complainers pleaded—"(1) The complainers, being landholders under the Small Landholders (Scotland) Act 1911, in virtue of awards or findings of the Land Court, are entitled to exclusive occupation and control of their holdings, and interdict in terms of the first branch of the prayer should therefore be pronounced as craved. (4) The right asserted by the respondent being inconsistent with the statutory obligations of the complainers, and destructive of their rights under the Landholders (Scotland) Act 1911, interdict should be granted as craved."

The respondent, *inter alia,* pleaded—"(1) The complainers have no title to insist in the present note, in respect that, upon a sound construction of the orders founded on, the grazing rights of the respondent upon the lands of the complainers, and upon the common hill pasture pertaining thereto, are not affected thereby either expressly or by implication, and, *et separatim,* in respect that the complainers have not obtained any order either (*a*) dealing with the adjustment of the rights of parties in regard to the grazings in question, or (*b*) making regulations for the use of such grazings under one or other of the relative provisions of the statute thereanent, and the note should therefore be refused."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (ANDERSON), who on 22nd January 1914 granted interdict as craved.

Opinion.—". . . Prior to 31st May 1913 the complainers were in possession of certain holdings as yearly tenants of the Marquis of Breadalbane, the owner of said lands. The complainers also had on the same title, and as pertinent to their holdings, rights of common grazing over adjacent pasture land known as the 'Cow Park,' which provided pasturage for eleven cows. The complainers possessed their holdings under a common law conventional lease, as Perthshire did not come within the scope of the Crofters Acts 1886-1908.

"The respondent became tenant at Whitsunday 1907 of the hotel and farm of Ben Lawers, which belong to the Marquis of Breadalbane, at a yearly rent of £160. The duration of the lease is ten years. The third article of the lease provides that the respondent shall have right to the sheep wintering of Cuiltrannoch Crofts, with entry to the same at 15th November and removal therefrom at 15th April in each year during the lease. I was informed that the respondent, in virtue of the said stipulation, has been in use to winter sheep during the foresaid period, not only on the crofts proper possessed by the complainers, but also on the common grazings to which they have right as pertinent thereto. It is to be noted that the respondent is not limited as to the number of sheep he may pasture on said holdings and grazings. He now maintains that in virtue of the foresaid lease, and notwithstanding the decrees which the Land Court has pronounced in favour of the complainers, he is entitled to graze an unlimited number of sheep between 15th November and 15th April on the complainers' holdings and common grazings. His defence to the present action is that his rights under the foresaid lease have been impliedly reserved to him by the Land Court in the decrees which have been pronounced. The complainers, on the other hand, maintain that the Land Court has conferred on them an exclusive right to their respective holdings and shares of the common grazings, impliedly abrogating any rights the respondent had therein by virtue of said lease, and entitling them to interpel him from pasturing his sheep on said holdings or grazings.

"The action thus raises a question of importance under the Small Landholders Act of 1911, which was exhaustively and ably debated in the procedure roll.

"The matter falls to be decided on a consideration of what was done by the Land Court in connection with the complainers' applications for small holdings. The question is—What rights has the Land Court conferred on the complainers? The decrees of that Court are ambiguous in this sense, that the respondent's rights are neither expressly reserved nor expressly abrogated. The decrees are therefore subject to construction. It was not suggested that it

was incompetent for me to construe these decrees. On the contrary, I was asked to do so by both parties, who each founded on the decrees of the Land Court as substantiating their respective contentions. I am of opinion that I am entitled, and indeed bound, to interpret the judgments of the Land Court and endeavour to ascertain their meaning.

"Each party, as I have stated, appealed to the applications to the Land Court and to the decrees following thereon; and each party further appealed to the provisions of the Act of 1911 as justifying the interpretations which they respectively put on the decrees of the Land Court.

"The appropriate method of considering the question seems to me to be first of all to examine the Act of 1911, to ascertain from its provisions the nature and extent of the right conferred upon landholders, and how the common law rights of landowners have been modified and limited; thereafter to ascertain, from a consideration of the terms of the applications and decrees, what rights have been granted to the complainers by the Land Court. . . .

"I now proceed to consider the main question which I have to decide, and, in the first place, direct my attention to the purpose and provisions of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, c. 49).

"It is common knowledge that the political motive of this Act was to endeavour to bring about the repopulation of depopulated rural Scotland. The statute, with this end in view, offers inducements to those who are desirous of earning a livelihood by cultivating the soil. The main inducements are that small holdings will be provided, with fixity of tenure, and at a fair rent.

"The Act applies to the whole of Scotland the principles of the Crofters Act 1886-1908, which were confined to certain counties of Scotland. The tenure set up by the Act is similar to that established by the Crofters Acts, the size of the holding and limit of rent being slightly extended by the Act of 1911.

"The landlord's freedom to contract is materially circumscribed by the provisions of the Act. There is limitation in this respect—(1) as to the subject of the lease, for a landowner may be compelled, if the Board of Agriculture so determine, to turn his land into small holdings; (2) in the matter of rent, which falls to be fixed, not by agreement of parties, but by the Land Court; and (3) in the matter of duration of the tenancy, which, in a question with the landlord, is perpetual, provided the conditions of the tenure are observed by the landholder. These conditions are not to be made the subject of agreement, but are prescribed by the Act. The landlord's right of interference with the landholder in connection with his holding is also strictly defined by statute. Section 10 of the 1911 Act refers on this matter to section 1 of the Crofters Holdings (Scotland) Act 1886, which sets forth in subsection 7 the occasions on which, and the purposes for which, a landlord shall have right to enter upon a holding. By section 12 of the 1911 Act the landlord is empowered to enter on a holding for the additional purpose therein specified of using for any estate purpose any springs of water rising on the holding.

"Although the tenure is perpetual in a question with the landlord, it is defeasible at any time in the option of the landholder on his giving one year's notice to the landlord. If the landholder renounces the tenancy or is removed by the landlord under the provisions of section 19 of the 1911 Act, or section 2 of the 1886 Act, he is to be entitled to compensation for permanent improvements suitable to the holding which he or his predecessors of the same family have executed or paid for. The holding which the Act of 1911 deals with appears, from the terms of section 2, to be a holding held either (*a*) as a crofter holding, *i.e.*, in perpetuity, or (*b*) from year to year, or (*c*) on lease for a succession of years. The Land Court can only grant a holding of the character contemplated in the statute, and cannot attach any other conditions to the grant than the statute has prescribed (section 7). In other words, the statute seems to impose upon the Land Court the duty of granting to a prospective landholder the exclusive use of a small holding from one year's end to another, and under the conditions of tenure prescribed by the Act. The presumption is that in the present case the Land Court has discharged its statutory duties in these respects. But the respondent says that the Land Court has done otherwise. He maintains—(1) that the holdings granted by the Land Court have in effect been granted for only seven months in each year; (2) that thus the landholder does not have the exclusive use of the holding; and (3) that conditions have been imposed on the landholder burdening his tenure, which are not sanctioned by the statute.

"The respondent maintains that these points can be made good by reference to the applications and decrees and to certain sections of the 1911 Act. I therefore proceed now to examine the applications and decrees and the particular sections founded on by the parties.

"The respondent's counsel submitted a general argument applicable to both the holdings proper and the common grazings, but it may be convenient to consider these separately:—

"1. *As to the holdings proper.*—There is a specialty with regard to M'Martin's application which I shall deal with later. The other three applications do not present many features of difference, and I take that of Duncan Ferguson as typical. It is to be kept in mind that there was here no compulsory taking of land, and that the applicant was an existing yearly tenant desirous (1) of obtaining a holding as a landholder, and (2) of having fixed a first fair rent. The applicant accordingly, on page 1 of the application, applies to the Land Court to do these two things. He describes the holding which he desires as Cuiltrannoch,

Lawers; he sets forth on page 3 the acreage of that holding, states that he is interested in $\frac{1}{11}$th of the 42 acres of common grazing, that he has 1 cow of stock, that the rent he is then paying as yearly tenant is £4, 3s. 6d., and refers to the permanent improvements made by himself and the landlord respectively. On the second page he sets forth a statement of facts in these terms:—'My holding, for which I pay a full year's rent, may be said to be mine for only seven months of the year, as a neighbouring farmer has the right from the landlord to winter as many sheep as he likes on the Cuiltrannoch ground from November 15th till April 15th, without making any allowance to the tenant. At one time the Cuiltrannoch crofters had sheep and right of hill grazing, but were deprived of both; at that time the wintering was given over to the farmer.'

"The specialty in the application of M'Martin to which I have alluded is to be found on page 1 of his application. In describing his existing holding he states that it has been held by him from 'April 15th till November 15th,' and adds at the conclusion of the application—'the tenant of Ben Lawers farm has a right of grazing his sheep on the land occupied by me from November 15th till April 15th of each year, so that I get no return for that period.'

"The decree of the Land Court pronounced in Ferguson's application is in the following terms:—'Edinburgh, 31st May 1913. The Land Court, having heard parties, inspected the holding and resumed consideration of the application; find that at the inspection of the holding the respondent's factor, Mr Logan, waived the objections stated in the answers marked A/39 and consented to the applicant being declared a landholder, therefore find and declare of consent that the applicant is a landholder within the meaning of the Acts, and having considered all the circumstances of the case, holding and district, including any permanent or unexhausted improvements on the holding, and suitable thereto, executed or paid for by the applicant or his predecessors in the same family, Have determined and do hereby fix and determine that the fair rent of the holding is the annual sum of Two pounds five shillings sterling; find no expenses due to or by either party. 'N. J. D. KENNEDY.
'ROBT. F. DUDGEON.
'NORMAN REID.'

"The respondent founds upon the terms of the applications, especially that of M'Martin, and of the statements of facts embodied in the applications. He contends that the applicants recognised the existence of the respondent's rights, were willing that these rights should be perpetuated, and indeed, invited the Land Court to do so. The 'grievance' of the respondent's rights was referred to, not in order that the Land Court might annul the grievance, but that it might weigh with the Court on the question of rent. I am unable to take this view of the meaning of the applications. I think reference was made to the rights of the respondent because of their burdensome character, and as a reason for making the applicants landholders, and thus abrogating these rights. The applicants knew that they were the real occupiers of the land during the whole twelve months of each year, but M'Martin desired to emphasise the grievous character of the burden of the respondent's rights by the manner in which he described his holding, and the others do the same thing in a less emphatic fashion.

"The respondent points out that the rents were reduced by the Land Court, and argues that this necessarily implies the continuation of the existing burden. There might be substance in this argument had the existing rents been fair rents, but the existing rents were conventional rents, and I therefore am unable to draw the inference suggested by the respondent. The respondent referred specially to the following sections of the Act of 1911:—Section 14. This section deals with the adjustment of rights of parties interested by the Land Court. It does not cover the case of the respondent's interests if the effect of the decree of the Land Court is to annul these rights. Section 24. This section refers to regulations of common grazings, and will fall to be dealt with when that part of the case is reached. Section 25 (2). I am unable to see that this sub-section has any bearing on the question. Section 26 (1). This section was quoted to show that a common grazing may be held in common by landholders and those who were not landholders, but it does not touch the *de quo queritur*, to wit, whether the respondent has now a share in the common grazings. The complainers made two pointed references to the Act of 1911. They referred to section 10 (1), which makes it imperative for the landholder to cultivate his holding and enables him to cultivate it by way of horticulture, fruit growing, &c. How could the landholder cultivate in one of the latter methods and so avoid the statutory irritancies if the respondent is to have right to what is practically exclusive possession for five months in the year?

"The complainers also argued on sections 10 and 12 of the 1911 Act that the landlord's rights of interference with the holding are strictly defined by statute and are not to be extended beyond what the Acts allow. If the landlord may qualify the decrees of the Land Court in the manner suggested, by continuing the burden which formerly existed, why should he not be equally entitled to impose additional burdens and so make the Act a dead letter? It is noticeable that the Legislature has thought it necessary in section 32 of the 1911 Act when dealing with statutory small tenancies to provide (sub-section 6) that landlord and tenant may agree as to conditions of tenure, and (sub-section 9) that the terms and conditions of the renewed tenancy shall be those of the determining tenancy. If the present case had been that of a small tenancy, the terms of that last sub-section would have been directly applicable; but there are no similar provisions applicable to landholders.

"2. *As to common grazings.*—The respondent founded specially on section 24 (1) and (2) in connection with the matter of com-

mon grazings. I have already dealt with sub-section (2), which is concerned with intimation to persons interested in the grazings. The first sub-section has reference to the regulation by the Land Court of the rights of common grazing, and it seems to me that that Court may at any time prescribe regulations for the exercise of pasture rights of those who, in point of fact, hold the grazings in common. This sub-section, however, does not seem to touch the question I have to decide, to wit, whether the respondent has now any interest in the common grazings. The complainers make two answers to the respondent's claim as to the common grazings, which seem to me to be conclusive. They say (1) that the respondent's claim is destructive of the notion of common grazings. He asserts a right to pasture thereon an unlimited number of sheep between November and April. He thus puts forward a claim to exclusive possession of the grazings during that period. (2) The complainers show from the productions that the 42 acres of common grazings are divided into 11 parts or shares; that the applicants have received from the Land Court right to 6/11ths thereof; that the remaining 5/11ths are divided between David Kennedy, smith, and Duncan M'Lellan, landholder. There is thus no share of the common grazings left for the respondent.

"On the whole matter I am of opinion that the complainers have an exclusive right to their respective holdings and pertinent common grazings, and are therefore entitled to decree of interdict against the respondent as craved."

The respondent reclaimed, and argued—The Lord Ordinary was in error in holding that the effect of the decree of the Land Court was to abrogate his (the reclaimer's) rights under his lease. What the Land Court had done was to fix a fair rent for the holdings in view of his grazing right during winter. *Esto* that the complainers were "landholders," that did not give them exclusive possession of their holdings. As to the meaning of the word holding, reference was made to the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) secs. 2 (1) and 26 (1), and also to the Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sec. 30. [Counsel were stopped by the Court.]

Argued for complainers—The complainers as landholders were entitled to exclusive use of their holdings. *Esto* that the proprietor had a right of entry thereon that was only for certain specified purposes—Crofters Holdings (Scotland) Act 1886 (*cit.*), sec. 1; Small Landholders (Scotland) Act 1911 (*cit.*), sec. 12.

LORD PRESIDENT—This appears to me to be a singularly clear case. The complainers are crofters on the Breadalbane estate, and they made applications to the Land Court for the purpose of having it declared that they were landholders under the statute of 1911, and ought to have a fair rent for their holdings fixed. They set out that they had certain rights of grazing upon certain ground which extends to some 42 acres, and that the tenant of the Lawers Hotel had the winter grazing on the ground on which they enjoyed the summer grazing. They did not ask that his grazing rights should be impaired or that their grazing rights should be enlarged. The Land Court having heard their applications decreed that they were landholders in the sense of the statute, and fixed fair rents which, as we are told, were substantially smaller than the rents originally paid.

It is now contended that the effect of the declaration that they were landholders and ought to have their rents reduced was to deprive the tenant of the Lawers Hotel of his winter grazing. That, I think, is an accurate and precise statement of the contention of the complainers. As so stated, it bears its own contradiction upon its face. The tenant of the hotel was no party to the proceedings, for the extent of his grazing rights was not in question. The Lord Ordinary, I observe, concludes his note by saying that "On the whole matter I am of opinion that the complainers have the exclusive right to their respective holdings and pertinent common grazings, and are therefore entitled to decree of interdict against the respondent as craved." I am of opinion that they have an exclusive right to their holding, that they have now exactly the same right to the common grazing which they enjoyed anterior to their application, and by necessary consequence that they are *not* entitled to the decree of interdict sought here.

I propose to your Lordships that we should recall the Lord Ordinary's interlocutor and refuse the application for interdict.

LORD JOHNSTON—I concur with your Lordship. The point at which I think the Lord Ordinary has gone wrong is in not attending to what the holding, with which the Land Court were dealing, and with which he had to deal, was. The application was not an application for the fixing of a new holding or an increased holding, but merely for declaring an existing holding to be a landholding under the statute. The measure of such holding, therefore, was clearly the measure of the existing rights of the applicants, and it is difficult to understand how the Lord Ordinary persuades himself that the duty of the Land Court, having declared that existing holding to be for the future a landholding under the Act, and fixed a fair rental, was to do anything more.

I think that the complainers here (the applicants below) are entirely put out of Court by the terms of their own application. They disclaim any question of altering the holding, and they table distinctly that the rights which they held were subject to a certain right of grazing by somebody else. Now they maintain that this right of grazing is by the action of the Land Court on their application abrogated. It seems to me that their attitude here is not in good faith considering the terms in which they applied to the Land Court.

LORD SKERRINGTON—I agree with your Lordships.

LORD MACKENZIE was absent.

The Court recalled the Lord Ordinary's interlocutor and refused the note.

Counsel for Complainers—Anderson, K.C. —Dykes. Agent—James Scott. S.S.C.

Counsel for Respondent—Wilson, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Thursday, June 11.

FIRST DIVISION.

[Lord Anderson, Ordinary.

CLARKE *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation — Negligence — Relevancy — Alternative and Inconsistent Averments.

In an action of damages for personal injury the pursuer averred that while preparing to alight from one of the defenders' cars she was, owing to the car having given a sudden jerk forward, thrown to the ground and injured, and that the jerk was due either to the fault of the conductor in failing to give the signal to the driver to stop, or, alternatively, to the fault of the driver in failing to notice the conductor's signal.

Held that the action was *relevant.*

Process — Proof — Precognoscing of Witnesses—Facilities.

In an action of damages against a tramway company the pursuer averred that when preparing to alight from a car she was thrown to the ground and injured owing to the fault of the conductor, or alternatively of the driver. After the record had been closed—the case being continued for adjustment of issues—the pursuer moved for an order on the defenders to disclose the names and addresses of the conductor and driver of the car for the purpose of precognoscing them.

Held that the Lord Ordinary was in error in refusing the motion.

On 21st November 1913 Mrs Annie Batchelor or Clarke, wife of John Clarke, 11 Johnstone Terrace, Edinburgh, *pursuer*, with the consent and concurrence of her husband, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £200 damages for personal injury sustained through being thrown to the ground while preparing to alight from one of the defenders' cars, owing, as she alleged, to the fault of the defenders.

The pursuer averred — "(Cond. 2.) At or about 11 o'clock p.m. on Thursday, 30th October 1913, the pursuer, accompanied by her said husband, boarded one of the defenders' tramway cars at Hope Park Terrace, Edinburgh, with the intention of being conveyed to High Street, Edinburgh. (Cond. 3.) At or near the corner of North Bridge Street and High Street there is in North Bridge Street a stopping-place fixed by the defenders at which all cars proceeding north along North Bridge Street stop for the purpose of setting down and picking up passengers, and it was the intention of the pursuer and her husband to alight at said stopping-place. (Cond. 4.) As the tramway car upon which they were travelling approached said stopping-place the pursuer and her husband rose from their seats inside the car and proceeded to the rear platform of said car in order to be in readiness to alight whenever said car should stop at said stopping-place. When pursuer and her husband arrived at said rear platform the car was already slowing down, and the pursuer took hold of the handrail at the window of said car with her right hand in order to steady herself. Instead of the car coming slowly to a stop, as it should have done, suddenly and without warning the car started violently forward with a jerk which threw the pursuer off her feet from said platform and precipitated her from said car on to the street. . . . (Cond. 6.) The said accident was occasioned by the fault of the defenders, or of those for whom they are responsible. It is the duty of the driver of a car to obey the signals of the conductor with regard to passengers desiring to alight. It is the duty of the conductor of a car to be on the rear platform of said car, or at least to be in such a position on said car when it is approaching a stopping-place that he can see whether there are any passengers who desire to alight. It is also his duty when approaching said stopping-place to keep a careful look-out to see whether there are any passengers on said car who desire to alight at said stopping-place, and to signal the driver to stop when there are such passengers. On the night in question the conductor of said car, as the car approached said stopping-place, was inside the car at the end next the driver making entries in an official book kept in a receptacle at said end of the car. The pursuer and her husband were seated near the rear end of the inside of said car, and when they proceeded from their seats to the rear platform for the purpose of alighting at said stopping-place the conductor was so engrossed in making entries in said book that he negligently and in breach of duty failed to observe that the pursuer and her husband had left the inside of said car for the purpose of alighting. He made no attempt to ascertain by personal inspection whether there were any passengers on the rear platform desiring to alight, and gave no signal to the driver to stop at said stopping-place. The driver of said car had slowed down the car and was preparing to bring the car gently to a stop, but when he received no signal to stop he instantly and with a violent jerk set the car in motion again, when the pursuer had been led to believe by the slowing down of said car that the said car was about to stop. The pursuer was thus taken unawares, and the accident resulted. The