Thursday, June 8.

SECOND DIVISION.

YEAMAN (MONCUR'S *CURATOR BONIS*) *v.* GREWAR.

Landlord and Tenant—Small Holding—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (3) (*d*) *and* (*f*)—*Agricultural Holdings (Scotland) Act* 1908 (8 *Edw. VII, cap.* 64), *sec.* 35—*Land Used for Growing Fruit.*

Held that the lessee of 10 acres of land on which he had planted raspberry bushes, the fruit from which he sold mainly to jam-makers and sometimes outright to fruit dealers, was not entitled to have himself declared a "landholder," the land being a market garden and excluded from the operation of the Small Landholders (Scotland) Act 1911 by sec. 26 (3) (*d*).

Opinions that the land was excluded from the operation of the Act by section 26 (3) (*f*) as it was not a "holding" within the meaning of the Agricultural Holdings (Scotland) Act 1908.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 26 (3), enacts—"A person shall not be held an existing yearly tenant or qualified leaseholder under this Act in respect of—(*d*) any land being a market garden within the meaning of the Agricultural Holdings (Scotland) Act 1908, or . . . (*f*) any land which is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908. . . ."

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), sec. 35 (1), enacts—"In this Act, unless the context otherwise requires—. . . 'holding' means any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord. 'Market garden' means a holding cultivated, wholly or mainly, for the purpose of the trade or business of market gardening. . . ."

John Yeaman, solicitor, Alyth, as *curator bonis* of Miss Agnes Margaret Moncur, *appellant*, being dissatisfied with an Order of the Scottish Land Court pronounced in an application presented on 13th September 1913 by Adam Grewar, Corsehill, Blairgowrie, *respondent*, for an order (1) that he was entitled as from the term of Martinmas 1912 to exercise the rights of a landholder in and relating to the holding at Knockie Hill, Blairgowrie, then held by him on a written lease which expired at the said term, and (2) fixing a first fair rent for the said holding.

The Case stated—". . . 2. The said John Yeaman lodged answers in which he objected to the competency of the said application on the grounds, *inter alia*, (1) that the land to which the application related was a market garden within the meaning of the Agricultural Holdings (Scotland) Act 1908, and was therefore excluded from the operation of the Small Landholders (Scotland) Act 1911, by section 26 (3) (*d*) of the last-mentioned Act; (2) on the assumption that it was not a market garden within the meaning of the Agricultural Holdings (Scotland) Act 1908, that it was not a holding within the meaning of that Act, and was therefore excluded from the operation of the Small Landholders (Scotland) Act 1911, by section 26 (3) (*f*) thereof; and (3) that the applicant was not a qualified leaseholder as defined by section 2 (1) (iii) of the Act of 1911, in respect that he did not by himself or his family cultivate the holding in the sense of that sub-section. . . .

"3. The *facts* admitted or proved were as follows:—(1) By lease dated 5th and 12th November 1900 the late William Japp, solicitor, Alyth, then *curator bonis* for the said Agnes Margaret Moncur, let to the said Adam Grewar at the yearly rent of £51, 5s. for the space of twelve years from the term of Martinmas 1900 a piece of ground belonging to the said Agnes Margaret Moncur, situated near Blairgowrie, and known as Knockie Hill, measuring 10 acres 65 poles or thereby. The said lease contained a clause in the following terms—'It is hereby specially stipulated and agreed that the said land hereby let is not let and shall not be treated as a market garden under the Market Gardeners Compensation (Scotland) Act 1907, and the said tenant hereby accepts this let on that express condition as an agreement betwixt him and the landlord, any law or practice to the contrary notwithstanding, and in particular it is hereby agreed that the tenant thereof under this lease shall not at its termination possess any rights of compensation or removal conferred upon him by the aforesaid Act or any of such rights conferred otherwise upon market gardeners . . . Declaring always (notwithstanding any provision hereinbefore expressed) that no objection will be offered to the said Adam Grewar cultivating fruit and vegetables on the land hereby let or any part thereof if he be so minded;' (2) The applicant occupied the land let to him by the foregoing lease from the term of Martinmas 1900, but by feu-charter, dated 4th February 1902, the late Mr William Japp, solicitor, Alyth, who was then *curator bonis* foresaid, feued to the applicant 60 poles out of the said piece of ground, making the area held under the lease 10 acres 5 poles as from Martinmas 1901. The applicant occupied the said restricted area from the last-mentioned term down to the term of Martinmas 1912, when the lease expired, at the reduced rent of £49, 8s. 2d. . . . (3) During the whole period of the lease the applicant used the said holding of Knockie Hill for the purpose of growing raspberries. The entire holding is planted with raspberry bushes permanently set out. The applicant disposes of his raspberries mainly by selling them direct to jam-makers and sometimes by selling them outright to fruit dealers. He has never consigned them to commission agents for sale on his behalf. The applicant resides with his wife in a house in

the burgh of Blairgowrie. That house is situated within two miles of the holding of Knockie Hill. The applicant grows fruit on three other pieces of ground in the neighbourhood of his house, viz., (*a*) On 12¼ acres belonging to himself which were formerly rented at £46, 17s. 6d.; (*b*) on 8½ acres of glebe land, for which he pays an annual rent of £25, 10s.; and (*c*) on 2½ acres in the burgh of Blairgowrie, for which he pays an annual rent of £15, 15s. The applicant sells no fruit other than that grown on these holdings, except that he has had at times to buy in fruit to complete his contracts on account of shortages in his own crop. (4) The applicant devotes his whole time to growing fruit on said pieces of ground and selling the fruit grown there, and he has no other occupation. He personally purchases all the manures, canes, wires, stakes, &c., and disposes of the produce. The manures are applied by his foreman and workpeople strictly according to his instructions. During the fruit harvest the applicant is of necessity often absent from the holding in connection with the disposal of the crop. His time is occupied in attending to correspondence and telegrams regarding sales and dispatch of fruit. He personally superintends the dispatch of all his fruit to his different customers. He assists in the loading of the fruit barrels on the carts, and visits the railway station daily with regard to his consignments, and to arrange for the proper return of his empty barrels. During that period the foreman superintends the pickers, and has power to engage them and to dismiss them if unsatisfactory. These pickers are always paid by the applicant personally or by his wife. The applicant, although up in years, still takes part in the manual work of cleaning the ground, &c., but most of his time is necessarily taken up in superintending his hired labourers and in attending to sales, &c., as already mentioned. The applicant has no family, but for many years a niece resided with him and assisted him in the work. (5) The greater part of the permanent improvements on the holding have been provided or paid for by the applicant without receiving from the landlord any payment or fair consideration therefor."

The *Order* pronounced by the Scottish Land Court was—"Repel the objections stated in the answers for the respondent: Find and declare that the applicant is a landholder within the meaning of the Small Landholders (Scotland) Acts, 1886 to 1911, in and of the holding specified in the application; 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 thirty-three pounds sterling: Find the applicant entitled to expenses: Modify the same to the sum of five guineas, and decern."

Note.—"Adam Grewar, the applicant, became tenant of this holding at Martinmas 1900 under a lease which expired at Martinmas 1912. Part of the land so let was feued to the applicant as a site for buildings in February 1902. The area of the holding after deducting the portion feued is 10 acres or thereby, and the present rent is £49, 8s. 2d. By the terms of the said lease the applicant bound himself to 'cultivate the land in a husbandlike manner according to the rules of good husbandry as recognised and practised in the district,' it being expressly provided that no objection should be offered to the tenant's cultivating fruit and vegetables on the land let or any part thereof, but not so as to impoverish or exhaust the land. It was specially provided and agreed 'that the land hereby let is not let, and shall not be treated as a market garden under the Market Gardeners' Compensation (Scotland) Act 1897.' The land is and has been prepared for fruit growing and worked as a fruit farm since the beginning of the lease. There is no dispute that this holding satisfies the conditions of the Act of 1911 so far as limits of rent, area, and residence of the applicant within 2 miles are concerned. But it was argued that this land is not a 'holding' within the meaning of the Act on four separate grounds— . . . '2. That as the land is appropriated to growing fruit, particularly raspberries, "fruit growing" is not cultivation within the meaning of the Act of 1911. 3. That the land is wholly a market garden within the meaning of section 26 (3) (*d*) of the Act of 1911, and therefore excluded from the operation of the Act. . . .'

"2. The second objection is that fruit growing is not cultivation of land within the meaning of the Act of 1911. The argument is that cultivation should be limited to growing grain, potatoes, turnips, and the like. . . . We therefore see no ground why in section 2 (ii) and (iii) we should arbitrarily narrow down the expression "cultivate" so as to exclude from the operation of the Act of 1911 this holding, or any holding, because it is used for the growth of fruit, which is now a recognised purpose of husbandry. As an illustration of its recognition as a purpose of husbandry, we may refer to *Meux* v. *Cobley*, 1892, L.J., Ch. 253.

"3. In the next place it is objected that this land is a 'market garden within the meaning of the Agricultural Holdings (Scotland) Act 1908,' and therefore expressly excluded from the Small Landholders Acts by section 26 (3) (*d*) of the Act of 1911. For the definition of a market garden 'within the meaning of the Act of 1908' we turn to the interpretation clause, section 35 (1) of that Act, in which 'market garden' is declared to mean 'a holding cultivated wholly or mainly for the purpose of the trade or business of market gardening.' This definition is substantially taken from the Market Gardeners' Compensation Act 1897, section 6. In both Acts the essential character of a 'market garden' is that it is used for the purpose of the trade or business of market gardening. The question is, was this holding cultivated wholly or mainly for the purpose of such trade or business?

"On the evidence we are satisfied that this holding was not cultivated mainly, or at all, for the purpose of such trade or business. The applicant has never carried on the trade or business of a market gardener on this holding or anywhere else. He sells the produce of his holding in order to meet expenses and rent and make a livelihood, as agricultural tenants, whether fruit growers or not, ordinarily do. He does not sell, or hold himself out as selling, his fruit to the public, on his holding or off it. It is sold usually to wholesale buyers for boiling purposes, occasionally and to a small extent to retail dealers. We are satisfied that this holding does not fall under the exclusion enacted by section 26 (3) (*f*) or (*d*). Until this application was presented it had never occurred to the landlord that this land was a market garden. On the contrary, landlord and tenant had, as already mentioned, specially agreed in the lease that this land was not let, and should not be treated as a market garden under the Market Gardeners' Compensation Act 1897, now repealed. That Act was passed to put market gardens in a more favourable position as regards compensation for improvements than other agricultural holdings. Market gardens were within the Agricultural Holdings Act of 1883, but were not distinctively treated. This agreement being made after the commencement of the Act of 1897, excluded this holding from the special provisions in the Agricultural Holdings Act 1908 (particularly section 29), which come in place of the Act of 1897, and specially apply only to holdings (or parts of holdings) (*a*) which the parties have agreed in writing made after 1st January 1898, shall be let or treated as market gardens, or (*b*) which were before 1st January 1898 in use or cultivation as a market garden, and are treated under the Act as if there had been a written agreement after that date that they should be let or treated as a market garden. A market garden, though excluded by section 26 (3) (*d*) of the Act of 1911, is a 'holding' under the Agricultural Holdings Act 1908.

"4. The next objection, viz., that the applicant is tenant of three other pieces of land in the neighbourhood, which he also uses for fruit growing, has no substance. The applicant does not claim to be a landholder or statutory small tenant in respect of these other pieces of land. Whether he might have claimed one or two under section 26 (2) depends on facts not before us. The third appears to be glebe land, and therefore excluded from the Act of 1911 under section 26 (3). There is nothing at common law or in the Landholders Acts to prevent a person from being a landholder or statutory small tenant in a holding under these Acts, and also being or becoming proprietor or tenant under any different agricultural or other tenure of other lands. If the conditions laid down in the Act of 1911 are satisfied, the tenant becomes a landholder or statutory small tenant of his holding under and by force of these Acts."

The *questions* submitted were — "1. Are the subjects in respect of which the said application was made excluded from the operation of the Landholders Acts by virtue of their being a market garden within the meaning of section 26 (3) (*d*) of the Small Landholders (Scotland) Act 1911? 2. In the event of the preceding question being answered in the negative, are the said subjects excluded from the operation of the Landholders Acts in respect that they do not constitute a holding within the meaning of the Small Landholders (Scotland) Act 1911? 3. On the facts above stated were the Land Court entitled to hold that the applicant by himself or his family cultivated his holding within the meaning of section 2 (1) (3) of the said Act?"

Argued for the appellant—This was a market garden, and was excluded from benefiting by the provisions of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) by section 26 (3) (*d*). The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) explained what a market garden was in section 35, and conferred certain rights on the market gardener by section 29. Schedule III showed what market gardening was by showing the operations for which compensation could be obtained by market gardeners. Judged in all these ways this was a market garden, and the stipulation in the lease as to compensation proved that also. In the case of *Bishop* v. *Johnston*, C.S., 9th June 1915, agricultural and market gardening uses were clearly distinguished, because the Sheriff had allowed two years in which to bring land back to agricultural uses again, and the Second Division of the Court of Session altered the time to one year, otherwise acquiescing in the decision. If, however, it were held not to be a market garden, still it did not come within the Act, for the holding was not "cultivated."

Argued for the respondent—The definition in section 35 of the Agricultural Holdings (Scotland) Act 1908 (*cit.*) must be read along with section 29 (1) and (2). A holding was not a market garden unless it came under the privileges given to market gardens under the latter section. The conditions in sub-sections 1 and 2 of section 29 of the 1908 Act did not apply to this holding, and in any case the agreement between the parties was that it was not to be treated as a market garden. Again, a market garden should be the equivalent to a private garden, but the land in question did not bear the faintest resemblance to a private garden either in appearance, cultivation, or produce. Variety of things grown was of the essence of a garden—*Purser*, 18 Q.B.D. 818. In *Meux* v. *Cobley*, [1892] 2 Ch. 253, Kekewich, J., described how market gardens grew up near cities, and the description had no application here. Husbandry was equally applicable to a market garden as to a farm. Agriculture, horticulture, and forestry were three distinct things, none of which should be held to include the other without express provision — *Gilchrist* v. *Assessor for Lanarkshire*, 1898, 25 R. 589, *per* Lord Stormonth Darling, 35 S.L.R. 663. The

land not being a market garden was cultivated and formed a holding.

At advising—

LORD JUSTICE-CLERK — The question stated in this case is whether the holding of the applicant is a holding cultivated wholly or mainly for the purpose of the trade or business of a market garden. On the facts stated in the Case it appears to me that that question must be answered in the affirmative.

The whole area of the subjects, the extent of which is about ten acres, is used for the growing of raspberries, and these are disposed of by sale mainly to wholesale traders but partly also to retail buyers. In my opinion this is just a typical instance of a market garden, and it satisfies in all respects the definition of that term given in the Agricultural Holdings Act of 1908.

Accordingly the first question here, in my view, falls to be answered in the affirmative. This land being a market garden within the meaning of the Agricultural Holdings (Scotland) Act 1908 falls under section 26 (3) (*d*) of the Small Landholders (Scotland) Act 1911, and the applicant is therefore not a small landholder.

I am for answering the first question which has been submitted to us in the affirmative. If it had been necessary I should have been prepared to answer the second question in the affirmative, and the third question does not arise.

LORD DUNDAS—I am of the same opinion. I think this place is a market garden. If the Land Court had found in fact that it was not there might have been great difficulty in disturbing the conclusion at which they had arrived. But they have not done that; they have given us a conspectus of their views on the facts and the law, which with a study of the statutes for ourselves enables us to deal with the question of law as stated. Accordingly I think the first question must be answered in the affirmative. I may add that if it had been necessary to do so I should have been prepared to answer the second question in the affirmative upon the hypothesis postulated by it. On the third question it is unnecessary to express any opinion.

LORD SALVESEN — I am of the same opinion. We have the fact stated here that the entire holding is planted with raspberry bushes permanently set out. Now it is perhaps somewhat rash to attempt any definition of what constitutes a market garden. But I should think that a market garden is a piece of ground on which fruit or vegetables or flowers, or one or more of these classes of produce, are cultivated for profit. Mr Hamilton indeed argued that variety was of the essence of a garden, and therefore of a market garden. But it does not seem to me that it makes any difference if a man specialises in one particular kind of vegetable or fruit instead of cultivating a variety of these. I think a man may very well be a market gardener who grows only one kind of fruit or vegetables or flowers.

But that is not the ground upon which the Land Court have decided that this was not a market garden. Their view apparently is that this was not a market garden because its cultivator does not dispose of his produce to individuals but to a wholesale buyer and only occasionally to retail dealers. In my opinion that has nothing to do with the character of the holding, which cannot be affected by the manner in which the tenant disposes of his produce. In some localities it may be the best mode of disposing of the produce to sell to customers who come to the place; in other localities again, and with a larger holding, it may be the better plan to sell only to wholesale buyers.

A second ground on which the Land Court held that this was not a market garden was that the parties in their lease had stipulated that it should not be so treated for purposes of compensation, and in the note appended to their judgment the Court says that until this application was presented it had never occurred to the landholder that this was a market garden. In support of that proposition they found upon the lease. Now I think the lease is clear evidence to the contrary. It shows that both parties considered that this was a holding which was a market garden, and that the provisions of the Act with regard to compensation to a market gardener would apply unless they agreed to exclude it. Accordingly I draw the exactly opposite inference from the provisions of the lease to that which the Land Court drew.

Another point, which seemed more plausible and which was raised by Mr Hamilton, was that in law this could not be treated as a market garden because the tenant did not have all the legal privileges with regard to compensation given to market gardeners, and especially those which in the absence of stipulation the statutes would confer upon him. Again I think that the conception of a market garden is not a legal conception. It depends upon the mode, and entirely upon the mode, in which the soil is being cultivated.

For these reasons I concur that we must answer the first question in the affirmative, and that it is unnecessary for us to consider the second and third questions raised in the case.

LORD GUTHRIE—I agree. The tenant here says that this subject is not a market garden but that it is a fruit farm, and comes as such under the category of an agricultural subject. I think a case may arise in the future in which that question will have to be decided. I do not think it arises here either in respect of the size or any other characteristic of the subject or the method of carrying on the business. When it arises it may not follow that a proper fruit farm must be held to be within the statute. It may be that the proper result will be to hold that the Legislature did not have that in contemplation. But I do not think that question arises here.

The Court answered the first question of

law in the affirmative and found it unnecessary to answer the other questions.

Counsel for the Appellant—D.-F. Clyde, K.C. — MacRobert. Agents — J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Respondent—Macmillan, K.C.—Hamilton. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, June 9.

FIRST DIVISION.

[Lord Hunter, Ordinary.

ROBERT ADDIE & SONS' COLLIERIES, LIMITED *v.* SULLIVAN.

Mines and Minerals—Statutory Regulation of Mines — Timechecker — Procedure for Appointment—Coal Mines (Weighing of Minerals) Act 1905 (5 *Edw. VII, cap.* 9), *sec.* 1 (2), (3).

The Coal Mines (Weighing of Minerals) Act 1905 enacts—Section 1 —"(2) A statutory declaration made by the person who presided at a meeting for the purpose of appointing a checkweigher . . . to the effect that he presided at that meeting, and that the person named in the declaration was duly appointed checkweigher . . . by that meeting, shall be forthwith delivered to the owner, agent, or manager of the mine, and shall be *prima facie* evidence of that appointment. (3) Where the checkweigher . . . was appointed by a majority ascertained by ballot . . . the declaration shall so state, and if he was not so appointed, then it shall state the names of the persons by whom or on whose behalf the checkweigher . . . was appointed."

The foregoing enactments are made applicable to the appointment of a timechecker under the Coal Mines Regulation Act 1908 by section 2 (2) thereof.

A meeting was held for the appointment of a timechecker, when it was decided to have a ballot. No further meeting was held, but after the ballot the person who had presided signed a declaration in which the candidate successful at the ballot was stated to have been appointed.

Held (*dub.* Lord Skerrington) that the procedure had been irregular, and that mineowners were entitled to refuse to recognise the appointee.

The Coal Mines (Weighing of Minerals) Act 1905 (5 Edw. VII, cap. 9), sec. 1 (2), (3), is quoted *supra in rubric.*

The Coal Mines Regulation Act 1908 (8 Edw. VII, cap. 57) enacts—Section 2 (2)—"The workmen in a mine may . . . appoint . . . one or more persons, whether holding the office of checkweigher or not, to be at the pit-head at all times when workmen are to be lowered or raised, for the purpose of observing the times of lowering and raising and the provisions of the Coal Mines Regulation Acts 1887 to 1905 relating to the checkweigher, and to the relations between the owner, agent, or manager of the mine, and the checkweigher shall, so far as applicable, apply to any person so appointed, as they apply to the checkweigher, with the substitution as regards appointment of the workmen in the mine for the persons who under those Acts are entitled to appoint a checkweigher." Section 1 (7)—"For the purposes of this Act the expression 'workman' means any person employed in a mine below the ground who is not an official of the mine (other than a fireman, examiner, or deputy), or a mechanic or horsekeeper, or a person engaged solely in surveying or measuring."

Robert Addie & Sons' Collieries, Limited, *complainers*, brought a note of suspension and interdict against Thomas Sullivan, 4 Crofthead Street, Uddingston, *respondent*, craving the Court to interdict him from "(first) entering upon the pit-head at the colliery known as the Viewpark Colliery of the complainers, situate in the parish of Bothwell and county of Lanark, and from taking part in or interfering in any way with the weighing of the output of the minerals at the said colliery, and from interfering with the hutches by which the minerals are raised at the said colliery, or with the weighing machines or apparatus for weighing the minerals thereat, and from exercising or pretending to exercise the office of checkweigher at said colliery, or doing any act as checkweigher or pretended checkweigher of the miners employed by the complainers thereat; and (second) from entering upon any part of the property or premises or works of the complainers at or near their said Viewpark Colliery."

The respondent pleaded, *inter alia*—"2. The respondent being entitled (*a*) as timechecker and (*b*) as inspector to enter upon the complainers' premises, the crave of the note should be refused and interim interdict recalled."

On 24th March 1915 the respondent was removed from the office of checkweigher by the Sheriff-Substitute at Hamilton (HAY SHENNAN), and he acquiesced in his removal, and did not now resist the first crave of the interdict.

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 18th February 1916 granted interdict against the respondent as checkweigher, and "(second) from entering upon any part of the property or premises or works of the complainers at or near their said Viewpark Colliery, except in so far as is necessary for exercising the functions of inspector on behalf of the workmen at said colliery, under section 16 of the Coal Mines Act 1911, and decerns."

Opinion.—"What I have to consider on the evidence is whether the respondent is timechecker at Viewpark Colliery and also inspector on behalf of the workmen in said colliery, or holds one or other of these offices. The respondent says that he was first appointed timechecker in 1910 by a meeting of the miners, and that although he never received any separate remuneration for so acting, he in the knowledge of the