LORD MACKENZIE—The only question which need be decided in this case is the first. The appellants contend that the Land Court had no power to fix a rent for the respondent's holding as from Whitsunday 1912, when the period fixed by the lease expired. Their argument is that from Whitsunday 1912 down to Whitsunday 1913 Clyne held by tacit relocation, and that there accordingly was for that year a legal tack the terms of which could not be altered. This contention appears to me not to be consistent with the provisions of the statute. The title of the respondent to the benefits of the Act (which came into operation on 1st April 1912) was that of a leaseholder, and under 2 (1) (*b*) a statutory small tenant. His title could not be that of a tenant from year to year at the commencement of the Act, because the ish stipulated in the lease was subsequent to the date when the Act came into operation. If, however, he was a leaseholder, the date of the "termination of the lease" means (under section 31 (1)) the expiration of the lease through the running out of the stipulated term of endurance, that is to say, Whitsunday 1912. This under section 32 (4) was the "determination of the tenancy." That expression was, in my opinion, used in that sub-section because different classes are being dealt with, and it was intended to cover termination of the lease in the case of the leaseholders, as well as the expiry of the year in the case of a tenant from year to year. The true construction of the Act is, in my opinion, this—On the Act coming into operation a right vested in the parties entitled under section 2, postponed only in the case of leaseholders to the termination of the existing lease, and in the case of tenants from year to year to the expiry of the year then current. The right which so vested could be made effectual by an application to the Land Court. To this extent the Act innovates upon the doctrine of tacit relocation. It is not necessary to decide what effect the doctrine of tacit relocation would have if the person in whom the right vested delayed, after the right had vested, in making his application.

In the present case I think it was not incompetent for the Land Court to do what they did.

The Court answered the first question of law in the affirmative, and found it unnecessary to answer the second question.

Counsel for Appellants—Murray, K.C.—Hon. W. Watson. Agents—J. & A. F. Adam, W.S.

Counsel for Respondents — Moncrieff, K.C.—T. G. Robertson. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, May 23.

FIRST DIVISION.

[Scottish Land Court.

CARMICHAEL *v.* MACCOLL.

Landlord and Tenant — Property — Statutory Small Tenant — Joint-Tenants — Application for Renewal of Tenancy — Competency — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 2 *and* 26 (8).

The joint-tenants of a holding whose lease had expired at Whitsunday 1912, but who had continued in possession, applied on 18th June 1912 to the Land Court for, *inter alia*, a renewal of their tenancy as from Whitsunday 1912.

Held (1) that the provisions of the Act with regard to statutory small tenants applied to joint-tenants, and (2), following *Clyne* v. *Sharp's Trustees* (*sup.*, p. 688), that the applicants were entitled to a renewal of the tenancy as from Whitsunday 1912.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 2 —"*Who to be Landholders.*—(1) In the Crofters Acts and this Act (hereinafter referred to collectively as the Landholders Acts) the word 'holding' means and includes . . . . (iii) As from the termination of the lease, and subject as herein after provided, every holding which at the commencement of the Act is held under a lease for a term longer than one year by a tenant who resides on or within two miles from the holding, and by himself or his family cultivates the holding with or without hired labour (such tenant, or his heir or successor, as the case may be, holding under the lease at the termination thereof being hereinafter referred to as a qualified leaseholder): Provided that such tenant from year to year or leaseholder (*a*) shall (unless disqualified under section twenty-six of the Act) be held an existing yearly tenant or a qualified leaseholder within the meaning of this section in every case where it is agreed between the landlord and tenant or leaseholder, or, in the event of dispute, proved to the satisfaction of the Land Court that such tenant or leaseholder, or his predecessor in the same family, has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without receiving from the landlord or any predecessor in title payment or fair consideration therefor; and (*b*) in every other case shall not be held an existing yearly tenant or a qualified leaseholder within the meaning of this section, but shall (unless disqualified under section twenty-six of this Act) in respect of the holding be subject to the provisions of this Act regarding statutory small tenants. . . . (2) In the Landholders Acts the word 'landholder' means and includes, as from the respective dates above mentioned, every existing crofter, every existing yearly tenant, every qualified

leaseholder, and every new holder, and the successors of every such person in the holding being his heirs or legatees."

Section 26 (8)—"The provisions of section two of this Act shall extend to and include joint-tenants, being existing crofters, existing yearly tenants, or qualified leaseholders; but not more than one person shall be registered as a new holder in respect of any holding, and (without prejudice to the continuance of a joint-tenancy through statutory successors) where at any time after the commencement of this Act a holding is held by a single landholder, or a holding which has been held in joint-tenancy ceases to be so held, it shall not be competent for more than one person to be a landholder in respect of such holding."

This was a Special Case stated by the Scottish Land Court in an application under the Small Landholders (Scotland) Act 1911, at the instance of Hugh Carmichael and another, joint-tenants of the farm of Mid-Achindoun, Lismore, *applicants*, against Duncan Maccoll, proprietor of the estate of Achindoun, *respondent*, for the opinion of the First Division of the Court of Session, in terms of section 25 (2) of the Act.

The Case stated—"1. Hugh Carmichael senior and James Carmichael were joint-tenants of the farm of Mid-Achindoun and one-sixth share of the island of Bernera, on the estate of Achindoun, Lismore, under a lease granted by Duncan Maccoll, the proprietor of the said estate. The stipulated period of endurance of the said lease was nine years from Whitsunday 1903, the yearly rent being £48. The stipulated period expired at Whitsunday 1912. Neither party gave notice of removal at the termination of the stipulated period of endurance. The tenants continued and continue in possession. Nothing was done by either landlord or tenants with reference to the tenancy until the application mentioned in next paragraph was presented.

"2. The Small Landholders (Scotland) Act 1911 came into force on 1st April 1912. On or about 18th June 1912 the said joint-tenants presented an application to the Scottish Land Court, under section 32 (11) of that Act in the following terms—'We, Hugh Carmichael senior and James Carmichael, statutory small tenants of the holding of the lands and farm of Mid-Achindoun, . . . hereby apply to the Land Court, under reference to the annexed statement of facts, to find and declare in accordance with section 32 (11) of the Small Landholders (Scotland) Act 1911, that Duncan Maccoll of Portcharren and Achindoun, Lismore, has on the renewal of our tenancy at Whitsunday 1912 failed to provide the buildings required for the cultivation of our said holding at Mid-Achindoun according to the terms of the lease of agreement between us, or alternatively has failed to provide and maintain the buildings and permanent improvements required for the cultivation of the said holding: And thereafter for an order finding and declaring that we became and are the landholders in and of the said holding as from the twenty-eighth day of May Nineteen hundred and twelve, and fixing a fair rent for the said holding.

"3. The landlord pleaded, *inter alia*, that the application was incompetent on the grounds now developed in the questions stated below. He alleged no ground of objection to the applicants as tenants under section 32 (4) of the Act of 1911. After proof before answer and inspection the Land Court issued an interlocutor in the following terms:—'. . . Repel the objections to competency stated by the respondents in their answers . . . : Find that the applicants are joint statutory small tenants in and of the holding described in the application, and became entitled to a renewal of their tenancy as at and from the term of Whitsunday 1912, under and in terms of section 32 of the Small Landholders (Scotland) Act 1911. . . .

"4. The said Duncan Maccoll disputes this decision on the ground that the application is incompetent (1) in respect that the provisions of the said Act with regard to statutory small tenants do not extend to joint-tenants; (2) in respect that tacit relocation had, by neither party having given notice of removal, taken place before the said Act came into operation, there was no determination, and therefore there could be no renewal, of the tenancy at Whitsunday 1912 within the meaning of section 32 (4) (9) and (11) of the said Act."

The *questions of law* included the following:—"1. Whether the provisions of section 32 of the Small Landholders (Scotland) Act 1911 apply to the case of a holding which at the commencement of the Act was held, and continues to be held, by joint-tenants? . . . . 3. Assuming that the said lease terminated at Whitsunday 1912, and that respondents were statutory small tenants, whether at Whitsunday 1912 there was a renewal of the tenancy within the meaning of section 32 (4) and (11) of the Act; or whether the tenancy is to be held as renewed for one year from Whitsunday 1912 solely by tacit relocation to the effect of excluding the respondents from applying for an equitable rent, or to fix the period of renewal, or for an order under sub-section 11 of section 32, until that renewal by tacit relocation has been determined?"

Argued for the appellant—*Question* 1.—The application was incompetent, for the provisions of the Act with regard to statutory small tenants did not extend to joint-tenants—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 26 (8). The reason for their exclusion was obvious, viz., that the Legislature did not intend to favour joint-tenancy in small holdings. It was therefore sanctioned only in the case of those who had a real interest in the soil, *i.e.*, crofters, yearly tenants, and qualified leaseholders.

Argued for the respondents—*Question* 1.—The application was clearly competent, for the applicants were statutory small tenants in the sense of section 2 of the Act. The fact that they were not mentioned in section 26 (8) was not sufficient

to deprive them of the benefits which the Act had expressly conferred upon them.

[On the question 3 counsel for the parties adopted the arguments in the case of *Clyne* v. *Sharpe's Trustees*, *supra*, p. 688.]

LORD PRESIDENT—This case raises, to begin with, precisely the same point as the point that your Lordships have just decided in the case of *Clyne*. The judgment, necessarily, will be same. But there is the additional point in this case that the applicants are joint-tenants, and it was argued to your Lordships that the provisions of the Act do not apply to joint tenants.

I cannot disguise from myself that I think this question is one of some difficulty, but upon the whole I have come to the conclusion that here again the judgment of the Land Court is right, and that joint-tenants are admitted to the benefit of the provisions of the Act applicable to statutory small tenants. The whole difficulty arises from the terms of subsection (8) of section 26, which is a general section of supplementary provisions. If that section had not been there I do not think there can be much doubt that we should have construed the word tenant in the Act as including a joint-tenant. But sub-section (8) of section 26 provides—"The provisions of section 2 of this Act shall extend to and include joint-tenants being existing crofters, existing yearly tenants, or qualified leaseholders, but not more than one person shall be registered as a new holder in respect of any holding; and (without prejudice to the continuance of a joint tenancy through statutory successors) where at any time after the commencement of this Act a holding is held by a single landholder, or a holding which has been held in joint tenancy ceases to be so held, it shall not be competent for more than one person to be a landholder in respect of such holding." And it is argued that inasmuch as the section says specially that joint-tenants shall be included where they are existing crofters, existing yearly tenants, or qualified leaseholders, and does not mention statutory small tenants, that it is meant that statutory small tenants should be excluded.

I am not driven to that result, which I think would be an unfortunate one. I do not think that the proviso (8) that I have just read was really put in for any purpose whatsoever except to make it clear that there were to be no new holders registered as joint-tenants, and that if in any case an existing holding under joint tenancy ceased to be so held by one of the tenants going away and not wishing to renew, that you should not have a new joint-tenant put into the holding. In other words, the Act did not want to foster joint tenancy. But I think that the answer to the strict legal argument is to be found in the curious phraseology of section 2, to which I referred in the last case, where persons are first defined as crofters, existing yearly tenants, and qualified leaseholders, and then in a certain case it is said, not that an existing yearly tenant and qualified leaseholders is not to be so, but that he is not to be held so, and certain things are to apply to him. I think that on a strict reading of the words these persons are existing yearly tenants or qualified leaseholders in the sense of section 2, and that therefore the joint-tenants in this case are included although they are not to be held so, and accordingly have not the benefit of the other sections which apply to existing small tenants and qualified leaseholders, but instead have only the benefit of the section applying to statutory small tenants.

The total result is, I think, that the judgment here is right, and that so long as these two people come forward to ask for renewal they are entitled to have it. If one of them for any reason disappears, then I do not think any other joint-tenant can ever be put in his place.

LORD KINNEAR—I have more difficulty in this case than in the last one, but I have come to the same conclusion as your Lordship and do not find myself bound to put the strictest verbal interpretation upon the mere words of the 8th sub-section of section 26 to the effect of depriving joint-tenants of the right which the statute would otherwise clearly give. I agree with your Lordship's conclusion.

LORD JOHNSTON—I concur. There is no doubt that sub-section (8) of section 26 of the Act does create considerable difficulty by reason of the use of the words "existing" and "qualified." Had those words not been there there would have been no difficulty. But I think that the explanation which your Lordship has given is sufficient, and that if the word "such" in the proviso which precedes section 2, sub-section (1) (iii) (*b*) is considered in relation to what precedes and what follows, it really explains what the Legislature meant, namely, to include the statutory small tenant within the purview of section 26, sub-section (8).

LORD MACKENZIE—I have had great difficulty in this case, occasioned by the way in which this Act has been drafted, but I agree in the result at which your Lordships have arrived.

The Court answered the first question of law in the case and the first alternative of the third question in the affirmative, and the second alternative thereof in the negative.

Counsel for Appellant—Chree, K.C.—M'Gregor. Agents—Hume M'Gregor & Co., S.S.C.

Counsel for Respondents — Moncrieff, K.C.—Morton. Agent—M. Graham Yool, S.S.C.