LORD DUNDAS concurred.

LORD GUTHRIE—I am of the same opinion. The Lord Ordinary has repelled the third plea-in-law, which is to the effect that the agreement is corrupt and illegal. But he has made a reservation in his opinion which was admitted not to be consistent with the terms of his interlocutor, because he says—"It may be that as regards certain of the fees pooled it may be established that there was an improper stipulation which renders it against public policy to give effect to the provisions of the agreement."

It is averred by the pursuers, and it is not denied, that in several instances the defender acted as factor and trustee on sequestrated estates, but it is not said that he ever acted improperly. The question raised in this case is thus a pure question of construction of the agreement, seeing that there are no averments of corrupt conduct under any of the three heads which Mr Wilton founded on as involving Milne in a position of double interest. It was said by Mr Wilton, first, that the defender had an interest to employ the firm, whose servant he was, for valuations and other purposes; secondly, Mr Wilton said that he had an interest to allow his firm to pile up their charges if they were so employed; and thirdly, Mr Wilton said that he had an interest to deal favourably with his firm's claims as creditors.

I agree with your Lordship in thinking that in all these particulars Mr Milne had a direct and necessary double interest which the law will not allow. As was said by Mr Mitchell, almost any contract may involve the possibility of a double interest, but that is not to say that in every case a question of double interest necessarily or directly arises. Here, seeing that under the arrangement between him and his firm, the defender might participate in the results of any of those three things that I have mentioned, the case does come within the category of direct and necessary double interest.

Take the last of them—the interest that he had to deal favourably with his firm's claims. It appears that, under the 5th clause of the contract, when a division was made out of what had been pooled, "there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate." That was to be deducted. Therefore as much as possible should, in order to suit Milne, be charged against the estate, leaving as little as possible to be paid out of the fund of which he was to get a certain proportion.

Therefore I think, applying the words of Lord Chief-Justice Cockburn in the case of *Harrington*, (1878) 3 Q.B.D. 549, this was a case, whether you call it a bribe or not, where a payment or a promise of payment was given to this man in the cases where he acted as a factor or trustee which put him in the position of having a direct and necessary inducement to act otherwise than with loyalty and fidelity to the creditors whom he represented. In that case, as the Lord Chief-Justice puts it, "the agreement is a corrupt one and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be."

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first and third pleas-in-law for the defender, and dismissed the action.

Counsel for the Pursuers and Respondents—Sandeman, K.C.—Mitchell. Agents—Tait & Crichton, W.S.

Counsel for the Defender and Reclaimer—C. D. Murray, K.C.—Wilton. Agents—John C. Brodie & Sons, W.S.

Friday, December 12.

FIRST DIVISION.

[Scottish Land Court.

COUNTESS OF SEAFIELD'S TRUSTEES *v.* M'CURRACH.

Landlord and Tenant—Small Holding—"Lotted" Lands—Allotments—Statutory Small Tenant—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49)—*Applicability.*

The yearly tenant of certain "lotted" lands, extending in all to 11 acres odd, applied to the Land Court for an order determining, *inter alia*, whether he was a landholder or a statutory small tenant. The allotments in question formed part of lands laid out by the proprietor for occupation as agricultural subjects by householders in the adjoining village, and were held by the tenants under leases of one year or upwards, distinct from the leases or titles on which they held their houses. All the tenants, including the applicant, resided within two miles of their respective holdings. The applicant possessed and cultivated the allotments in question as one agricultural subject at an annual rent of £23, 12s. His dwelling-house and offices were held on a separate title, and were not included in the holding, on which there were no buildings.

Held that the provisions of the Small Landholders (Scotland) Act 1911 applied to the lands in question.

This was a Special Case stated by the Scottish Land Court at the request of A. D. Mackintosh and others (the Countess-Dowager of Seafield's trustees), *appellants*, in an application by John M'Currach, Fordyce, to determine, *inter alia*, whether he was a landholder or a statutory small tenant in respect of certain "lotted" lands of which the appellants were proprietors.

The *facts* are given in the note (*infra*) of the Land Court, which, on 8th May 1913, issued the following Order—"The Land Court having resumed consideration of this application, repel the objection taken for the respondents, that the Act of 1911 does not apply to the applicant's holding: Find that the applicant is a statutory small tenant in and of the holding described in the application, and that no reasonable ground of objection to the applicant as tenant has been

established: Therefore find that he is entitled, in virtue of the 32nd section of the Act of 1911, to a renewal of his tenancy, and to have an equitable rent fixed; and having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at seven years, and the equitable annual rent payable by the applicant at £16, 10s. sterling, each to run from the term of Whitsunday 1912."

The Case further stated—"The appellants object to the final order of the Land Court on the ground that the Small Landholders (Scotland) Act 1911 does not apply to the lands in question, because they are 'lotted' lands. The contrary contention is that there is no ground for excluding lotted lands from the operation of the Small Landholders (Scotland) Act 1911."

The *question of law* was—"Do the provisions of the Small Landholders (Scotland) Act 1911 apply to the lotted lands of Fordyce?"

Note.—"The applicant's holding is made up of lots of land let to him at different dates from 1894 to 1905. He entered on the tenancy of lot 22 and part of lot 21 at Martinmas 1894, the rent being £11, 18s., and of another part of lot 21 at Martinmas 1896, the rent being £6, 12s., and of lot 39 at Martinmas 1905, the rent being £7, 12s. In each case the tenancy was from year to year, and the first rent became payable at the Martinmas succeeding the term of entry. Since 1905 he has possessed and worked these originally separate lots as one holding at the total rent of £23, 12s., payable at Martinmas of each year for the crop of that year.

"There are no buildings on the holding. The applicant has resided and resides in the village of Fordyce, within two miles of the holding. His dwelling-house and offices are held on a separate title, and are not included in the holding, as specified in the application.

"There is no dispute that he is a tenant from year to year of these subjects in respect of which he claims. This *prima facie* satisfies the requirements of the Act of 1911. It is clear that he is not a landholder, as his predecessors in the different lots were not members of his family, and though he aided the creation of some permanent improvements on the land since his entry, this aid is comparatively small. It is equally clear that he is a statutory small tenant in and of this holding, unless the respondents' special plea is sustained.

"That special plea is that this holding consists of 'lotted lands' and that 'lotted lands' are, or ought by construction to be, excluded from the operation of the Small Landholders Acts.

"'Lotted lands' mean simply lands which are laid out or lotted by an estate for the individual agricultural use of householders in villages or burghs of barony on the estate, held on lease, usually from year to year, sometimes for a term of years. They are found in many parts of Scotland. In some instances this lotting first took place when a particular village was formed; in other instances the existing lotted lands probably are the result of a rearrangement by the estate of what had formerly been common land, whether cultivated or not, of a village or burgh of barony.

"It does not appear from the evidence at what date the lotted lands at Fordyce were laid out for the use of the householders in the village of Fordyce. Probably this lotting took place over seventy years ago. The purpose of the estate was to supply the tradesmen, labourers, and other villagers with small holdings in order to increase their means of subsistence and promote the prosperity of the village.

"All the holders of existing lotted lands have their houses and offices in the village. Most of these are held under feu-charters or long leases from the estate. The holders reside within two miles of their respective holdings of lotted lands. Considerable expenditure has been made by the estate, chiefly on drainage of these lands, between 1861 and 1912.

"Under the original arrangement each lot may have been let to the proprietor or tenant of a particular house in the village. If that was the original arrangement it has long been departed from.

"The lotted lands at the earliest date in evidence extended to 190 acres; the present area is only 150 acres, as 40 acres have been added to two adjoining farms. The lots which make up the 150 acres have been divided or amalgamated from time to time.

"It may be noted that lot 22 and part of lot 21, acquired by the applicant in 1894, are described simply as 'the lots of land at Fordyce given up by William Neish;' the other part of lot 21, acquired by him in 1905, as the 'lot of land at Fordyce presently occupied by William Eadie,' and his last acquired portion as the 'lot of land at Fordyce presently tenanted by the Reverend John C. Macgregor.' In each case the tenant is bound to conform to the regulations of the estate. These regulations appear to be regulations for the farms and crofts of the extensive Seafield estate generally, and not specific regulations for 'lotted lands.' In the last two cases a plan of the 'Fordyce lotted lands' is referred to.

"It is beyond doubt that these Fordyce 'lotted lands' do not come within any of the express exclusions in section 26 of the Act of 1911. Any 'small holding' under the Small Holdings Act 1892, or any allotment under the Allotments (Scotland) Act 1892, or the Local Government (Scotland) Act 1894, is no doubt excluded by sub-section 3 (*e*) of that section.

"This sub-section refers only to holdings and allotments formed on land which a public authority has acquired either by agreement or compulsorily, and subject to special regulations with regard to the tenure, rights, and obligations of the holders, under the statutes expressly cited in the sub-section. The formation or preservation of small holdings by public authority was regulated or extended in England by a series of statutes from 1601 to 1908—in Scotland much later, by the Crofters Act, the Acts above cited, and the Act of 1911.

"It was not maintained that these lotted

lands were excluded from the operation of the Agricultural Holdings Acts, 1883-1910. We have been unable to discover any specialty of these lotted lands which if held sufficient to exclude them from the operation of the Small Landholders Act, would not equally exclude them from the operation of the Agricultural Holdings Act.

"If any 'lotted lands' had been shown to be pertinents of or held under the same title, whether feu-charter or long lease, as the houses in the village occupied by the tenant of these lands, then such lotted lands would either not have been a holding in the sense of the Act of 1911, because a feuar is a proprietor, or the Act would not have applied until the long lease terminated. But it is not disputed that these lotted lands have been held at separate rents on a distinct and lesser tenure, usually a tenancy from year to year.

"There may be cases where a dwelling-house in the village with its pertinents has come to be held by a tenant of lotted lands from the same proprietor on the same tenure as his 'lotted lands.' In such cases the dwelling-house and offices connected therewith, specially if they include a byre or stable, or barn, may be so worked along with the lotted lands as to form part of the holding under the Act of 1911.

"It was maintained by the estate that it was inexpedient that these lotted lands should come under the Act. Even if it were so, that would not justify us in adding a new clause of exclusion to the list specified in the Act. But we see no real ground for supposing that any inconvenience will result from the application of the Act, nor was any definite inconvenience suggested. On the contrary, the beneficent purposes for which these lotted lands were originally formed will be more effectually carried out. The tenant will have greater security of tenure at a rent independently fixed, and therefore stronger motives to make the best of his land.

"Indeed the terms of the Crofters' Holdings Act 1886 seem to have been expressly extended by the Act of 1911 in order to include lands of this kind. The definition of the crofter in the Act of 1886 required residence on the holding. Village lands were almost unknown in the crofting counties. In the other counties, now added by the Act of 1911, they were not uncommon. Between 1886 and 1912 experience had shown that small holdings tenanted by villagers were equally beneficial, and could be more readily worked by co-operation. Accordingly for residence on the holding the Act of 1911 substituted residence 'within two miles of' the holding as one of the conditions required to bring a holding within the Act.

"The applicant's rent-account shows arrear to the extent of two years' rent, amounting to £47, 4s. as at Martinmas 1912, including rent for crop 1912. He was under the impression that he was only one year's rent in arrear. This was due to his having for some years been allowed to pay his rent within the year after it had become due. The applicant promised, and is apparently able, to pay all his arrears, and the objection to renewal on the ground of his existing arrears was not pressed."

Argued for appellants—The lands in question were outwith the ambit of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), for the statute did not apply to "lotted" lands held as an appanage of a house in conformity with estate regulations. Such lands did not fall within the definition of holding in section 2 of the Act. What the statute contemplated was the joint-occupation on the same piece of ground of land and buildings—sec. 8 (4), sec. 26 (1) and (3) *f*, and sec. 32 (11). Such lands were not within the definition of "holding" in section 35 of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), as applied by section 32 (5) of the Small Landholders Act. Nor were they within the definition of holding in section 34 of the Crofters Act 1886 (49 and 50 Vict. cap. 29)—which, however, was repealed by section 39 of the Small Landholders Act—for both these Acts had in view the joint-occupation of lands and buildings. If the Act applied the appellants might at the termination of the tenancy be compelled to erect buildings on these allotments—sec. 32 (11). That could not have been intended, nor could the Legislature have meant to create fixity of tenure in allotments. Such lands fell rather within than without the exceptions enumerated in section 26 (3) of the Act.

Argued for respondent—The Act of 1911 applied in terms, for the lands in question were clearly within the definition of "holding" in section 2, and equally clearly were outwith the exceptions in section 26. There was nothing in the Act which made it essential that the tenant should be actually resident on the holding, or that the buildings should be situated upon it. It was enough if, as here, the lands were used for agricultural purposes, and were in the occupation of a tenant residing within two miles of his holding.

At advising—

LORD PRESIDENT—The applicant in this case is a tenant of lotted lands in the immediate vicinity of the village of Fordyce, and the question we have to consider is whether or no he is a statutory tenant within the meaning of the Scottish Small Landholders Act.

Now I venture to ask why not, and all Mr Murray's ingenuity, although it is great, and his researches through the clauses of this Act, which was most industrious, failed to give a satisfactory answer to that question. I am of opinion, therefore, that the final order pronounced by the Land Court is correct, and for the grounds of my opinion I refer to the very full and clear note which the Land Court have appended to their final order and to which I have nothing to add.

LORD JOHNSTON—I think it is unfortunate that this Act should interfere with the well-intentioned efforts of landowners, made long ago and at great expense, to supply lotted lands to the inhabitants of villages,

but I can find nothing in the statute which warrants the particular pieces of land in question being withdrawn from its application. It is worthy of notice as a comment upon the anticipations of those who passed the Act that apparently these lotted lands have not continued to be appreciated, as lotted lands, by the people of this village, for two things have happened—in the first place a considerable portion of the original lotted lands have had to be resumed and handed over to the tenant of an adjoining farm, and, in the second place, this particular tenant has in 1894, 1896, and 1905, gradually amassed into his own hands three holdings or rather four, because one of them was at the time divided, and now cultivates them, not for the greater comfort of himself and his family, as an adjunct to his ordinary occupation, but as his regular business. This looks as if there was no demand for allotments properly so-called in this village, or else as if, having ceased to be regarded as ordinary allotments, this particular tenant has secured these lots by outbidding his neighbours, affording therefore the best criterion of their market value.

LORD MACKENZIE—I am of the same opinion. I had difficulty in following the argument presented for the appellants—certainly not because of any want of clearness of statement on the part of Mr Murray. I understood him to admit that the Commissioners' statement in their note is correct, viz.—"It is beyond doubt that these Fordyce 'lotted lands' do not come within any of the express exclusions in section 26 of the Act of 1911. Any 'small holding' under the Small Holdings Act 1892, or any allotment under the Allotments (Scotland) Act 1892, or the Local Government (Scotland) Act 1894, is no doubt excluded by sub-section 3 (*e*) of that section. This sub-section refers only to holdings and allotments formed on land which a public authority has acquired either by agreement or compulsorily, and subject to special regulations with regard to the tenure, rights, and obligations of the holders, under the statutes expressly cited in the sub-section. The formation or preservation of small holdings by public authority was regulated or extended in England by a series of statutes from 1601 to 1908—in Scotland much later, by the Crofters Act, the Acts above cited, and the Act of 1911."

Accordingly he addressed himself to what seemed to me the hopeless task of saying that by implication they were excluded by reason of the operation of certain sub-sections of section 26. It is impossible to come to that conclusion.

LORD SKERRINGTON concurred.

The Court answered the question of law in the affirmative.

Counsel for Appellants—Murray, K.C.—D. P. Fleming. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, December 13.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

GALBRAITH (MACDOUGALL'S TRUSTEE) *v.* IRONSIDE.

Bankruptcy — Fraudulent Preference at Common Law—Consciousness of Debtor of Own Insolvency—Reduction.

An action by a trustee in a sequestration for reduction, on the ground of fraud at common law, of a security voluntarily granted by an insolvent to a creditor, in which the pursuer averred that at the date when the insolvent granted the security the creditor was aware of the granter's insolvency, *held irrelevant* in the absence of an averment that the granter was himself conscious of his own insolvency.

On 6th May 1913 William Brodie Galbraith, C.A., Glasgow, trustee on the sequestrated estates of Hugh MacDougall, builder in Oban, *pursuer*, brought an action against William Ironside, solicitor and bank agent, Oban, and Peter Moir, bank agent there, *defenders*, for reduction of an assignation by the said Hugh MacDougall in their favour of a bond and disposition in security for £2000 in favour of the said Hugh MacDougall.

The pursuer averred — "(Cond. 1) The estates of Hugh MacDougall, builder in Oban, were sequestrated on 12th February 1913, and the pursuer was elected and duly confirmed trustee thereon. . . . (Cond. 2) Prior to the sequestration of his estates the said Hugh MacDougall carried on business in Oban for a period of twelve years or thereby. During that time his law agents were Messrs Hosack & Sutherland, solicitors in Oban, of which firm Mr John D. Sutherland and the defender William Ironside until the end of March 1912, and thereafter the said William Ironside, were the sole partners. Mr Sutherland was also the agent of the Royal Bank of Scotland's branch in Oban, at which bank the said Hugh MacDougall kept his bank account. The said firm of Hosack & Sutherland were thus intimately acquainted with MacDougall's entire business affairs and with his financial position from the time he commenced business onwards. (Cond. 3) About the month of October 1910 the said John D. Sutherland recommended the said Hugh MacDougall to erect a building of shops and dwelling-houses at Kinlochleven. At that time MacDougall's entire capital amounted only to £600, but on the representation of Mr Sutherland that he would procure a loan for him, MacDougall proceeded with the erection of the tenement. Mr Sutherland failed to procure a loan, but MacDougall succeeded in finishing the property with the assistance of an overdraft from his bankers. On its completion the property was sold for £3000, of which £1000 was paid in cash and the bond and disposition in security described in the conclusions of the summons was taken in payment of the balance. The £1000 received in cash