I cannot understand how that should be so. Of course, if the statute had expressly provided that an agreement between the occupier and the local authority was to enfranchise the premises—which was the view of Lord Dunedin—that would have to be given effect to. But I can see no ground for the view that one man is to be exempt from taxation because somebody else makes an agreement which enables him to escape from the assessment because he pays a larger sum in another way.

The importance of the question may be gauged from the circumstance which was stated at the Bar, and which I think was not disputed, that in circumstances such as we have here the practice has hitherto been to levy the water rate upon owners who are not also occupiers. In view of your Lordship's decision it seems to me that that practice will have to be entirely changed, because I cannot see how the owner who happens to be the occupier of the premises should be in a different position from the owner who is not the occupier.

LORD GUTHRIE—I think the Lord Ordinary has come to a sound conclusion and on the right grounds. There is at least one part of section 126 of the 1897 Act (on the sound construction of which section and not on practice the question turns) which is unambiguous. Referring to the whole assessment, which is payable half by owners and half by occupiers, it is said to be "leviable on such buildings or premises." The buildings or premises get the benefit of increased value even when no water is used. That is in accordance with the defenders' contention that there are not two assessments, but that the assessment itself is one and indivisible, although for purposes of recovery it is divisible. On the other hand, the reference in the earlier part of the section to "the persons desirous of being so supplied" and to "the persons so supplied" is consistent with the pursuers' contention that the persons so designed are the occupiers and not the owners. But if in a clause of a statute one part is unambiguous, and another part which is ambiguous is reasonably capable of construction in accordance with the part that is unambiguous, then the ambiguous part will be so construed, at all events where, as I think is the case here, the result does not conflict with any other clause in the statute or with its general purpose, or with the usefulness or reasonableness of its application. The case seems to me to be ruled by the case of *Motherwell*, which involved consideration of supervening legislation providing that what had been only recoverable under the Special Act from occupiers should be recovered from owner and occupier equally. The soundness of that decision was not questioned in the subsequent case of *Dickson*, although there may be dicta in the case of *Dickson* which are difficult to reconcile with the soundness of the decision and with the opinion of Lord President Dunedin in the previous case. If a meter rate is charged there is no provision for recovery of assessment. In my opinion, under section 126 there cannot co-exist two separate modes of charge. Measurement is alternative with assessment, and payment by meter enfranchises the premises from assessment.

The Court (*dis.* Lord Salvesen) adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuers and Reclaimers—Wilson, K.C.—M. P. Fraser. Agents—J. & F. Anderson, W.S.

Counsel for Defenders and Respondents—Macmillan, K.C.—Wilton. Agents—Davidson & Syme, W.S.

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*Wednesday, February* 20.

## WHOLE COURT.

## FIRST DIVISION.

[Scottish Land Court.

## DUKE OF HAMILTON'S TRUSTEES *v.* M'NEILL.

*Landlord and Tenant—Small Holdings—"Holding"—Contents of Holding—Buildings not Used or Required in Connection with Cultivation of Holding—Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (3) (*f*)—*Agricultural Holdings (Scotland) Act* 1908 (8 *Edw. VII, cap.* 64), *sec.* 35 (1).

By section 26 (3) (*f*) of the Small Landholders Act 1911 a person is not to be held an existing yearly tenant or a qualified leaseholder under that Act in respect of any land that is not a holding within the meaning of the Agricultural Holdings Act 1908, which in section 35 (1) defines a holding as "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."

*Held* by the Whole Court (*dis.* Lord Johnston, Lord Salvesen, Lord Skerrington, Lord Cullen, Lord Ormidale, and Lord Anderson) that when, at the date of the Small Landholders Act 1911 coming into operation, there existed on any land held on such a tenancy that it would otherwise be a statutory holding a dwelling-house forming an integral and material part of the subjects of such tenancy, but not used or useful in connection with the agricultural or pastoral or agricultural and pastoral occupation of the land, the said dwelling-house with its pertinents and site might competently be excised from the land held on such tenancy, leaving the remainder a statutory holding under said Act.

*Held* by the First Division, applying the judgment of the Whole Court, that a double cottage not used in connection with the farming of the land, but half of which was sublet to a tenant for the

whole year with the exception of two months, when it was let to summer visitors, and the other half of which was let to summer visitors for two months, fell to be excised from the land held by the yearly tenant at the passing of the Act of 1911, leaving the remainder of the subjects held by him, which included a building under the same roof as the dwelling-house on the subjects ordinarily used as a farm store room but occupied as a dwelling-house by the tenant when the other dwelling-houses on the subjects were let to summer visitors, a statutory holding in the sense of the Act of 1911.

*Landlord and Tenant—Small Holdings—Fair Rent—Crofters Holdings (Scotland) Act* 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 6 (1) *—Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49).

*Held* by the First Division that where buildings forming part of a holding of a landholder were let during the summer months to summer visitors the revenue derived from such letting fell to be taken into account in fixing the fair rent for the holding.

*Landlord and Tenant—Small Holdings—"Holding"—Sub-tenancy—Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (6).

*Opinions*, by the First Division, that where an existing yearly tenant or qualified leaseholder let a house from Martinmas to Martinmas subject to the condition that it was to be vacated for two months in summer, there was no sub-tenancy within the meaning of section 26 (6) of the Small Landholders (Scotland) Act 1911, the period being less than for a year.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap 49) enacts—Section 1—"From and after the commencement of this Act, and subject to the provisions thereof, the Crofters Acts shall be read and construed as if the expression 'landholder' were substituted for the expression 'crofter' occurring therein, and shall have effect throughout Scotland." Section 26—". . . . (3) A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of— . . . (*f*) Any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908. . . . (6) Notwithstanding anything contained in sub-section (1) of this section, the holding of any existing yearly tenant or qualified leaseholder within the meaning of this Act shall not, for the purposes of the Landholders Acts, be deemed to include any lands or heritages at the commencement of this Act forming part of such holding and occupied by a sub-tenant of such existing yearly tenant or qualified leaseholder whether paying a rent or not."

Section 32—"With respect to statutory small tenants the following provisions shall have effect:— . . . (8) In determining the rent the Land Court shall, so far as practicable, act on their own knowledge and experience, taking into consideration all the circumstances of the case, holding, and district, including the rent at which the holding has been let, the proposed conditions of the renewed tenancy, the improvements made by the landlord and tenant respectively, and the then condition and value of such improvements; and shall fix as the rent to be paid by the tenant the rent which in their opinion would be an equitable rent for the holding between the landlord and the tenant as a willing lessor and a willing lessee. . . ."

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) enacts—Section 35—"(1) 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. . . ."

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), as amended by the Small Landholders (Scotland) Act of 1911, enacts—Section 6—"(1) The landlord or the [landholder] may apply to the [Land Court] to fix the fair rent to be paid by such [landholder] to the landlord for the holding, and thereupon the [Land Court], after hearing the parties and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the crofter or his predecessors in the same family, may determine what is such fair rent and pronounce an order accordingly."

The Duke of Hamilton and others, the testamentary trustees of the late Duke of Hamilton, *appellants*, being dissatisfied with a decision of the Scottish Land Court in an application by Mary M'Neill, widow, and John M'Neill, eldest son of the late Allan M'Neill, *respondents*, for an order fixing a first fair rent of the holding at Auchenhew, of which the appellants were proprietors, applied for a case for the opinion of the Court. Appeals were also taken by the appellants in similar applications (*v. infra*) by Alexander M'Alpin, Peter Mackinnon and another, Mrs Mary Hamilton, and Helen Fullarton and others, which cases, together with an appeal in an application by Mrs Mary M'Kelvie, were all heard together.

The Case set forth—"3. The said tenants are the widow and son of the late Allan M'Neill, who became tenant of the said holding in 1880, at a yearly rent of £55, and continued tenant till his death in 1909. Allan M'Neill became tenant of the said holding in succession to his father James M'Neil or M'Neill. Since Allan M'Neill's death the said Mary and John M'Neill have continued the tenancy as from year to year. At the date of the application the rent was £44, 6s. 6d., the reduction having arisen as follows:—

"In 1898 a piece of ground extending to 76·36 poles, together with two cottar houses, the rents of which were received by Allan M'Neill, and included in the rent of £55 paid

by him to the estate, was resumed for a feu, and the rent reduced by £5, 5s. to £49 15 0

"In 1901, after the report of David Stevenson mentioned in paragraph 14, the rent was fixed of new at £49, 15s. as from Martinmas 1901.

"In 1910 further ground extending to 113·628 poles was resumed for a similar purpose, and the rent reduced by . . . . £1 8 6

"In 1911 a cot-house on the holding had become uninhabitable, and as the rent paid by the tenants had included £4 for the said cot-house, a further reduction to that extent was made . 4 0 0

5 8 6

£44 6 6

4. At and since the commencement of the Act of 1911 there were no cot-houses, or cottar houses, and no cottars on this holding. 5. The total extent of the holding as let to and possessed by the tenants at the commencement of the Act of 1911, and at the date of their application, is 44·473 acres or thereby, of which about 43 acres are arable and pasture land, the remainder being sites, roads, and waste. 6. The whole existing buildings on the said holding were erected by and at the expense of the said James M'Neill and Allan M'Neill, the predecessors of the present tenants, with a substantial contribution from the estate in the case of (1) a new byre, and (2) of the double cottage after mentioned. They have been maintained entirely by the said James M'Neill, Allan M'Neill, and the present tenants in succession. No payment or consideration or material aid has been received from the estate by them or any of them in respect thereof except the contribution above mentioned to the erection of the new byre and of the double cottage, and wood from estate sawmill in 1888 to the value of £8, 5s. 9d. 7. These buildings on the holding include (in addition to the byre, barn, stable, and ordinary farm offices) the following subjects:—(*a*) The main or usual dwelling-house of the holding, erected about 1866, inhabited by the tenants, except when let to summer visitors. (*b*) Double cottage near shore, erected in 1906-7, to which the estate contributed wood and slates at a cost of £123, 18s. 6d. (*c*) Building, in or at steading, used by the tenants as their summer dwelling-house and for other purposes—erected about 1897-8. 8. The said double cottage was erected by the said Allan M'Neill on the site of two cot-houses for which rents amounting to £7 per annum or thereby had been received by him, which rents were included in the rent of £49, 15s. paid by him to the estate. It is situated between 200 and 300 yards from the steading. There is no fence or enclosure round it. The land between it and the sea is part of the pasture ground of the holding. The said double cottage can be inhabited either as one dwelling-house or as two separate dwelling-houses. Sometimes one part has been let furnished to summer visitors, while the tenants, having also let their main dwelling-house, have inhabited the other part during the period of summer letting, sometimes both parts have been let to summer visitors either as one dwelling-house or as separate dwelling-houses. Usually neither part has been let except during the summer months. But at Martinmas 1911 one part of the said double cottage was let furnished by the tenants to Miss Young for twelve months from Martinmas 1911 to Martinmas 1912, excepting summer months, it being agreed that Miss Young should vacate these premises for two months of the summer season in order that they might be let by the tenants to summer visitors. Miss Young removed to another house during July and August 1912, and these premises were let by the tenants to summer visitors for these months. Miss Young again occupied the premises in September. She paid £30 for the ten months of her occupation; the summer visitors paid £25 for those two months' occupation. In 1912 the other part of this double cottage was also let furnished to summer visitors for two months at £11 a month. 9. The said double cottage is not in present circumstances necessary to or utilised for the working and cultivation of this holding. The present tenants form one household and occupy together the main dwelling-house of the holding. In the event of each joint-tenant having a separate household in consequence of marriage or otherwise the double cottage is suitable for this holding as the farm dwelling-house of one of the joint-tenants. 10. The building in or at the steading referred to in paragraph 7 (*c*) hereof is under the same roof as the main or usual dwelling-house of the holding, and separated from this dwelling-house by a barn. It has internal communication with the said dwelling-house through this barn. It is chiefly built of brick. It is not inhabited or used or fitted for use as a dwelling-house except during the summer letting season. It is furnished and ordinarily used by the tenants for their own habitation when the main dwelling-house and both parts of the double cottage are let to summer visitors. It has sometimes been let to summer visitors. It is used during the remainder of the year as a storeroom for potatoes and feeding stuffs, and sometimes as sleeping accommodation for domestic servants or members of the tenants' family and for general purposes in connection with the holding. In present circumstances this building is not necessary to the working and cultivation of this holding as an agricultural or agricultural and pastoral subject, but it is suitable and is useful during part of the year for that purpose, and might become necessary to the holding if hired labour were introduced or if the system of working and cultivation came to be altered. 11. It was not disputed that the said uses of the said double cottage, main dwelling-house, and the other building were reasonable and customary at the commencement of the Small Landholders (Scotland) Act 1911 and were not inconsistent with the working and cultivation of the holding. 12. The said double cottage and building have been for some years entered in the

valuation roll as three separate houses and the tenants entered as proprietors and occupiers thereof by the county assessor for the purposes of the Valuation Acts. For the purposes of these Acts the said subjects are treated by the assessor as erections made or acquired by the tenants but not made or acquired for agricultural purposes within the meaning of section 4 of the Lands Valuation (Scotland) Amendment Act 1895. 13. The island of Arran has for many years been one of the resorts most frequented by summer visitors. The tenants of agricultural or pastoral holdings have been in use to let their dwelling-houses, one or more, on their holdings, and sometimes other buildings temporarily fitted for habitation as furnished houses or apartments, with or without attendance, mainly to summer visitors, usually for periods varying from one to three months, at rents which vary according to the season, the period, and the quality of the accommodation. They have improved, renewed, and in many cases rebuilt their houses or built new houses on the holding both for their own comfort and convenience according to modern standards and in order to attract summer visitors. This letting has been recognised as a customary and reasonable use of the buildings on holdings which has been and is contemplated both by proprietors and tenants in Arran as in similar places of summer resort. This use is not inconsistent with the working and cultivation of the holdings which have been inspected by the Court. It provides an auxiliary or subsidiary occupation during part of the year for the tenants and members of their families. 14. Until 1900 it does not appear that the rents of agricultural holdings in Arran included any charge or addition for summer letting by tenants of the houses on their holdings. In 1900, in consequence of certain tenants in the south end of Arran, including the said Allan M'Neill, having made complaints about their rents, the proprietors instructed the late Mr David Stevenson, of Crossburn, Troon, a well-known land valuer, to inspect and report on the holdings of these tenants. Mr Stevenson was instructed (1) to value each holding as an agricultural subject, without adding anything in respect of summer letting, (2) to state the extent and condition of the buildings on each holding, and (3) to give the numbers and names of any cottars on the holding, and in the cases of cottars paying rent to the tenant the amount of such rents. Mr Stevenson valued these holdings and reported according to these instructions. Mr Stevenson's valuations when obtained were considered by the late Mr Patrick Murray, the then factor, and by the proprietor, with reference to the effect of summer letting upon Mr Stevenson's figures. The rent of this holding then payable was £49, 15s., which included cottars' rents paid to the tenant. Mr Stevenson reported that the new rent of this holding should be £42, 10s., in which sum he included cottars' rents amounting in all to £10, 12s. 6d. paid to the tenant, but did not include any addition for summer letting. An abstract of Mr Stevenson's valuations was prepared for the proprietor, on which Mr Patrick Murray wrote his remarks on the various new rents. An excerpt therefrom dealing with the holdings forming the subject of applications before the Land Court was produced. The entry in that excerpt dealing with the present holding shows an estimate of the revenue then derived by the tenant from summer letting, and bears that there was 'added for letting' the sum of £7, 5s., which represents the difference between the former rent and the amount of Mr Stevenson's valuation. The rents as so fixed by Mr Murray and the proprietor were intimated in March 1901 to the tenants concerned. They were informed that the new rents would take effect as from Martinmas 1901, and were requested if agreeable to continue tenants of their holdings at the rent fixed to sign an accompanying agreement to pay the proposed new rent as from the said term. The tenants were not made aware that the rents proposed by Mr Stevenson had been altered, or that any addition had been made for summer letting. The tenants agreed to pay the rents fixed and intimated as aforesaid. The rent of this holding was accordingly continued at £49, 15s., subsequently reduced as already explained to £44, 6s. 6d. . . . 16. There was no dispute regarding the boundaries, extent, or area of this holding as it was occupied and possessed by the tenants at and since the commencement of the Small Landholders Act 1911. There was no application made to the Court for any order defining or limiting the boundaries, extent, or area of the said holding by either tenants or proprietors. The question whether the double cottage and the other building referred to in paragraphs 8, 9, and 10 should be excluded or severed from the holding for the purposes of the Small Landholders Acts was not raised until the hearing on the evidence on 3rd and 4th January 1913, when this question was stated and argued for the proprietors, though verbal notice that objection would be taken to extra houses being included in holdings for the purposes of the Act had been given in Court at a previous sitting by the agent for the proprietors. 17. The Land Court, after inspection of the holding, fixed a fair rent for the holding as possessed by the tenants at and since the commencement of the Act of 1911. They took into account in fixing such fair rent the value of the sites of all the buildings upon the said holding, including the sites of said double cottage and building and also the value of the proprietor's said contribution to or expenditure on the said double cottage. The Court were of opinion that in fixing a fair rent for the said holding no addition or allowance should be made, and no addition or allowance was made, in respect of the revenue derived, or which might be estimated as likely to be derived, by the tenants from letting the said double cottage or the said building in the circumstances stated in the preceding paragraphs. The Court were of opinion that no cause had been shown for excluding or severing from the said holding for the purposes of

the Small Landholders Acts the said double cottage and building (referred to in argument as 'the extra houses') or any portion of them, all of which were included in the holding as possessed by the tenants at and since the commencement of the Act of 1911."

The *order* of the Land Court was—"*Edinburgh, 27th June* 1913—The Land Court having considered this application, find and declare that the applicants are joint landholders within the meaning of the Act; 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 applicants or their 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-one pounds sterling."

The *questions of law* included—"2. Were the Land Court bound to exclude from the holding for the purposes of the Small Landholders Acts (Scotland) 1886-1911 the following subjects, all which formed part of the holding as possessed by the tenants at and since the commencement of the Act of 1911 —(*a*) That portion of the double cottage let furnished to Miss Young, with the site thereof, referred to in paragraph 8 of the Stated Case; (*b*) the other portion of the said double cottage, with the site thereof, referred to in paragraph 8 of the Stated Case; (*c*) the building in or at the steading, with the site thereof, referred to in paragraph 10 of the Stated Case, or any, and if so which of them? (3) In the event of the preceding question, or any branch thereof, being answered in the negative, were the Land Court bound, in fixing a fair rent for the holding, to include in such fair rent a sum, or allowance, in respect of revenue derived, or which might reasonably be expected to be derived, by the tenants of the holding from letting furnished the said subjects, or any of the said subjects not excluded from the said holding for the purposes of the Small Landholders Acts."

The *note* of the Land Court relating to the questions was—"It may be convenient to indicate the view which we take as to the construction of the Small Landholders Acts 1886 to 1911 with regard to several questions which have been raised and argued in many applications, particularly as to the effect of the provision in the excluding clause, section 26 (3) (*f*), and the manner in which tenants' improvements and also summer-letting by tenants are to be taken into account in the fixing of fair rents for landholders under either the 1886 or the 1911 Act.

"There are several preliminary considerations which are of weight in construing particular sections of either of these Acts.

"In the first place, it should be kept in view that the Landholders Acts, indeed the great body of statutes dealing with the relation of landlord and tenant from 1449 to 1911, have been expressly framed for the purpose of making material changes in the powers and rights of landlords for the benefit of tenants, and particularly the class of small tenants. These statutes, and particularly the Landholders Acts, are in the view of the Legislature remedial statutes, and therefore in case of doubt should be interpreted so as to carry out their spirit and intention.

"In the next place, the Small Landholders Act of 1911 is directed by section 35 to be read and construed with the Crofters Act, and it is enacted by section 1 of the same Act that, subject to the amending provisions and qualifications, the Crofters Acts shall have effect throughout Scotland. It is clear from the Acts that the sitting tenant whose holding satisfies the conditions laid down by the Acts becomes by force of statute entitled to the status and rights of a landholder or of a statutory small tenant, as the case may be, at the date when the Acts apply to his holding. In the case of the landholder, the essential conditions of his tenure are fixed by section 1 of the Crofters Act of 1886, as extended and qualified by section 10 of the Act of 1911. His right to a fair rent is conferred by section 6 (1) of the Act of 1886, and his right to compensation on renunciation or removal is conferred by sections 8, 9 (partially) and 10 of the same Act. The landholder who is a yearly tenant acquires the rights and becomes subject to the obligations imposed by or under the Acts by force of the Act of 1911 at the date when that Act came into operation—1st April 1912.

"1. We deal first with the construction and effect of section 26, sub-section 3 (*f*), of the Act of 1911, which provides that a person shall not be held an existing yearly tenant or a qualified leaseholder under the Act of 1911 in respect of . . . (*f*) 'Any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908.'

"In the first place, it must be observed that there is no single definition in the Small Landholders Acts of the statutory holding of a yearly tenant or qualified leaseholder. One must collect a description from the positive enactment of section 2, the exclusions in section 26 (3), and the other provisions of the Act of 1911. The original definition in section 34 of the Act of 1886 has been repealed, but parts of it are substantially re-enacted by section 26 (1) of the Act of 1911, which, *inter alia*, includes in the holding, for the purposes of the Acts, 'The site of any dwelling-house erected or to be erected on the holding, or held or to be held therewith, and of any offices or other conveniences connected with such dwelling-house,' and 26 (3) (*b*) of the same Act so far as relating to garden ground only appurtenant to a house. In the next place the definition of a holding which is contained in section 35 (the interpretation clause) of the Agricultural Holdings (Scotland) Act 1908 is not as such or in every part of it in the Act of 1911. The parts of that definition which refer first to market gardens, and secondly to land let to a tenant during continuance in the landlord's employment, are separately dealt with and altered by section 26 (3) (*d*) and section 26 (7) of the Act of 1911. Accordingly there remain the opening words which describe the nature or character of a holding under the Act of 1908 as '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.' This description also appears in the English Agricultural Holdings Act of 1908, section 48. It substantially re-enacts section 35 of the Agricultural Holdings (Scotland) Act of 1883, which is identical with section 54 of the Agricultural Holdings Act (England) of 1883.

"Now it is possible to read clause (*f*) of section 26 (3) in two ways. (1) It may be read as a direction to exclude from the subject of tenancy for the purposes of the Act of 1911 any part of it *which by itself is not* 'land either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral.' Or (2) it may be read as meaning that if the subject tenanted taken as a whole is not a holding under the Agricultural Holdings Act 1908 it shall not be a holding under the Act of 1911. The former construction does not appear reasonable or practicable in application. If every part of the area of the subjects tenanted must be agricultural or pastoral, then gardens, orchards, plantations of trees, fish ponds, landing stages, and other permanent improvements for which the tenant would be entitled to receive compensation at outgoing under the schedules of the Crofters Act of 1886 or the Agricultural Holdings Act of 1908 would be excluded. It seems unreasonable and inequitable that the existence on the subjects tenanted at the commencement of the Act of 1911 of any buildings or permanent improvements which the tenant would be entitled to make under the Agricultural Holdings Act or the Crofters Act 1886 should be excluded from falling under the operation of the Act of 1911. Land used also for sporting purposes or for peat cutting and similar purposes would not be either *wholly* agricultural or pastoral in this extreme literal sense. This reading would also require the exclusion of land occupied by improvements lawfully made by a tenant for his comfort and convenience though not strictly necessary for the working of or adding a definite value to the holding. This would be difficult to work out in practice and not less unfair to the tenant. On this reading subjects tenanted would often resemble a kind of chequer or mosaic—bits of land, parts of buildings, held under the Landholders Act, interspersed with other bits of land or parts of buildings left to be held on ordinary defeasible tenure.

"There are many ways in which the buildings existing on a holding at the date when the Small Landholders Acts apply to the holding may happen to be greater in extent or size than is necessary strictly for the working of the holding at the time. The holding sometimes consists of two or more holdings which were formerly separate but have been combined in one, and therefore has two or more sets of buildings. Or the holding may have been reduced in size by rearrangement or resumption of part of the land for other purposes. Or it may be held or have been held by joint-tenants, and therefore reasonably required separate dwelling-houses. Or the tenant may have built a new dwelling-house, but also retained the old dwelling-house because both together were not larger than modern standards of comfort or propriety required for the accommodation of a family and any hired servants who might be occasionally required to help in the working of the holding, or because the old dwelling-house could be used for temporary occupation during part of the year as a dwelling-house, while used at other times for storing implements or produce or general purposes. It must also be kept in view that a landholder's holding may, and in ordinary circumstances will, continue to be held by the landholder, his heirs or legatees, or statutory assignees in perpetuity. So long as the statutory conditions of tenure are observed the tenure is indefeasible, subject to the contingencies of resumption or failure of heirs, legatees, or statutory assignees. Accordingly it would be specially unreasonable to exclude any parts of buildings or bits of land forming part of the actual tenancy to which the Act applies, which, though not strictly necessary at the time for the working of the holding, may become necessary or useful to future landholders in working the holding or using it for any purposes sanctioned by the Act. If once excluded these are excluded for ever. Similarly, these words if taken in the extreme literal sense would exclude existing pertinents, adjuncts, and accessories of the subjects corporeal or incorporeal. Accordingly the reasonable construction of these words appears to be that they are meant only to prescribe that the subject of the tenancy *taken as a whole* must be agricultural or pastoral, or partly agricultural and partly pastoral in its *character* (as distinguished from a subject which taken as a whole is urban, industrial, or mercantile in character) in order to come within the scope of the Act of 1911.

"There is no reason, and so far as we are aware there is no authority, for adopting the narrower view of this particular clause. Under other clauses of this sub-section (3) which refer to land which is usually definitely marked off by limit or title it may be practicable and reasonable to sever such land from the remainder of the land held in tenancy for the purposes of the Act, *e.g.*, glebe land, policy, woodland, public recreation ground, or land acquired under Act of Parliament for a public undertaking, But under this clause 3 (*f*) the subject of tenancy is intended to be taken as it is let and possessed at the commencement of the Act, with its buildings, improvements, adjuncts, pertinents, and accessories—in short, with everything on it or held and possessed in connection with it under the same tenancy. If, for example, the land cultivated or pastured is only an adjunct or accessory of a country residence or of an inn, or of a fishing or of a public ferry, or of a factory or a shop or an auction mart, let and possessed under the same tenancy, then the subject of tenancy is not a 'holding' within the meaning of the Act.

"This conclusion is confirmed by considering the nature and character of some of the other exclusions, *e.g.*, 26 (3) (*g*), which implies that land other than permanent

grass parks is not excluded from a holding though it may be partially occupied or used by the tenant for a trade or calling which is not primarily agricultural or pastoral.

"The provision in section 1 (8) of the Act of 1886 points in the same direction. The only trade or business which a crofter is prohibited from exercising on his holding is opening without the landlord's consent any house on the holding for the sale of intoxicating liquors. So do the provisions of section 10 of the Act of 1911. The landholder is expressly authorised to make such use of his holding for subsidiary or auxiliary occupations as in case of dispute the Land Court may find reasonable and not inconsistent with the cultivation of the holding.

"Now it would be unreasonable to suppose that the Legislature intended that the use by a tenant of a building or a portion of land of the subject let, with the landlord's consent or acquiescence, up to the commencement of the Act, for some auxiliary or subsidiary occupation, in the same manner and to the same extent as he would if a landholder immediately become entitled to do by force of section 10, should exclude either (1) the subject of tenancy, or (2) the building or part so used from the operation of the Acts. The cases of *Mackintosh* v. *Lord Lovat*, 14 R. 282, 24 S.L.R. 202 (hotel), *Taylor* v. *Earl of Moray*, 19 R. 399, 29 S.L.R. 336 (travelling grocery business), and the only English case on the English Agricultural Holdings Acts, *Morley* v. *Jones*, 1888, 32 Solicitors' Journal 630, do not conflict with the view we have indicated. In each of these cases the principal subject of the tenancy was not agricultural or pastoral but mercantile, and the cultivated or pastoral land was a mere adjunct or accessory. . . . .

"III. A question has also been raised whether the fair rent for a holding must include some proportion of or some allowance for any revenue derived by the landholder from keeping paying guests, boarders or pupils, or letting one or more furnished houses or buildings on his holding to summer visitors.

"It is not disputed that this practice is reasonable and usual, and is not inconsistent with the proper cultivation of the holding. It may be, and is on parts of some estates lying near a mansion-house or a game preserve, prohibited by the conditions of tenancy without the proprietor's consent. It has become by general custom a use which is reasonable in itself, and contemplated by both landlord and tenant, except where forbidden by contract between the landlord and his tenant. The practice has been general among all classes of farmers, clergymen, and schoolmasters, and tenants of country houses for many years. Indirectly it is an advantage to the landlord, because tenants who desire to attract summer visitors or boarders or pupils improve their houses and keep them in more thorough repair than would otherwise be required. The main advantage to the small tenant is that he gets ready money for payment of his rent and necessary expenditure on the holding. On the other hand, the small tenant and his family, in the case of letting the dwelling-house, have to remain on the holding for its cultivation, and therefore suffer the inconvenience of having to live in an extra cottage, or often in a part of the steading or a makeshift building during the period of summer letting.

"The letting may be for one or for two, or sometimes for three, months of the year or longer. To a large extent both letting and revenue are uncertain. All the risk and expense fall on the tenant alone. Any revenue is derived entirely from the work and expenditure of himself and his family. No doubt summer visitors frequently buy eggs, fowls, butter, and garden produce from the holding. If this can be called a market, it is a market created by the labour or enterprise and at the sole expense of the tenant and his family.

"These considerations apply as strongly to the case of the landholder as to the case of the ordinary agricultural tenant. There is this additional consideration in the landholder's case, that he maintains, and when necessary renews or replaces, at his own expense, the buildings on the holding, whether they were provided by the landlord or by the landholder and his predecessors.

"So far as we know it has not been usual to charge rent or increase the existing rent in respect of the tenant and his family making use of the buildings on any agricultural holding either for summer-letting or for keeping paying guests or boarders, or for other auxiliary or subsidiary occupations such as spinning, weaving, and other home industries, unless the landlord had provided or improved or contributed to improve the buildings for the special purpose of making or aiding the tenant and his family to make such subsidiary or auxiliary use of them.

"It does not appear that any addition to or increase of rent of any agricultural holdings in respect of summer-letting was made on the Arran estate until about fourteen years ago.

"In 1900 the estate instructed Mr David Stevenson to make a valuation and report with regard to a considerable number of holdings in the south end of the island, the tenants of which had complained that their rents were too high. Mr Stevenson was instructed to state the extent and condition of the buildings, give the number and names of any cottars on the holding, the rents, if any, paid by such cottars to the tenant, and the state of cultivation of the holding, and 'to value each holding as an agricultural subject, without adding anything in respect of house-letting to summer visitors, it being intended that this should be considered separately.' Mr Stevenson made a valuation and report according to these instructions. Mr Murray, then factor, revised the rents arrived at by Mr Stevenson by adding where he thought fit a sum for summer-letting, chiefly in cases where Mr Stevenson's rent was materially lower than the existing rent. The new rents as fixed by Mr Murray were intimated to the tenants concerned by a formal letter, the terms of which certainly suggested that the new rents were the rents fixed by Mr Stevenson. The

tenants concerned were not aware that any addition had been made for summer-letting. Nor was the present commissioner of the estate aware that the rent of any farm on the Arran estate included a charge for summer-letting until the inquiry under application from these tenants brought out the fact. The question for us is whether we are bound in fixing a fair rent for the holding of a landholder to include any special allowance for or any proportion of revenue derived by the tenant and his family from these auxiliary and subsidiary uses.

"The Act has committed to the Land Court, as to our predecessors the Crofters Commission, the largest discretion in fixing a fair rent after hearing parties and considering the circumstances of the case, holding, and district. A fair rent is what, to the best of our judgment, we think fair as between landlord and tenant for the particular agricultural or pastoral holding during the first septennial period and succeeding periods.

"Now every fair rent includes rent (1) for the whole land comprised in the holding, including the sites of all existing buildings and offices, after allowing for the existing value of improvements on the land made by the landholder or his predecessors in the same family without payment or fair consideration received, and (2) for all existing buildings and offices on the land, unless and in so far as not provided or paid for by the landholder or his predecessors in the same family without payment or fair consideration received. No tenant is to be rented on existing improvements made by himself and his predecessors in the same family unless or except in so far as in respect of payment or fair consideration received they have become landlord's improvements. Accordingly if the house or building has been wholly provided or paid for by the tenant or his predecessors in the same family no rent can be charged upon it. If the landlord has contributed material or money to the building or its extension or renewal, then the existing value of his contribution is taken into account in fixing the fair rent.

"Further, we have, in view of section 10 of the Act of 1911, to take into account that this section has 'expressly conferred' on the landholder the right to make such use of his holding for subsidiary or auxiliary occupations as in case of dispute the Land Court may find reasonable and not inconsistent with the cultivation of the holding.

"Now in this case also, if the landlord has provided or aided or contributed to provide buildings to be used, and which are used wholly or partially, for any such subsidiary or auxiliary occupation, it is fair that the value of this provision, aid, or contribution should be taken into account in fixing a fair rent for the landholder.

"We have had instances in the northern counties of a landlord building an addition to the tenant's dwelling-house in order that the tenant might use it as a post-office or shop or workshop, for which an allowance is properly and fairly made in fixing the rent. But there is nothing in the Acts to suggest that we are bound to include in the fair rent any charge or allowance in respect merely that the tenant uses the holding, or any building on the holding erected by the labour and expense of himself or his predecessors in the same family, for a purpose which the section above quoted has authorised him to use it.

"The Landholders Acts 1886-1911, like the Agricultural Holdings Acts, confer many new rights on the tenant. All these undoubtedly increase the value of the holding to the tenant, *e.g.*, fixity of tenure, freedom of cultivation, no rent on his own improvements, compensation for permanent improvements, the right to renounce on a year's notice, right of bequest, as well as the rights conferred by section 10. These are not circumstances of the case, holding, and district. All these are rights not granted by or flowing from the landlord, but freely conferred by the Legislature for reasons of public policy. We might add the abolition of landlord's hypothec and the concurrent right to take ground game. Are we to include in the fair rent of the tenant a charge in respect of fixity of tenure, or of the right not to be rented on his own improvements, or of the right to compensation at renunciation or removal, or of freedom of cultivation conferred by section 10? That would be making the tenant pay yearly compensation for the restriction or abolition of powers formerly belonging to the landlord which Parliament thought it expedient and right to restrict or abolish. Where Parliament intends that compensation in any form shall be given for loss arising from changes of the law it makes special provision for that purpose as is made for example in the Act of 1911 in the case of land taken for new holdings or for enlargements.

"Therefore we think it follows that a fair rent should not include any charge or allowance for the tenant's use of the holding in the manner sanctioned by section 10 of the Act of 1911, unless and in so far as the landlord has provided or aided to provide buildings or equipment for the purpose of such use being made by the tenant.

"There is no dispute that the use of buildings on holdings for summer-letting, entertaining paying guests or boarders, is a customary and reasonable use, and not inconsistent with the cultivation of the holding. We are dealing with a lawful use of existing buildings on the holding for the purpose of summer-letting (entertaining paying guests or boarders and the like), which use prevailed before the commencement of the Act of 1911, and has since continued under the Act without appreciable change in its degree or extent. Extreme cases may be figured where this use may be increased to such an extent as to be inconsistent with the cultivation of the holding. When that happens the use can be restrained within reasonable limits.

"It was argued that a distinction should be drawn between (1) the use of the dwelling-house or principal dwelling-house on the holding for summer letting or keeping lodgers or boarders, and (2) the use for the same purposes of any other buildings on

the holding which were not necessary for the working of the holding. In the former case it was stated for the proprietors that while maintaining their right to demand that some proportion of the revenue derived by the landholder from these uses in addition to allowances for (*a*) site value and (*b*) expenditure by the estate should be included in the fair rent, they did not insist in this demand for this proportion, while in the latter case the demand was insisted in.

"The argument for this distinction was mainly founded on the practice of the assessor for the county in making up the valuation roll. Whenever he considered that buildings or structural improvements of buildings wholly or mainly provided or paid for by the tenant were not necessary for the working of a holding, he held that they were not erections or structural improvements made or acquired for agricultural purposes, and he entered the tenant as proprietor of these buildings and structural improvements at such rent as he considered to be the yearly value of these buildings or structural improvements as a separate subject. Whether this did not proceed on a too strict construction against the tenant of the Lands Valuation (Scotland) Amendment Act 1895 under which the assessor proceeded is debateable. In cases where the existing rent included a charge for summer letting, of which the assessor may not have been aware, it rather looks as if the tenant had to pay rates twice over on these erections and structural improvements. But these questions are for the Valuation Court to determine, and they will continue to arise under section 31 (6) of the Small Landholders Act 1911 in cases where a fair rent has been fixed.

"However this may be, the action of the assessor for the purposes of the Valuation Acts forms no precedent or authority to qualify our duty in fixing a fair rent as between landlord and landholder under the Landholders Acts. As we have already said, when the question of the value to an incoming tenant of the buildings on a holding arises in consequence of the renunciation or removal of a landholder, it may be material to consider how far the existing buildings are in excess of what is reasonably suitable to each particular holding. But in fixing a fair rent the important consideration is by whom they were provided or paid for, in whole or in part, whether by the landholder or his predecessors in the same family, or by the landlord or his predecessors in title. Further, it seems inconsistent with the provisions of section 10 of the Act of 1911 to draw a fixed distinction between the principal and secondary or additional dwelling-houses or other buildings on a holding in connection with letting. The right conferred on the landholder is to make such use of his 'holding' for subsidiary or auxiliary occupations as in case of dispute the Land Court may find to be reasonable and not inconsistent with the cultivation of the holding. These are the only qualifications. It is possible that a case may arise in which the use of a secondary or additional dwelling-house or any other building for summer-letting or for entertaining boarders or paying guests may not be reasonable and may be inconsistent with the cultivation of the holding. In that event such use will not be sanctioned. But no such case has yet come before us. The cases with which we have been dealing are cases of a continued use in substantially the same manner as prevailed when the Small Landholders Act applied."

The appellants lodged a *note*, which set forth, *inter alia*—"2. The leading question of law (question 2 in the Case) which arises is whether certain dwelling-houses upon the subjects tenanted by the applicants form part of the statutory small holding. The said dwelling-houses are additional to the dwelling-house referred to in the Case as the 'usual dwelling-house of the holding' and have been referred to throughout the proceedings as 'extra houses.' These extra houses consist of—(*a*) A dwelling-house forming part of a double cottage; (*b*) another dwelling-house forming the remainder of the said double cottage; and (*c*) a third dwelling-house attached to the usual dwelling-house. In stating the Case the chairman of the Land Court has ignored the existence of the third dwelling-house referred to, but has inserted in the Case a reference to a building at the steading used by the applicants as their own summer residence, and treated it as though the appellants' argument as regards the third dwelling-house referred to it. The attention of the chairman of the Land Court has repeatedly been drawn to this inaccuracy, but he continues to represent in the case—contrary to the fact—that the appellants claim the building at the steading referred to as an extra dwelling-house outwith the statutory holding, and continues to refuse insertion of the statement of fact proved at the inquiry, and capable of verification at the inspection, regarding the third house referred to, which is claimed by the appellants to be an extra dwelling-house."

The appellants argued that the extra houses were not part of the holding, but if they were the revenue derived from the summer-letting ought to be taken into account in fixing a fair or equitable rent, or if not the value of the site of the extra houses should be computed in fixing a fair or equitable rent, not as for agricultural land but as for building stances. *Carmichael* v. *Morrison*, 1912, 1 S.L.C. Rep. 42, was referred to upon the question of the fair rent.

The respondents argued that the decision of the Land Court was right and should be affirmed.

At advising the Judges of the First Division delivered the following opinions:—

LORD PRESIDENT—The main question raised in this case is whether certain houses on the holding of the tenants, the use of which was not necessary for, although not inconsistent with, the cultivation of the holding, should be excluded from the holding for the purposes of the Small Landholders Acts. In my opinion this question ought to be answered in the negative. In

considering the matter it must be kept in view that it is not merely the houses with their sites which are sought to be excluded but also an undefined portion of the holding requisite to provide suitable offices, garden ground, and approaches to these houses. So far as regards this additional ground so to be carved out of the holding the Stated Case and relative minute and note for the proprietors are silent. And the statute throws no light upon the subject. The facts which give rise to the controversy may be briefly stated. The holding let to and possessed by the applicants consists of 44½ acres of land. About 43 acres are arable and pasture. The remainder is sites, roads, and waste. In addition to the usual farm buildings there is a double cottage near the shore situated about 200 or 300 yards away from the steading. There is no fence round this double cottage. Between it and the sea is part of the pasture ground of the holding. Sometimes one cottage and sometimes both are let to summer visitors for a couple of months in the year. Under present circumstances the double cottage is not necessary to or utilised for the working and cultivation of this holding. There is also a building under the same roof as the usual dwelling-house of the holding which is occupied by the tenant as a dwelling-house in the summer months when the usual dwelling-house is let to summer visitors. And under present circumstances this building is not necessary to the working and cultivation of this holding as an agricultural or agricultural and pastoral subject. Further, it was not disputed that the uses of the double cottage, main dwelling-house, and the other building were reasonable and customary at the commencement of the Small Landholders (Scotland) Act 1911, and were not inconsistent with the working and cultivation of the holding. At the date of the application the rent for the whole subjects let was £44, 6s. 6d. The question we have to consider and decide is whether this holding is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908. If it is not, then the applicants are not landholders within the meaning of the Act and cannot claim its benefits. Now this holding is not a holding within the meaning of the Act unless it is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral. In other words it is either a holding within the meaning of the Act or it is not. There is no middle state. And there is no room for applying a process of excision to a part or it may be several parts of the holding. The subjects let are, for the purposes of the Landholders Acts, a *unum quid*. The double cottage and the building under the same roof with the main building form an indivisible part of the holding and cannot be struck out as forming no part of the holding. I am unable to find any warrant whatever in the Landholders Acts for cutting and carving upon a tenancy. Such an operation appears to me to be entirely subversive of the whole scheme of legislation disclosed in these Acts. If excision of portions of a subject let were permissible in order to bring holdings within the statutes it is difficult to see how such questions as were decided in *Mackintosh* v. *Lovat*, 1886, 14 R. 282, 24 S.L.R. 202; *Taylor* v. *Earl of Moray*, 1892, 19 R. 399, 29 S.L.R. 336; *Yool* v. *Shepherd*, 1914 S.C. 689, 51 S.L.R. 639; *Stormonth Darling* v. *Young*, 1915 S.C. 44, 52 S.L.R. 35; and *Malcolm* v. *MacDougall*, 1916 S.C. 282, 53 S.L.R. 224, could ever have arisen. It certainly never occurred to anyone that in order to bring the land in these cases under the statutes all that was necessary was to strike out the buildings with an appropriate although undefined portion of the holding attached to each building so excised to afford suitable offices, garden, and accesses. I regard these decisions as conclusive of the present controversy. For although the precise question now before us was not adverted to it was certainly open on the facts, and was I think by necessary implication determined. For indeed the statute in express terms states the issue with perfect precision—Is the holding as we have it a holding within the meaning of the Act, or is it not? No other issue is possible. It is intelligible, doubtless, in cases resembling this, that the holding should be represented as truly urban or villa property, but never till the present case was it argued that the urban portion ought to be excluded in order that the holding might come within the statutes. The general considerations hostile to that view have been carefully and comprehensively stated by the Land Court in the opinion appended to the case of *M'Alpin*. In the main their reasoning appears to me to be sound. I adopt it and do not repeat it.

A critical examination of the rent clause demonstrates that to take the subjects otherwise than as a *unum quid* would be directly contrary to the true meaning of the statute. Thus by the 13th section of the Act "the present rent" of a holding is defined. In this case the "present rent" of this holding within the meaning of the 13th section of the Act is the rent payable for the year current at the commencement of the Act. That obviously must be just the rent paid for the holding as let—£44, 6s. 6d. I am unable to see how it can be otherwise. There was no rent payable for the double cottage by itself, or for the building under the same roof as the usual dwelling-house. The "present rent" must therefore mean the rent payable for the holding as a *unum quid*. Further, the "fair rent" which the Land Court is to fix under section 6 of the Act of 1886, it is expressly said in sub-section (2) of that section, is to come "in place of the present rent." In other words, it is to be substituted for the former rent of the holding. But it is certainly not a rent which is to be paid for a different subject altogether—for only part of the original subject—the part which remains after the extra buildings, with suitable offices, garden ground, and approaches, have been excised from the holding. Similarly in the proceedings taken to have a fair rent fixed for the holding the Land Court is empowered by the Act of 1886, section 6 (5), to deal with "arrears of rent due or to become due before the application is finally determined." It

seems to be certain that it is the arrears payable for the holding as let, and not arrears payable for part only of the holding. Plainly it would be impossible to say that arrears of rent related to one part of the holding but not to the whole. Finally, the argument in favour of excision would lead to the conclusion that when an applicant comes into Court asking that a fair rent be fixed he is entitled, if necessary, to bring his holding within the Act by striking out (1) the sites of all buildings (with suitable offices, garden ground, and approaches) not necessary for the proper cultivation of the holding, and (2) the rents payable for the excised subjects. How the quantity of land and the amount of rent to be struck out are to be determined it is impossible to say. On all these topics the statute is silent. Considerations such as these, in addition to the general considerations discussed in the note by the Land Court appended by them to their order in the case of *Alexander M'Alpin*, lead, I think, inevitably to the conclusion that the holding must be dealt with as a *unum quid*, and must be included altogether or be excluded altogether from the provisions of the statute.

The appellants contend that the Land Court has in enumerating the "extra" houses omitted from the Stated Case "a third dwelling-house attached to the usual dwelling-house." I do not think this is so. But the question is obviously immaterial if the foregoing views are sound. It is, however, maintained by the appellants that the revenue derived from summer-letting of extra houses falls to be considered in fixing the "fair rent" of the holding. The Land Court refused to consider it, and declined to receive evidence of the income derived from this "third dwelling-house." I am of opinion that here the Land Court erred. In fixing a fair rent for the holding under section 6 (1) of the Act of 1886 "all the circumstances of the case, holding, and district" must be considered. That there are on the holding "extra houses" from letting which the tenant derives revenue is certainly a circumstance which the Land Court is bound to consider. How they ought to estimate its weight and what effect they might give to it is for the Land Court to determine. All that we can decide is that this is a circumstance which must be considered. [*His Lordship then dealt with similar questions which were raised in the other cases reported herewith.*]

The Court being equally divided in opinion upon the question of excision or not excision it will be necessary, if the appellants desire that question to be answered, to call in the aid of a larger court.

On the other hand we are unanimous in thinking that if excision did not take place the revenue derived from summer-letting ought to be taken into consideration in fixing the fair rent, and it may be that the appellants may be satisfied to have that question answered in the affirmative, and may deem it unnecessary to require an answer on the question of excision or not.

LORD JOHNSTON—[*Opinion revised after the consultation*]—If the appellants in these cases from the Island of Arran had confined their attention to essentials, and the Land Court had met them half way, the whole questions of real importance might have been dealt with long ago, and the long drawn-out contentions and arguments which have occupied the Court so unduly might have been avoided.

There is one outstanding matter which is of real and, for the Arran estate at least, far-reaching interest, viz., the bearing of the statutory provisions upon the opportunity and practice of the island to turn any available premises to the purpose of house and lodging letting to visitors in the summer season.

This matter really embraces two aspects of the same question, viz. — Whether a separate house or houses comprised in the same tenancy, but not erected, required, or used for purposes agricultural or pastoral, are after 1911 to be held as comprised in the new statutory holdings created by the Landholders Acts; and—If everything falling under the general description of a house situated on a tenancy is to be held as included in the holding, and certain of these bring into the pockets of the landholder a revenue from letting or otherwise accommodating visitors, how is the fact to be dealt with by the Land Court in fixing a fair rent?

But these two aspects of the case really require to be broken up into three questions for their full solution, viz.—1st. Is the holding, if there be included in it such a separate house or houses, a holding under the Landholders Acts? 2nd. If this be answered in the negative, can such separate house or houses and their site or sites be excised or excluded from the holding so as to leave the remainder a holding under the Act? 3rd. If the first question be answered in the affirmative, on what basis are the Land Court to value such house or houses in fixing a fair rent for the holding?

These questions are raised by most of the questions before us, but I think for the present that it is sufficient that I refer to one of these only, viz., the case of *Mary and John M'Neill*, where the question is most important in matter of value, though the Land Court has thought fit for some unknown reason to append to the case of *M'Alpin*, one of minor importance, their note giving their grounds for answering the first question in the affirmative, and at the same time impliedly disposing of the third question by refusing to give any consideration to the revenue derived from letting, &c., in their estimate of a fair rent.

Your Lordships have found yourselves much embarrassed by the failure of the parties to aid in bringing these points to a sharp issue, and of the Land Court so proceeding as to leave it doubtful whether they can be determined without further facts being ascertained. So far as my own opinion is concerned I think that the above questions are sufficiently raised on the cases I have referred to, and that they can now

be determined, but that the application of the judgment along the whole line may require some more facts to be found in individual cases and disputes about facts which have been assumed by the Land Court to be settled.

The comprehensive question may be stated to be, how are what may be called "extra dwelling-houses" to be treated in applying the provisions of the Small Landholders Acts to subjects which were before 1912 held on ordinary tenancies?

I do not think that that question can be determined by one abstract judgment, and that something must depend upon circumstances, and in this I think that my brother Lord Dundas, and probably others of the consulted Judges, agree with me. But I think that when the above two concrete cases are considered, a judgment may be pronounced which will clear the way to the decision of any others which have occurred or may subsequently occur.

The case of *M'Neill* gives an example of one very definite ascertained state of circumstances in which the above questions arise, and I propose to deal with it by itself first. These circumstances are that at 1st April 1912, besides the tenant's dwelling-house, steading, and offices (and passing over one or more houses at the steading which the proprietors aver that the Land Court have, against remonstrance, persisted in ignoring, and as to which we have judicially no information), there had been built so recently as 1906-7, on a site near the sea, partly at the cost of the proprietors and partly of the tenants, a substantial double cottage, which never had and never was intended to have any relation to the holding as an agricultural or pastoral subject, but was so provided in order to admit of the tenants sub-letting to residenters, whether for summer quarters or a longer period. And here I think it appropriate to say, as I see traces of the Land Court being actuated by a contrary view, that in applying the statute we cannot be influenced by the motives under and objects for which anything was done under the former relations of landlord and tenant. The Legislature has seen fit to break up that relation and to replace it by one of an anomalous kind which has not been by any means clearly defined, but which makes the tenant what the statute calls a "landholder," with such statutory independence that he is more nearly a landowner than a tenant, and which leaves the landowner proper a mere rentaller, but a rentaller with heavy contingent obligations. In these circumstances, as the Legislature has ended the old relations and established by statute an artificial system of land-owning and land-holding under which neither party can be expected to concede more than the statutory pound of flesh, we have to take things as they stood in fact at 1st April 1912, without regard to how they arose or the relations of parties when they arose.

There stood then upon the ground of the applicants', now respondents', former tenancy, *inter alia*, a very lettable double cottage, which had no relation to the agricultural or pastoral occupation of the subject of the tenancy. Then *quid juris?* and—

1st. If this double cottage is included in the holding, is the holding a statutory holding?

I may first make comparison with the position existing and dealt with under the former tenure. The Isle of Arran, though not a statutory crofting area, so far as capable of cultivation was largely held under the crofting tenure, and consequently there had arisen the cottar system superimposed on the crofting system. But evidently at the time we are dealing with the cot-houses on this tenancy had fallen back to the estate, and the tenants of the farms or crofts were in the position of tacksmen *quoad* the cot-houses. There were prior to 1898 on this tenancy two cot-houses, the site of which the landowner resumed in order to feu it. But prior to their resumption their sub-rent of £5, 5s. had been received by the tenant, and having been included in his own rent, his rent on the resumption was reduced by that amount. Similarly in 1911 a cot-house, for which the tenant had been receiving a rent of £4, became ruinous, and that amount was thereafter deducted from his rent. Had these cot-houses continued to exist at 1912 they would have been excluded from the holding (Act of 1911, section 26 (6)) notwithstanding that they were held under the former tenancy and covered by the one rent. I rather think that the double cottage in question has been substituted for other cot-houses. At any rate it might quite well have been so. But now, if the Land Court's determination is sound, the landholder, who could not have included the cot-houses in his holding though they were in his former tenancy, is to be dealt with as regards the double cottage as if it was in his holding, and substantially as if he was the feuar of the site of this double cottage. He takes the full annual value of the subject and is to be charged with merely its site value as pro-feu-duty. It is difficult to see how the two different results are to be reconciled without doing violence to the Act.

The application of the M'Neills as landholders (they were year-to-year tenants by tacit relocation) is to fix a *first* fair rent, and it was made as soon after the Act came into operation as was reasonably possible.

I shall consider next what was the position at common law before the Act of 1911 came into operation. The landowner was proprietor of the subjects, and as the tenancy was from year to year he was entitled to resume them at the end of any year on paying to the tenant any compensation which the Agricultural Holdings Act of 1908 provided. What improvements were not covered by the schedule to that Act (and to most of them, such as buildings, the written consent of the landlord was required) passed at common law, as affixed to the soil, without compensation to the landlord.

Unless then the Statute of 1911 applies, the double cottage in question was at 1st April 1912 part of the landlord's property, subject to any claim under the Act of 1908. The tenant cannot complain. If the Statute

of 1911 leaves this subject with the landlord as at common law, the tenant on his part is getting a great deal by the statute which was not his at common law but is taken from the landlord. He cannot have it both ways, as one at least of the Consulted Judges seems to hold. He appeals to the statute and must abide by the statute.

Unfortunately the statute proceeds in such a way as to smother instead of disclose its meaning. It takes the Crofters Act of 1886 as the basis of its extended scheme, wipes out its definition of crofter, also wipes out the definition of holding, modifies many of its other provisions, and bundles them up with the provisions of the new Landholders Act without attempt at order or codification. Yet it has a sort of codification in view, for it declares (section 1) that the Crofters Acts, main and subsidiary, are thenceforth to apply to all Scotland, the expression "landholder" being substituted in them for that of "crofter," and (section 36) that the Act of 1911 is to be read and construed with the Crofters Acts as if they were one comprehensive enactment. Such a drastic interference with the rights of property at common law, assuming that its principle had found acceptance with Parliament, proceeding as it does without attempt at proper codification, the result was that it was impossible for the draftsmen of the Bill to make sure of its provisions applying uniformly and without hitch to all circumstances which might occur, and still more impossible for the Legislature to follow the details of its provisions. *Inter alia*, while the definition of "crofter" and "holding" of the Act of 1886 is repealed, the Act of 1911 goes about a substituted definition thus: a holding is to mean and include these four things—existing crofters' holdings, existing year-to-year tenants' holdings, qualified leaseholder holdings, and new holdings, all subject as thereinafter provided, leaving the reader to search the whole extent of the Landholders Acts for what that imports and implies, while a landholder is to mean the existing crofter, year-to-year tenant, qualified leaseholder, and new holder. This is pretty much like defining a cobbler as the man who mends shoes, and a shoe as the thing which a cobbler mends. Restricting oneself to the year-to-year and leasehold tenants with which we are here concerned, we find that this so-called definition is to be supplemented, under section 26 (3), by eliminating from the category of landholders the tenants of several defined classes of subjects, occupation of which from year to year or on lease was not to be held as conferring the status of landholder under the Act. The phraseology is to be noted. For it is more elastic than if it had expressly disqualified the holder *quoad* his whole tenancy.

It is not wonderful that such a convoluted mode of defining what was intended leaves something to be desired, and that in all probability there will be found more than one *casus improvisus*. I think that this is one such.

The exception most important in this case is that of section 26 (3) (*f*). A person is not to be held to be an existing yearly tenant or a qualified leaseholder, and therefore not a landholder "in respect of" any land which is not "a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908." When that Act, section 35 (1), is turned to, it is found that a "holding" means a piece of land held by a tenant either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral. If then we are justified in making a strict application of this provision I think that there is no escape from the conclusion that a subject, of which either the old rent of £44, or the Land Court's estimate of £31, is the agricultural or pastoral value, and from a small portion of which neither agricultural nor pastoral £66 can be drawn as stated in the Case by letting houses on it even furnished occupying at most a few roods of ground out of some 40 acres, *does not fall* under that definition. The logical result would be that the tenant was excluded from the category of landholder under the statute, and accordingly I find myself obliged to answer the first question above indicated in the negative. I am fully aware that the proprietors refused, for I suppose reasons of estate policy, to maintain this position, and as I understand would not take advantage of it. But they cannot in my opinion obtain a judgment on the second question which they really desire to raise unless the first is answered.

2nd. If then the subjects as they were held under the old tenancy do not fall under the category of a holding under the Landholders Acts, can the separate house or houses and their site be excised from the tenancy so as to leave what remains a statutory holding.

But for this accidental inclusion of what is neither agricultural nor pastoral in any sense, but was conceived and constructed for a totally different purpose, there is no doubt that the land generally regarded held by the applicants was such a holding as the Acts were intended to cover, and certainly just as much so as it would have been had these cottages been cot-houses, or otherwise sublets properly so called, and therefore by the statute expressly excluded from the holding though within the tenancy, and to be excised from it. If the general purview and intention of the Act call for, and by a liberal interpretation admit of, the land held by the applicants being brought under the Act, I think that we are entitled and bound to adopt that construction.

While then we should on a strict interpretation of the statute be obliged to determine in answer to the first question which I have put that if the double cottage is to be included within the holding, then the holding cannot be regarded as a holding under the Act, still I think that we are bound to consider whether an affirmative answer cannot be given to the second question. Section 26 (3), as I have said, enacts that a person shall not be held an existing yearly tenant or a qualified leaseholder "*in respect of any land*" which falls under nine different categories. The use of the words "*in respect of*" followed by the vague term

"*any land*" is consistent with the real meaning of Parliament being to except from the former tenancy any land falling under these categories, without denying to the residue the benefit of a "holding" under the statute. I think that it is impossible to conceive that the exception of any land in the category of the last half of head (*b*), head (*c*), and head (*g*), of section 26 (3), and in the category of section 26 (6), which formed part of a former tenancy, was intended by that mere fact to exclude the residue of the tenancy from the benefit of the Act. And therefore I think that it is possible to overcome any difficulty created by the ambiguous terms of section 26 (3) (*f*). But that can only be if there is nothing else in the statute which presents a more insuperable obstacle.

And there is a provision which does present a serious difficulty, viz., that which defines "present rent." Section 13 says that the rent payable by a landholder as one of the statutory conditions (and for statutory conditions we are sent off to the Crofters Act 1886, section 1, supplemented by the Act 1911, section 10) "shall be the *present rent*, that is to say, the yearly rent," payable by an existing yearly tenant in the year current at 1st April 1912, and in the case of a qualified leaseholder in respect of the last year of his tenancy "in each case unless and until the *present rent* is altered in manner provided by the Landholders Acts." Section 26 (3) again enacts that a person shall not be held to be an existing yearly tenant or a qualified leaseholder "in respect of (*a*) any land the *present rent* of which within the meaning of the Act exceeds £50," &c. The amount of the *present rent* is then the criterion of any land qualifying either the existing yearly tenant or the qualified leaseholder to be deemed a landholder. And in that collocation "present rent" must be the full rent paid for the whole land held under the tenancy. That is the effect of the Act however, and it is not possible to get over it or indeed necessary to get over it until the landholder desires a fresh arrangement in the matter of rent. Whenever the landholder presents himself and claims as the privilege of the Act the fixing of a first fair rent, he may find that he has been up to the specified date in occupation of and rented on some land which was within his former tenancy, but yet is excluded from his new statutory holding, and if neither he nor his landholder has moved to obtain a readjustment of his rent that he has tacitly for the time being continued on the old footing. But though the rent under his former tenancy may be the criterion of his right to come under the Act when he has run out the current year of his yearly tenancy or the last year of his lease it is open to him at any time to come to the Land Court and apply for an alteration of his present rent, and I think that we are bound to hold, if the object of the Act is not in certain cases to fail of attainment, that one ground for his asking such alteration is that under his former tenancy there was land included which by one or other of the heads of section 26 (3) falls to be excised from his statutory holding. Consequently I find myself able to give an affirmative answer to the second question. And notwithstanding the practical difficulties which some of your Lordships apparently have experienced in contemplating excision, I see no more difficulty in the definition of the area to be excised than in the case of the excision of a subtenancy or a bit of woodland.

But the tenants maintain that there are grounds on which the conclusion to which I have come on the first question can be avoided, and yet the necessity of excision be negatived, leaving their holding as it was under their yearly tenancy or lease. These are based on sundry statutory references to houses, from which it is sought to infer that any and every house on the land held under their former tenancy or leasehold is covered by their new landholding tenure.

Their principal support is in section 26 (1) of the 1911 Act, which says that for the purpose of the Landholders Acts the holding "shall be deemed to include . . . *the site of any dwelling-house* erected or to be erected on the holding, or held or to be held therewith, and of any offices," &c. Applying the same canon of construction which I have already resorted to in the tenants' favour, viz., the general intention and purview of the Act, I think that I must conclude that dwelling-house here is confined to dwelling-house required in a reasonable sense for the carrying on of the holding as an agricultural or pastoral or mixed agricultural and pastoral subject and not one which has no relation to that purpose whatever. The contrary contention is not consistent with the general purview of the statute, as is particularly borne out, *inter alia*, by the provision of the same section, sub-section (6), which excludes from the holding any part of such holding, and therefore any dwelling-house occupied by a sub-tenant.

Nor do I think that the tenants are assisted by the provision of the Act 1911, section 10 (1), on which they also found. In the first place the right thereby conferred can hardly make that part of their holding which is not otherwise part of their holding. But passing by that difficulty, which might be set down to the method of draftsmanship which pervades the Act, I am unable to hold that the keeping of separate houses on the holding for the sole purpose of letting them is in the sense of the statute a subsidiary or auxiliary occupation. It is a subsidiary or auxiliary occupation of the landholder, and not a subsidiary or auxiliary use of the holding, which is covered by these words. My conclusion therefore quite squares with the proviso in the Act of 1911, section 10 (2), relieving the landholder of the embargo laid by the Crofters Act of 1886, section 1 (4), against sub-letting, to the extent of authorising him to sub-let his dwelling-house—and it is markedly called "*his* dwelling-house," not "*any* dwelling-house" on the holding—to holiday visitors. This proviso would have had no meaning or necessity had the prior sub-section (1911, section 10 (1)) had the effect attributed to it.

There is finally no difficulty in giving

effect to the conclusion to which I have come, by the fact that the former tenancy was a *unum quid* and the rent one and undivided. Such a position is amply provided for, if indeed that is necessary, which I doubt, by the provisions of the Act of 1911, section 14, which empowers the Land Court to adjust the rights of the parties interested, arising on an existing yearly tenant or qualified leaseholder becoming a landholder so far as affected by the operation of the Act.

Though then, even if the subjects of the former tenancy, if there be included in it the double cottage, is not in my opinion a holding under the Act, there is, so far as I can see, no reason why the said double cottage and what pertains to it should not be excised from it so as to leave what remains a holding under the Act. And I should so answer the second question which I have stated.

So far I have confined my attention to the *M'Neills'* case, but I think it right to repeat what I said at the outset that I do not think that the matter with which I have been dealing can be determined by one comprehensive judgment and without regard to circumstances. The *M'Neills'* case presented one very definite ascertained state of circumstances. The other cases unfortunately present circumstances differing in degree but not definite as the proprietors traverse the statements made by the Land Court to such effect that it is I think impossible for me to apply this judgment to them or to go beyond the general conclusions which I have endeavoured to explain.

3rd. This brings me to the third question, which, though I have stated it under the *M'Neills'* case as applicable to its circumstances in particular, is really of more general application, viz., How are houses and buildings on a holding from which a revenue may be *legitimately* derived by sub-letting "to holiday visitors," to adopt the expression of the statute, to be dealt with by the Land Court in fixing a "fair rent?"

It appears to me that, approaching this question without prepossession, the natural answer would be, you have got to take as the basis of a fair rent what the tenant can make of the holding by using his opportunities. And I do not think that there is any reason for excluding from consideration in arriving at a fair rent the fact that by letting his house to holiday visitors, as he and his neighbours have been accustomed to do, the tenant can derive a return, just as he can do from cultivating a field. The fact of lettability is not a mere hypothetical suggestion as it would be in the case of say an isolated hill holding. It is made a practical matter in Arran by the opportunities and custom of the district. The question seems to me to be, would a tenant derive more profit from the holding if he had this privilege than if he was restrained from taking in holiday visitors? If he would, then as this fact enhances the value to him, it is clearly a consideration which should enter into the question of fair rent, and I should so answer the third question which I put in the *M'Neills'* case. Accordingly I think that the Land Court were wrong in acting as they state they did in article 17 of the *M'Neills'* case.

LORD MACKENZIE — (1) The important question argued in this case is whether a dwelling-house not connected with any agricultural or pastoral purpose, but used solely for letting to summer lodgers, is to be held part of a new statutory holding under the Act of 1911.

Whether the facts raise this question is as yet undetermined owing to the way the Land Court has dealt with the case, but I understand the point is maintained as one of relevancy. In my opinion there ought to be a remit for inquiry into the averments in the respondents' note, but as this will be unnecessary if these averments are irrelevant the applicants' argument has to be considered at this stage.

The contention is that the presence of such a dwelling-house upon a holding for which prior to the Act a single rent was paid can only be taken into account in determining whether the holding as a whole falls within the provisions of the Act or not. If the dwelling-house is of sufficient importance to qualify the character of the holding, then the result according to the applicants' contention is that the holding must be excluded from the Act and the tenant cut out from all statutory benefits. So far as the policy of the Act can be discovered the effect of this contention, if duly carried into effect, would be to defeat in several instances what the Act aims at. The important clause in this connection is section 26 (3), which provides that "a person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of" land falling under the classified exceptions in the section. These include the sites of ancient monuments, land within burghs, market gardens, glebes, woodlands, land held for public recreation, &c. Now what is to be the duty of the Land Court when they deal with a holding part of which, say one-hundredth part, is within burgh? Are they to exclude the holding from the Act altogether, or are they to cut out the land within burgh—the balance forming a statutory holding—and then apportion under their statutory powers a fair rent to what falls within the Act. The answer which in my opinion should be given is that the section means that the excluded portion must be excised. The language of section 26, sub-section 3, is imperative—"A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of," and then follow the exceptions. In the same way with woodland. Take the case of a holding, otherwise unexceptionable under the statute, but which out of its fifty acres has ten acres of woodland. Again excision would appear to be what the section intended. No ground in reason has been put forward for holding that because a man is not to be held an existing yearly tenant as regards woodland he ought therefore to be held not an existing yearly tenant as regards the rest of the holding. The sec-

tion does not say this is to be the effect, and it plainly implies the contrary.

In the same way when the crucial sub-section in this case is applied—26 (3) (*f*)—the same result ought to follow. It provides that a person shall not be held an existing yearly tenant or a qualified leaseholder under the Act in respect of "(*f*) any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908." This Act provides by section 35—"*Interpretation.*—(1) 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 is 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." Can a dwelling-house for summer visitors be held to fall within this description? In my opinion it cannot. But it is argued that the holding is a *unum quid*, and one part cannot be separated from the rest. The position of sub-section (*f*) in the section appears to me quite against this contention. If it were given effect to, then what is excluded by sub-section (*f*) would be in a different position from land excepted by the operation of all the other sub-sections of section 26. The policy of the Act is carried out by section 26, sub-section (6), which directs excision as regards what is occupied by a sub-tenant. In my opinion the excepted categories are all in the same position, and the result is excision not qualification.

For these reasons I think there should be a remit.

(2) The facts in regard to Miss Young's tenancy do not make her a sub-tenant within the meaning of section 26 (6), the let being for less than a year.

(3) Letting of his dwelling-house to summer visitors is expressly recognised by section 10 (2) as a right the landholder has. This differs from section 1 (4) of the Crofters Act of 1886. This is undoubtedly a right which has value, and must necessarily be taken into consideration in fixing the fair rent that a tenant would pay for the holding. The tenant will not be charged rent on his own improvements, but the landlord is entitled to more than an agricultural rent for the value of the site of the house.

(4) For the reasons above stated the Land Court was not justified in excluding evidence on the subject of summer-letting value.

(5) If it be held on the facts being properly ascertained that any house or houses ought to be excluded from the holding, then the order as framed is not competent.

LORD SKERRINGTON—The most general and important question of law which the appellants, the trustees of the Duke of Hamilton, desire to raise in most if not in all of these cases is whether a house not useful for any agricultural or pastoral purpose, but forming prior to 1st April 1912 a material and integral part of one single holding whereof the residue was agricultural or pastoral or both, ought, for the purposes of the Small Landholders (Scotland) Acts 1886 to 1911, to be considered as dissevered from that holding, with the result that the agricultural and pastoral land and buildings included within the original holding together form a new statutory holding, while the house in question, with its garden and approach, must be deemed to have been let by itself upon an ordinary leasehold tenure from year to year in return for a rateable proportion of the covenanted rent. The appellants point to the analogy of land within a burgh, land occupied by a sub-tenant, glebe land, and other classes of land of which it is enacted (either expressly or impliedly) that although forming part of a holding at the commencement of the Act of 1911 they are deemed not to be included within the holding for the purposes of the Landholders Acts (Act of 1911, section 26 (3) (*c*) and (*e*) (6)). The appellants also point to section 14 of the Act of 1911, which empowers the Land Court to adjust the rights of parties interested so far as affected by the operation of the Act at the date when a tenant becomes a landholder. Under this section the Land Court would have power to apportion the stipulated rent as between the parts of an original holding falling within and those falling without the Act, after which it would go on to fix a fair rent for the former—the statutory holding—as authorised by section 6 of the Crofters Holdings (Scotland) Act 1886. I do not think that the facts as found by the Land Court give the necessary basis for raising the legal question upon which the appellants wish to obtain a decision. Thus in the case on the application by *Mary and John M'Neill* it is stated (paragraph 9) that in the event of the two joint tenants wishing to have a separate household a certain double cottage situated on the farm would be suitable as the dwelling-house of one of them. And yet the appellants claim that this cottage forms no part of the statutory holding because it is, as they contend, an "extra house" useful only for the purpose of being let furnished to summer visitors, and of thus enabling a small farmer to carry on the business of a lodging-house keeper. This difficulty, however, is got over by the circumstance that the appellants move that almost every one of these six cases should be remitted to the Land Court for amendment upon the ground that (as they aver) the cases are so framed as either to omit or to misrepresent material facts which are patent and indisputable, or which at any rate were clearly proved. I am of opinion that if the appellants' averments as to the extra houses were relevant the motion for a remit would have to be granted, and in this indirect way the appellants will obtain a judgment upon the legal question which they seek to raise. In my judgment the facts which the appellants wish the Land Court to insert in the cases are, even if proved, entirely irrelevant, and the motion for a remit should be refused on that ground so far as it relates to the so-called "extra houses." Assuming for the moment that the appellants are right in

supposing that some or all of these houses serve no agricultural or pastoral purpose, the legal consequence on my reading of the Act of 1911 would not be to dissever them from the statutory holding but to exclude every part of the holding as it stood at 1st April 1912 from the operation of the Landholders Acts. The appellants do not ask for the remedy to which in my opinion they would be entitled if right in their facts. In none of the cases is the question put, whether a particular holding is excluded from the operation of the Landholders Acts in respect that a material part of it is neither agricultural nor pastoral. No such question was argued before the Land Court, and the appellants' counsel refused to argue it before us. It is unnecessary for me to consider whether, if the appellants' view of the facts is well founded, some other remedy may be open to them, but they cannot, even if they so desired, plead for a total exclusion from the operation of the Landholders Acts of holdings which both parties to the cases induced the Land Court to treat as falling in part at least under these Acts.

The appellants' argument in favour of dissevering from the holding for the purposes of the Landholders Acts certain houses which prior to 1st April 1912 admittedly formed an integral part of the holding, is based upon an entirely original interpretation of section 26 (3) of the Act of 1911, which enacts—"A person shall not be held an existing yearly tenant . . . under this Act in respect of" . . . "(*f*) Any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908." The Act of 1908 here referred to enacts (section 35)—"'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." It is unnecessary to consider the case where part of a holding consists of a market garden, a matter specially provided for in head (*d*) of section 26 (3) of the Act of 1911. Confining myself to the first part of the definition in the Act of 1908 I think that it requires that every part of a holding must be either agricultural or pastoral, and that consequently no holding which contains an element which is not of some utility from an agricultural or pastoral point of view (unless it be trifling and immaterial), falls within the definition. I did not understand the appellants to dispute this view of the Act of 1908, but they proposed to read sub-section 3 of section 26 of the Act of 1911 as if it had enacted that no land shall be included within a statutory holding which is not either agricultural or pastoral. The short but sufficient answer is that the Act of 1911 does not say so. The test which that statute directs us to apply is not whether certain lands or buildings, being purely agricultural or pastoral, would have formed a holding within the meaning of the Act of 1908 if (contrary to the actual fact) they had prior to the commencement of the 1911 Act been let together as a single subject, but whether they did in fact at that date constitute a holding within the meaning of the Act of 1908.

In support of their claim for partial in contrast to total exclusion from the Act of 1911 in the case of holdings partly urban and partly agricultural or pastoral the appellants' counsel referred to the decision of the Lands Valuation Appeal Court in *Sym* v. *Assessor for Bute*, 1915 S.C. 781, 52 S.L.R. 199. That was a judgment upon section 4 of the Lands Valuation (Scotland) Amendment Act 1895, and is an authority for the proposition that a landholder cannot claim exemption from the operation of that statute in so far as the annual value of his house exceeds the agricultural requirements of his holding. It does not assist however in the construction of the Act of 1911.

For the foregoing reasons I am of opinion that the Land Court acted rightly when it refused to treat the so-called "extra houses" as excluded from what all parties agreed to be statutory holdings tenanted by landholders. For the sake of clearness I may repeat that I have assumed, and indeed it is a condition of the appellants' argument, that at the commencement of the Act of 1911 every extra house formed part of a single holding which also included agricultural or pastoral buildings and land. If that had not been so there would have been no necessity for the appellants asking that the extra houses should be dissevered from the rest of the subjects. If any one of the extra houses had constituted a separate tenancy on 1st April 1912, such house would not have been included in a statutory holding unless it could have been shown to be a dwelling-house "held therewith" within the meaning of section 26 (1) of the Act of 1911.

The next question is also one of some general importance, although it arises in one only of the cases, that of the *M'Neills*. One of the so-called extra houses on this holding was a double cottage, one half of which was at the commencement of the Act of 1911 sublet to and occupied by a Miss Young. Section 26 (6) of the Act of 1911 enacts that the holding of any existing yearly tenant or qualified leaseholder shall not for the purposes of the Landholders Acts be deemed to include land at the commencement of the Act forming part of such holding and occupied by a sub-tenant of such existing yearly tenant or qualified leaseholder. It follows that in cases to which this sub-section applies any portion of a holding occupied by a sub-tenant is excluded from the statutory holding of the landholder. The question of law is whether the sub-section applies to the case of one who, like Miss Young, was tenant not for a complete year but only for a year minus two months. The Landholders Acts do not define the word "sub-tenant" but they provide by reference a definition of the word "tenant." The Act of 1886, which is to be read and construed along with the Act of 1911 (section 36), enacts (section 34) that "other expressions have the same meanings as in the Agricultural Holdings (Scotland) Act 1883." The latter Act, section 42 (now

repealed) defined "tenant" as "the holder of land under a lease," and defined "lease" as a "letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year." The definitions in the Act of 1908 (section 35) are the same. As a tenant for a period of ten months does not fall within the Agricultural Holdings Acts I am of opinion that the Land Court was right in holding that Miss Young was not a sub-tenant within the meaning of the Landholders Acts.

The next question of law is one which recurs in most of the cases. Assuming that the appellants are wrong in claiming that the "extra houses" ought to be dissevered from the statutory holdings, was the Land Court "bound in fixing a fair rent for the holding to include in such fair rent a sum or allowance in respect of revenue derived or which might reasonably be expected to be derived by the tenants of the holding from letting furnished" part of the buildings to summer visitors with or without attendance? I should hesitate in any case to affirm that the Land Court was "bound" to pick out some special advantage connected with a particular holding and to include in the fair rent "a sum or allowance" in respect thereof. What seems to be meant however is to inquire whether the Land Court was bound on general legal grounds to ignore the fact that these small farms, being situated in an island popular as a holiday resort, may profitably be utilised as lodgings for summer visitors, with or without attendance. Section 6 (1) of the Act of 1886 directs the Land Court to determine what is a fair rent for a holding after "considering all the circumstances of the case, holding, and district," and no good reason occurs to me why this particular circumstance ought to be regarded as irrelevant. It is of course an entirely different question — one of fact and not of law — whether in the case of any individual holding the Land Court, having listened to the evidence, and keeping in view that it has to fix a fair and not a rack rent, ought to fix the rent at a larger sum than it would have awarded in the case of a similar farm situated in a part of Scotland not resorted to by summer visitors. The whole question is discussed at great length in the note appended by the Land Court to its order in the case of Alexander M'Alpin, pages 15–22. The reasons there stated in favour of ignoring the particular advantage with which we are at present concerned seem to me to be either irrelevant or unfounded in fact. I do not see the relevancy of the fact that this use of a holding is reasonable and usual and authorised by the statutes. Unreasonable and illegal uses of a leasehold are not an element in fixing the rent. Nor do I understand why privileges conferred upon a tenant by statute should not be considered in fixing the rent just as much as privileges conferred by express contract or by custom. Again, it is not accurate to say that any revenue from summer visitors "is derived entirely from the work and expenditure of himself (the tenant) and his family." This view ignores the landlord's contribution of a site in an attractive locality, without which the exertions and capital of the tenant and his family would produce no return from summer visitors.

Having regard to the reasons which led the Land Court to exclude evidence as to the special advantages connected with these particular holdings, I see no alternative except to remit to the Land Court to reconsider what is a fair rent after hearing the evidence tendered by the appellants. The questions of law referring to this matter do not as framed admit of an answer.

The Court pronounced the following interlocutor:—"*Edinburgh, 17th July* 1917.—The Lords, in respect of the importance and difficulty of the following question of law raised in the Stated Case, viz., Where at the date of the Small Landholders Act 1911 coming into operation there existed on any land held on such a tenancy that it would otherwise be a statutory 'holding,' a dwelling-house or other buildings, forming an integral and material part of the subjects of said tenancy, but not used or useful in connection with the agricultural or pastoral or agricultural and pastoral occupation of the land, whether the said dwelling-house or other buildings with their pertinents and site may competently be excised from the land held on such tenancy, leaving the remainder a statutory 'holding' under the said Act? Appoint the Case to be considered by the whole Judges of the Court, and that on minutes of debate to be adjusted by the parties and boxed and lodged by the first sederunt day in the ensuing winter session."

Argued for the appellants in their minute of debate—The question related to extra houses, *i.e.*, dwelling-houses over and above those used or useful for the occupation of the tenant or his servants, which were sublet by the tenant. Those houses had been erected to meet the demand for holiday residences, in many cases (as in the present) materials were contributed by the appellants. No separate rents were charged for those houses, but valuations for fixing the rents of the holdings had been made from time to time and additions had been made to the rents of the holdings as agricultural subjects in respect of those extra houses, their sites and their use. That had happened in the present case. In the present case the question was most sharply raised in connection with the double cottage part of which was let to Miss Young, though there were other extra houses on the holding. The double cottage consisted of two dwelling-houses and their sites situated within the boundaries of the holding, having no relation either in use or in potentiality to the equipment or occupation of the holding as an agricultural subject but used and intended exclusively for the tenant's business of subletting. Lord Johnston and Lord Mackenzie were right in holding that the extra houses must be excluded from any statutory holding which might have come into existence at the commencement of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49). That result was in

accordance with the spirit and wording of that Act. The respondents were qualified as regards residence and cultivation and improvements under section 2 (1) of the Act of 1911. If the holding was a holding in the sense of that Act and the respondents were not otherwise disqualified they would have been "landholders" in the sense of section 2 (2). But section 26 replaced section 34 of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), which defined holding and had restricted the meaning of "holding" and "landholder" for the purposes of the Act of 1911. If the respondents and their holding did not satisfy the terms of that section they were not entitled to the benefits of the Act. The holding was composite, consisting of land and buildings; as a *unum quid* it was not a statutory holding, and the respondents were not statutory landholders. The part of it which was occupied and used for agriculture was a statutory holding, but the remainder could not be included in a statutory holding and must be excised or if not the whole holding was outside the Act. Sublet portions of a holding fell to be excised—section 26 (6). That was the condition on which the remainder of the holding could come within the statute. That view had been adopted by the Land Court—*Morrison* v. *Nicolson*, 1913, 1 S.L.C. Rep. 89, at p. 91. The house occupied by Miss Young and its site for that reason must at least be excluded. As to excision generally, it raised no insurmountable difficulties, provision being made for the adjustment of the rights of parties when excision took place—section 14. In general the extra houses and their sites must be excised, for they were neither wholly agricultural nor wholly pastoral, nor partly the one and partly the other—section 26 (3) (*f*), and the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), section 35 (1). Strictly, the effect of section 26 (3) was to exclude a landholder from the privileges of a statutory landholder *quoad* so much of his holding as was not of the nature of a statutory holding, but practically that was the same as excision of those portions. Excision was certainly contemplated with regard to the sites of ancient monuments and burghal and woodland portions of holdings—section 26 (*b*) (*c*) and (*g*). The same was true with regard to land for the protection of objects of historical interest, glebe land, and land forming part of a policy—section 26 (*b*) (*e*) (*g*). The same result should follow when part of the holding did not satisfy the conditions of section 26 (*f*), so that the non-agricultural portions of the holding in the present case should be excised, or, if not, the entire holding was affected by the disqualification, and the respondents could have none of the privileges conferred by the Act. That alternative would not be readily entertained, but being the only alternative to excision of the disqualified parts, it afforded a good reason for excision in part. Excision had been recognised by the Land Court in the case of burghal lands within a holding—*Boulein* v. *M'Dougall*, 1916, 4 S.L.C. Rep. 72, at p. 77, and also in the case of glebe lands, estate policies, home farms, and market gardens. The result was not anomalous or surprising, it was in conformity with section 26 (3), and the same rule should apply when the disqualification was under section 26 (3) (*f*) as when it fell under the other heads of that sub-section. The argument for the respondents would attach a different result to a disqualification under section 26 (3) (*f*) from the result attaching to disqualification under the other heads. Excision of part of a holding was contemplated in section 26 (6), and the absence of express provisions to regulate the rights of parties founded no argument against it. The holding as it existed at the commencement of the Act was not to be regarded as a *unum quid;* in determining whether it fell within the Act the examination of its different parts was sanctioned by section 26, and it was not accurate to say that the only alternatives were qualification as a whole or disqualification as a whole. The provision that the present rent was to run on after the commencement of the Act until a fair rent had been fixed (section 13), and that therefore if parts were excised the tenant would still have to pay the rent for the whole, raised no difficulty, for the rights of parties might be adjusted under section 14, or the tenant could at once apply to have a fair rent fixed, or could proceed under section 6 (3) of the Act of 1886. Section 17 and the following sections of the Act of 1908 dealt with the statutory holding and the rent, &c., therefor, so did section 13 of the Act of 1911. Section 26 (1) referred to the site of dwelling-houses upon the holding which were included in it as being proper for the accommodation of the tenant and his servants and not to extra houses. That was supported by the proviso of section 10 (2), which altered section 1 (4) of the Act of 1886. If not, section 26 (1) would be inconsistent with section 26 (3) (*f*). Section 10 (1) did not apply. The sub-letting of the extra houses withdrew them from use for agriculture, and was inconsistent with the cultivation of the holding, so that it could not be regarded as a subsidiary or auxiliary occupation. *Mackintosh* v. *Lord Lovat*, 1886, 14 R. 282, 24 S.L.R. 202; *Taylor* v. *Earl of Moray*, 1892, 19 R. 399, 29 S.L.R. 336; *Yool* v. *Shepherd*, 1914 S.C. 689, 51 S.L.R. 639; *Stormonth-Darling* v. *Young*, 1915 S.C. 44, 52 S.L.R. 35; *Malcolm* v. *Macdougall*, 1916 S.C. 282, 53 S.L.R. 224, were all distinguished. The extra buildings and their sites should be excised, or alternatively the whole subjects were not a statutory holding.

Argued for the respondents in their minute of debate—The double cottage and the building occupied in the summer when summer visitors occupied the ordinary dwelling-house were not necessary, nor used for the ordinary cultivation of the subjects, but they might if the method of cultivation were changed be required to provide accommodation for hired labour, &c. Their use at the commencement of the Act was reasonable and customary, and was not inconsistent with the proper working of the holding. It was admitted that there was a holding in the sense of the Acts of 1908

and 1911, and the respondents were entitled to the benefits of the Act of 1911, but the dispute was as to what was within the statutory holding and what was not. The original holding at the date when the Act came into operation was the statutory holding. There was nothing in the Act of 1911, and particularly in section 26 (3) (*f*), to justify severance or division of the holding as it existed when the Act came into operation. Section 26 (3) (*f*) referred to the Act of 1908, section 35. Wherever, as in the present case, the Act of 1911 applied, the leasehold in its entirety at the commencement of that Act became the statutory holding subject to all the provisions of the Act of 1908. In circumstances such as the present there were three possible views—(1) the subjects were excluded from the operation of the Act of 1908, (2) the presence of the extra houses was immaterial so long as they did not affect the agricultural or pastoral nature of the subjects as a whole, or (3) the extra houses fell to be excised from the statutory holding. The appellants had supported the last of those views. Their position was novel. It had never occurred to anyone hitherto, and it was inconsistent with the terms of the Act, and unsupported by any decision though the definition of holding had in substance remained the same all along. The Act of 1908 applied to leases existing when it came into operation, yet it contained no provision to regulate the rights of parties in case of such a division as was required by the appellants, and there was no provision in any individual section to meet such a case. Section 1 (1) read along with section 35 showed that the holding was just the original leasehold and not a part thereof. Section 10 gave compensation for refusal to renew an existing lease, and the only tenancy to be renewed was that under the original lease. The whole provisions of that section were inconsistent with the idea that the holding was only a part of the leasehold. Sections 17, 18, and 19 likewise treated the holding as the existing leasehold. Consequently holding in the sense of the Act of 1908 meant the entire leasehold, and if so any particular leasehold was either entirely within that Act or entirely outside its provisions. In *Mackintosh's* case (*cit.*) the decision turned upon the nature of the subjects as a whole. That was also the *ratio decidendi* in *Taylor's* case (*cit.*), *per* Lord Kyllachy (Ordinary) at p. 400. From these cases it followed that in considering whether a leasehold was a holding or not under the Act of 1908 its general nature was the decisive factor, and a detailed examination of its parts was irrelevant. Part only of the leasehold could not be held to be the holding. Under the Act of 1911 no case of excision could arise. The leasehold in its entirety either was or was not a statutory holding. The entire leasehold might fall outside that Act, but part of it could never fall within the Act and part outside of it. The Act of 1911 applied the Crofters Acts to the whole of Scotland (section 1). The scope of the Act was defined (section 2). That section set forth the persons entitled to the benefits of the Act rather than the lands to which it was to apply. Those persons were crofters, tenants of a holding from year to year, and tenants of a holding under longer leases than a year. The holding referred to was the existing leasehold. All such persons unless disqualified under section 26 were entitled to the benefit of the Act. Section 26 set out the disqualifications of persons who would otherwise be entitled to the benefit of the Act. The effect of subsection (3) (*f*) thereof was to provide that the Act of 1911 was limited in operation to leaseholds which were holdings within the meaning of the Act of 1908. There was nothing to imply a severance or division of that which was originally let as a *unum quid* unless it could be found in the Act of 1908, and if so the whole tenor of the Act of 1908 was against excision. When the Act of 1911 was passed agricultural holdings had long been known to the Legislature both in Scotland and in England. As shown by its title the Act selected from the persons who possessed agricultural holdings a certain class and gave them special benefits. The tenants of small already-existing holdings were given better conditions of tenure. The small holding was treated as a species of a wider and well-known class of holding (section 33). The absence of a definition of a statutory holding in the Act of 1911 was the result thereof. The small holding was just an agricultural holding, but it differed from others merely because of its size, rent, &c., and the Act of 1911 merely set out the discriminating elements. The various heads of section 26 (3) were only important in so far as they threw light on the question whether head (*f*) operated by way of disqualification of the tenant by total exclusion of the leasehold or by partial excision. Head (*a*) undoubtedly referred to total exclusion and not to partial excision. It made the question whether a leasehold fell within the Act or not turn upon its total acreage and rent. The rent certainly was the rent of the existing leasehold (section 13 (*b*) and (*c*)), not the rent for such part of the holding as was agricultural. Further, it was unnatural to make the test of whether the Act applied the rent of the existing leasehold and yet only to apply the Act to part of the leasehold. The first part of head (*b*), head (*d*), and head (*h*) were in the same position as head (*a*). From their nature they could not form part of a leasehold to the balance of which the Act could apply. The other heads were less clear, but total exclusion of the leasehold rather than excision of part of it was the policy of the statute, which was here dealing with existing holdings not with the formation of new holdings. Existing holdings would generally have suitable houses and buildings; if a material portion were excised one part would be left without buildings, while the other, if the excision were material, would have an unsuitable house and buildings. In some cases an excised portion might be so small as to cause no prejudice, but in others, *e.g.*, whether the dwelling-house and buildings were within burgh, their excision would be destructive of the holding. The presumption was therefore in favour of exclu-

sion *in toto* rather than excision in those cases, but even if the other heads contemplated excision it did not follow that head (*f*) also contemplated excision. Further, under section 13 the present rent was just the rent of the whole leasehold, and the tenant was to go on paying that rent until it was altered under the Act. Consequently he ought to continue to hold the same subjects as his statutory holding, and should not have to pay the same rent when part of the original subjects did not form part of his holding. There was no separate rent for the parts which the appellants proposed to excise, and the holding therefore must include everything for which rent was paid under the original lease. That derived support from section 32. In the case of the statutory small tenant the existing holding was carried on—section 32 (4), (7), and (9)—but he differed from the small landholder only in respect that he had not executed the major part of the improvements; both must possess a small holding in the sense of the Act. The landholder was the person primarily intended to be benefited by the Act, and he ought not to be placed in a less favourable position than the small tenant. Further, the fair rent was to come in place of the existing rent—section 6 of the Act of 1886. That implied that the fair rent was the rent for the original subjects and not for part of them. The same inference followed from the provisions as to arrears of rent—section 6 (5). Section 14 of the Act of 1911 did not provide a machinery to work out the rights of parties. It bore no reference to section 6 of the Act of 1886, and could not be held to have amended it. Had that been intended express words would have been used. Section 26 (3) (*f*) limited the operation of the Act to holdings which were properly agricultural and might justify total exclusion but could never justify excision of a part. If the appellants were right the decisions in *Yooll's* case (*cit.*) and *Stormonth Darling's* case (*cit.*) would have been different. But in those cases, and in *Malcolm* case (*cit.*), the Court proceeded upon the general nature of the subjects as a whole—there never was any question of excision. In the present case the fact that the double cottage could be severed from the remainder of the subjects without interfering with their use and occupation obscured the difficulties arising from the appellants' argument. Logically their argument led to great difficulties. There might be upon a holding things not necessary for proper cultivation but yet proper adjuncts and accessories. Thus the buildings might be too large owing to resumptions of the landlord or conversion of arable land into pasture, or the house might be larger or of a better class than was usual in such holdings. If the appellants were right and only things necessary for proper cultivation were to be included, those items would be excised *quoad* the excess, and the holding would consist of pieces of land and parts of buildings held on the statutory tenure, interspersed with which would be other pieces of lands and buildings held on some other tenure and perhaps held off the landlord or a third party. Such a result could not have been contemplated in the Act, more particularly as it intended the landholder to have a permanent or quasi-permanent tenure of the holding. The question should be answered in the negative.

The Consulted Judges returned the following opinions:—

LORD JUSTICE-CLERK — This case was brought before the Court by an appeal by way of a Stated Case from the Scottish Land Court.

Certain questions of law were submitted in that Stated Case for the opinion of the Court of Session. After parties had been heard, their Lordships of the First Division submitted a question of law to the whole Court by the following interlocutor, viz.—"*Edinburgh, 17th July* 1917.—The Lords, in respect of the importance and difficulty of the following question of law raised in the Stated Case, viz.—Where at the date of the Small Landowners Act 1911 coming into operation there existed on any land held on such a tenancy that it would otherwise be a statutory 'holding' a dwelling-house or other buildings, forming an integral and material part of the subjects of said tenancy, but not used or useful in connection with the agricultural or pastoral or agricultural and pastoral occupation of the land; whether the said dwelling-house or other buildings, with their pertinents and site, may competently be excised from the land held on such tenancy, leaving the remainder a 'statutory' holding under the said Act?"

The only point, as I understand it, we have to consider is Whether, in the circumstances predicated, it is *competent* to excise the buildings referred to, with the pertinents and site thereof, and still leave the remainder a "statutory" holding under the Act.

In my opinion the answer to this question, which is very general in its terms, can be solved by the construction put on section 26 of the Statute of 1911. I am of opinion that section 26 compels an affirmative answer.

The Statute of 1911 is one to encourage the formation of small agricultural holdings and to amend the law relating to the tenure of such holdings (including crofter's holdings), and for other purposes. I do not find any direct and precise definition of the term "holding" in the statute, and I proceed to consider section 26.

Sub-section (1) deals *expressly* only with rights in land which, however, may be either pasture or grazing land or the site of certain buildings and erections.

Sub-section (6) deals with certain lands or heritages. In my opinion "lands or heritages" falling within sub-section (6) not only may be competently excised, but must be excised in the sense of the question submitted to us, and when these are excised the remainder will still constitute the holding of an existing yearly tenant or qualified landholder.

Sub-section (1) and sub-section (6) might, in my opinion, instead of being expressed as two separate sub-sections, have equally

well, and so as to produce the same effect, been expressed by adding to sub-section (1) this proviso—"Provided always that for the purposes foresaid any lands or heritages at the commencement of this Act forming part of the holding of one who becomes an existing yearly tenant or qualified leaseholder within the meaning of this Act, and occupied by a sub-tenant of such existing yearly tenant or qualified leaseholder, whether paying rent or not, shall not be deemed to be included in such holding."

In my opinion that is just providing that such lands or heritages must be excised from such holding for the purposes of said Acts.

Similarly, in my opinion, any person who by the statute becomes an existing yearly tenant in the sense of section 2, sub-section (2), and whose holding at the date of the commencement of the Act included land falling under any of the sub-heads of section 26, sub-section (3), shall not be held to be an existing yearly tenant so far as such land is concerned.

So, too, with regard to a qualified leaseholder under section 2, sub-section (3).

If the above views are sound, in my opinion it follows that many holdings existing at the passing of the 1911 Act cannot be treated as each forming a *unum quid* constituting as a whole a statutory holding, but in order to constitute such a holding must be divided so as to exclude those portions which would fall under any of the categories above referred to, leaving the remainder as a statutory holding.

I do not see that it can be maintained successfully that because part of the original holding must be excised, therefore what remains cannot constitute a statutory holding under the Act. The statute does not say so, and in my opinion it sufficiently indicates the contrary, so as to make that the legal inference in construing the statute.

The above, in my opinion, necessarily leads to the question submitted to the whole Court being answered in the affirmative.

I do not think we are called on or are in a position to say whether the specific cases enumerated in section 26, sub-sections (3) and (6), to which I have referred, are the only cases where excision would be competent.

No more do I consider that we are asked, or are in a position to say, how the affirmative answer to the question submitted to us will affect the question submitted in the Special Case stated by the Land Court.

LORD DUNDAS—The question put to us is a general one as to the competency of excision. I am for answering it in the affirmative. I can see, however, that if my answer is correct its practical application or non-application to the facts in particular cases may turn largely upon the special circumstances presented, and may raise difficult questions for determination. It appears to me that sub-section (6), and various heads of sub-section (3) of section 26 of the Act of 1911 expressly recognise the principle of excision. I see no reason for holding that the instances therein specified were intended to be exhaustive, or that their extension would necessarily involve a violation of the general policy of the statute. I understand that the Land Court have in practice been in use to recognise the principle of excision, and I think such practice is legitimate and reasonable. The alternative would, I apprehend, be in many cases exclusion of the entire holding from the operation of the Act. I cannot accept the view that an affirmative answer to the question now put to us would run counter to the decisions of the Court in such cases as *Yool*, 1914 S.C. 689, and *Stormonth Darling*, 1915 S.C. 44. The present question was not in my judgment, and could not have been, raised in these cases.

LORD SALVESEN—The question stated for the opinion of the Whole Court is in general terms, but it relates primarily to the holding occupied by the appellants. On this holding, which was let as a *unum quid* prior to the commencement of the Act of 1911 at a rent of £44, 6s. 6d., there exist two cottages, one of which is let furnished for twelve months to a Miss Young at an agreed-on rent of £30, on the footing that during the two summer months she should vacate the occupancy so that the cottage might be available for summer visitors, from whom the appellants obtained a rent of £35. The other cottage was also let for two months at £11 per month. These cottages are not used or useful for the working and cultivation of the holding, there being another house in which the tenants reside. The question in the case is whether a holding on part of which such a double cottage is erected is a holding to which the statute of 1911 applies, or, if not, whether it is competent to make it a statutory holding by excising the site and accesses to the double cottage.

With every desire to bring such a holding within the purview of the Act, I do not think on a sound construction of its provisions that it is possible to do so. It is not a holding either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral. It is true that section 26 of the Small Landholders (Scotland) Act 1911 makes certain modifications on the statutory definition of a holding, and enacts that a person shall not be held a qualified leaseholder in respect of any lands within a burgh or forming part of any glebe, to mention only two of the cases expressly provided for. In such cases it is probably competent for the Land Court to excise such land if it forms part of subjects let as a *unum quid*, and if the remainder satisfies the conditions of the Act to treat it as a statutory holding, but I find no warrant for applying a similar right of excision to a holding on which are erected houses other than the dwelling-house and offices used for the purpose of the holding as an agricultural subject. Indeed, section 26 (1) appears to me by implication to exclude such a case. None of the other exceptions apply in terms, and it is plain that without these exceptions excision would have been incompetent. I therefore feel myself constrained to hold that this is not a holding which falls under the provisions of the Act of 1911, and that the Land Court

therefore had no jurisdiction to entertain the appellants' application.

I understand, however, that a majority of the Court are in favour of the opposite view. On that assumption I desire to associate myself with the opinion of Lord Sands, to the effect that their decision does not imply that wherever agricultural or pastoral land has been let along with other subjects the latter may be excised and the agricultural and pastoral land treated as a holding under the Act. I fear that there is grave risk, unless a warning note is sounded by a majority of the Court, of holdings which in their actual state do not fall within the Act being made to conform to its provisions by excising any portion that the Land Court may think proper. I hope that this is not the view of the majority, but that that view is confined to the particular case of houses which are let to summer visitors by people who are yearly tenants of small farms. That condition of matters is mainly prevalent in Arran, where apparently both the landlord and the tenant are desirous that the Act should if possible be put into operation, and if necessary for this purpose to excise the sites of such houses from the holding. I should gladly have assisted in giving effect to this laudable desire if I had found it possible to do so consistently with the terms of the Act, but in the judgment which is to be pronounced it seems to me that the Court is usurping functions which are reserved for the Legislature.

LORD GUTHRIE—On the question of the competency of excision (the only question before us) the respondents in their minutes of debate "submit that under the provisions of the Small Landholders (Scotland) Act 1911 no case of excision of part of the leasehold can arise." But in the cases contemplated under, *first*, the second head of section 26 of the Act, sub-section (3), sub-head (*b*), *second*, under sub-head (*c*) of the same sub-section, *third*, under the first part of sub-head (*g*) of the same sub-section, and *fourth*, under sub-section (6), I can see no other reasonable construction than to hold that excision is competent. Any other construction would in many cases defeat the object of the Act and seriously prejudice the small farmers whom the Act was designed to benefit, because the result in my opinion would be total exclusion of their land.

But if so the respondents do not suggest any reason—either from the object of the Act or from the nature of the respective subjects, or from the difference of the phraseology—why the same rule should not apply to the cases which give rise to the present question, namely, those arising under sub-section (3), sub-head (*f*), a sub-head which occurs between the sub-heads mentioned above. Indeed ground occupied as woodland is much more akin to agricultural and pastoral land than ground occupied by lodging-houses. It is easy for the respondents, dealing with a loosely-drawn statute like the 1911 Act, to suggest possible difficulties in reconciling this construction with certain other clauses of the statute, and to figure anomalous results which may ensue in certain possible events. But none of these criticisms seem to me sufficient to defeat a construction which is in accord with the purpose of the Act and with its plain words. I am unable to understand how a piece of land which is occupied as the site of a lodging-house, and which forms a material part of a larger area, can itself fall under the description of ground which must be "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." Nor, because the rest of the area answers to the above description, can I see any sufficient reason for holding that the portion separately occupied for radically different purposes, and it may be separately let, must be held to have the nature of the rest of the ground impressed on it for the purposes of an Act which was meant to benefit small farmers farming their own ground.

LORD CULLEN—The postulates regarding the subjects of tenancy which are made in the question formulated by the interlocutor of 17th July appear to me to infer that these subjects did not when the Act of 1911 came into operation possess the character of a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908.

Section 2 of the Act of 1911 says, *inter alia*, that the word "holding" in the Landholders Acts means and includes, "subject as hereinafter provided," every holding which at the commencement of the Act of 1911 is held by a tenant from year to year who resides on or within two miles from the holding, and by himself or his family cultivates the holding with or without hired labour; and it further says that such tenant is thereafter referred to in the Act as "an existing yearly tenant." Section 2 also defines in terms of similar generality the holding of a "qualified leaseholder" under the Act. It then follows on with these provisos — "Provided that such tenant from year to year or leaseholder (*a*) shall (unless disqualified under section 26 of this Act) be held to be an existing yearly tenant or a qualified leaseholder within the meaning of this section in every case where it is agreed between the landholder 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 qualified leaseholder within the meaning of this section, but shall (unless disqualified under section 26 of this Act) in respect of the holding be subject to the provisions of this Act regarding statutory small tenants."

On the terms of section 2 it is to be noted (1) that in so far as it offers positive *indicia* of the *status* of an "existing yearly tenant" or of a "qualified leaseholder" within the scope of the Act, the ascertainment of the existence of these *indicia* is referable in

point of time to the commencement of the Act; and (2) that section 2, having offered these positive *indicia*, nevertheless points forward to section 26 as containing provisions under which either a tenant from year to year or a leaseholder may be "disqualified," although his case happens to answer to the said positive *indicia*. The word "disqualified," as used in section 2, is not accompanied by a definition. It would appear to me, *prima facie*, to mean that a tenant of whom it can be predicated that he is "disqualified" does not possess within the meaning of the Act the quality of an "existing yearly tenant" or of a "qualified leaseholder," as the case may be.

Passing to section 26, where one has been told by section 2 that there is to be found what may "disqualify" a tenant from year to year or a leaseholder, one finds it to begin, in its third sub-section, by saying—"A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of"—and then follow nine sub-heads.

The words "existing yearly tenant" and "qualified leaseholder" represent statutory categories under section 2, and, as already mentioned, the positive *indicia* of these categories offered by section 2, so far as they go, are referable for their ascertainment in point of time to the commencement of the Act. And in so far as section 26 enacts conditions which may disqualify a tenant from being placed in either of said categories, the disqualifying operation of such conditions must also, as I think, be referable for their ascertainment in point of time to the same period.

The matters mentioned in the nine sub-heads of sub-section 3 of section 26 are heterogeneous. The sub-head here in question is sub-head (*f*), under which a tenant is not to be held an "existing yearly tenant" or a "qualified leaseholder" under the Act "in respect of any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908." The words "not a holding" may be noted, as seeming to point to a consideration of the subjects of a tenancy in their entirety.

On an application of sub-head (*f*) to the subjects of tenancy here in question, the postulates made in the question submitted seem to me to infer, as I have said, that these subjects viewed in their entirety did not, as at the date of the commencement of the Act of 1911, have the character of a holding within the meaning of the Act of 1908. If this be so, then the year to year tenants who present the present application were not, in respect thereof, as at the commencement of the Act of 1911, "existing yearly tenants" within its meaning, but were, to use the expression contained in section 2, "disqualified" as at that period.

Nevertheless the theory of what is called "excision" involves that the Act of 1911 directs or empowers the Land Court, under an application to fix a fair rent on the part of a tenant of such subjects, to preclude the operation of fixing a fair rent by remodelling the subjects in the way of shearing off them any part or parts which make them, viewed as an *unum quid*, disconform to the definition of the Act of 1908, so as to enable any shorn remainder of agricultural or pastoral land to be strained into the statutory mould.

One thing seems clear, viz., that a duty or power of so remodelling an applicant's subjects of tenancy as, on an application of sub-head (*f*), to make their character different from the character which they possessed at the date of the commencement of the Act of 1911, is nowhere in the Act of 1911 expressly imposed or conferred on the Land Court in dealing with an application to fix a fair rent. Such a process of remodelling would seem in essence to amount to constituting a new holding. And the process of constituting new holdings is regulated by a quite separate compartment of the Act.

On the arguments submitted for the appellants it does not seem to me to be quite clear whether they maintain the statutory function of the Land Court in the matter of "excision" under sub-head (*f*) to represent a duty or a power. Does the "excision" theory mean that in every case in which a tenant of subjects which do not in character make a holding within the meaning of the Act of 1908, but which include some extent of land which is agricultural or pastoral, applies to the Land Court to have a fair rent fixed, the Land Court is under a statutory duty to proceed, in the first instance, to remodel the subjects of tenancy by eliminating from them whatever it may be that excludes the definition in the Act of 1908, and having done so to treat the residuum of agricultural or pastoral land as being the qualifying "holding" in respect of which the applicant is to be regarded as applying under the Act to have a fair rent fixed? Or, on the other hand, is it contended that the Land Court has a discretionary power in such cases to excise or not to excise?

I take it that it must be the former of these alternatives which is maintained, because whatever the Act in other respects may be thought to contain, I cannot find that it contains anything in the way of enunciating limits or conditions of a discretionary power in the Land Court so to remodel holdings; and I can hardly conceive it to be maintained that the Land Court is invested with a perfectly arbitrary power of remodelling or not remodelling the subjects of an applicant's tenancy so as to transmute or not transmute him into an "existing yearly tenant" or a "qualified leaseholder" at the Land Court's pleasure.

Apparently therefore it is the other alternative view of the Land Court's function in the matter of "excision" under sub-head (*f*) which calls for consideration. According to it, in every case where a tenant of land who satisfies the positive *indicia* offered in section 2, but whose subjects of tenancy do not in character make a holding within the meaning of the Act of 1908, while containing some extent of ground of an agricultural or pastoral kind, applies to the Land Court to have a fair rent fixed, there is an imperative statutory duty on the Land Court, *primo loco*, to remove his *prima facie* disqualification by proceeding to remodel the

subjects in respect of which he has applied, and that by cutting out of them anything and everything in them which when they are viewed as a *unum quid* makes the definition of a holding in the Act of 1908 inapplicable to them. Having done this purifying work, the Land Court is then to fix a fair rent for the residuum of agricultural or pastoral land. If this be the true view of the Act, then it matters not what may be the character of the subjects of tenancy viewed as a *unum quid* so long as they include some land of an agricultural or pastoral character. It matters not what the rest of the subjects apart from such land consist of, or whether the said land is a subsidiary adjunct or not. It is sufficient that within the limits of the subjects of the applicant's tenancy there is found some land of an agricultural or pastoral character. This is to be held to be the "holding" in respect of which the applicant is to be duly qualified as an "existing yearly tenant" or a "qualified leaseholder," he being rendered so duly qualified by shearing off the offending constituents of his actual holding.

If this view of the functions of the Land Court in such a case be right, then it would seem that sub-head (*f*) of section 26 (3) of the Act does not contain in any real sense a disqualifying condition, but is positive rather than negative in its effect, inasmuch as it makes an imperative direction to the Land Court to remodel, if necessary, the subjects of tenancy held by a tenant applying for a fair rent so as to enable him to figure as an "existing yearly tenant" or a "qualified leaseholder," as the case may be, of some part of his *de facto* holding, which part viewed by itself will square with the definition in the Act of 1908 as being agricultural or pastoral in character.

It is clear enough under sub-head (*f*) that the Act does not *per expressum* impose such a duty on the Land Court to remodel the existing holdings of tenants applying to have fair rents fixed and so in effect to constitute new holdings. And on the best consideration I have been able to give to the terms of the Act I feel unable on a process of legitimate construction of it to reach the conclusion that by necessary implication from its terms it imposes on the Land Court such a supposed duty of remodelling holdings which it does not impose *per expressum*.

It is true that the nature of some of the sub-heads of section 26 (3) suggests that the Legislature may have intended "excision" of a part of a pre-existing holding rather than a total exclusion of the tenant in such cases from the scope of the Act. But it is at least clear, as I think, that the theory of 'excision' does not hold good as regards *all* the sub-heads of sub-section (3). Thus under sub-head (*a*) I cannot see how it can reasonably be maintained that if a tenant applying for the fixing of a fair rent be the tenant of 250 acres at a rent of £55 it is the duty of the Land Court to cut off 200 acres from his holding (any it chooses), and then to accept him as a duly qualified applicant tenanting the remaining 50 acres. If this is so, then the basis of the supposed necessary implication of a duty to "excise" under sub-head (*f*) seems to be largely taken away.

It may be that under some of the other sub-heads of sub-section 3 of section 26 the Legislature intended "excision." But if so then there is a material difference among the nine various sub-heads, seeing that sub-head (*a*) at least does not as I think admit of "excision," and the question would remain whether sub-head (*f*) is to be ranked in the one category or the other. Without reiterating considerations which I have endeavoured to state, I think that sub-head (*f*) should rank with sub-head (*a*). Like sub-head (*a*), which is directed to rent and acreage, sub-head (*f*) seems to me to involve the consideration of the existing subjects of tenancy as a *unum quid* (a "holding"), and to put it to the Land Court to answer the question, Do the subjects, while satisfying sub-head (*a*) in point of rent and acreage, also in point of *character* satisfy the definition of a "holding" contained in the Act of 1908? If not, then I think the applicant in respect of them stands "disqualified" under the Act of 1911, and that the Land Court is neither charged with the duty nor empowered to carve out of them a new holding composed of such agricultural or pastoral land as they may happen to include.

I am accordingly of opinion that the question should be answered in the negative.

LORD ORMIDALE—In my opinion the question submitted for the consideration of the Whole Court should be answered in the negative.

It is said that section 26 (3) of the 1911 Act supplies a statutory warrant for answering the question in the affirmative. I cannot so read it. It is at least doubtful in my judgment whether the section provides for excision under any of its sub-heads (*a*) to (*i*). There is no express provision therefor in regard to any one of them. On the other hand, in section 26 (4) express provision is made for the exclusion from a holding of any existing yearly tenant of any lands forming part of such holding and occupied by a sub-tenant whether paying rent or not, and one would have expected if the lands referred to in the sub-heads (*a*) to (*i*) or any of them were to be excluded from a subject which but for them would constitute a statutory holding the Act would have in terms so provided. Further, it seems clear that there is no room for excision or exclusion in the case of sub-head (*a*). But assuming that inferentially excision or exclusion is provided for in respect of some of the other sub-heads, *e.g.* (*c*) or (*g*), sub-head (*f*) appears to me to negative such treatment.

"A person shall not be held an existing yearly tenant under this Act in respect of . . . (*f*) any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908." By the interpretation clause of that Act (section 48) it is provided that "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.

There is nothing in the rest of the Act which modifies that definition.

Does the land which is the subject of this question constitute a holding within the meaning of the 1908 Act? Clearly it does not in its entirety, and why should one part or two parts or more be separated from it so as to make the remainder fit the statutory definition. In the case of the other sub-heads the land referred to is a distinct and limited area, an entity ascertained by the sub-head—a woodland, the site of an ancient monument, a part of a glebe, and so on. Assuming that excision is inferentially the treatment to which these each in its entirety are to be subjected, it follows *pari ratione* that the subject of (*f*) must also in its entirety and not only a portion of it be excluded, namely, the land which is not a holding in the sense of the 1908 Act. A holding as at the commencement of the Act is a *unum quid* and not a composite subject. If the contrary construction of (*f*) is the sound one, then it is difficult to see why there should have been included in the enumeration several of the items in the sub-heads. Woodland, or the site of an ancient monument, not being either pastoral or agricultural, would just like the cottages have fallen to be excised under sub-head (*f*).

The position of matters disclosed in the question appears to me to be a *casus improvisus* under the existing statutes which can only be remedied by the Legislature.

LORD HUNTER—The question put is general and abstract, the answer to which does not depend upon the particular facts of the case out of which it has arisen.

All yearly tenants and leaseholders at the expiry of their leases, unless disqualified in terms of the provisions of section 26 of the Small Landholders Act 1911, become landholders or statutory small tenants within the meaning of that Act. A person does not become a landholder or a statutory small tenant (sub-section (3) (*a*) of section 26) in respect of any land the rental of which exceeds £50, unless the land does not exceed 50 acres, nor (sub-section (3) (*f*)) in respect of any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908. Under the definition clause of that Act (section 35) "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." This definition may be held to cover the dwelling-house of the landholder and any offices or other conveniencies connected therewith. It is treated in the Landholders Acts as including such buildings (section 26 (1) of the 1911 Act and section 34 of the Crofters Act 1886). Only such buildings, however, are contemplated as part of a holding, and it does not appear to me to be possible on a reasonable construction of the provisions of the Acts to hold that a dwelling-house or other building forming an integral and material part of the subjects of a tenancy but not used or useful in connection with the agricultural or pastoral, or agricultural and pastoral occupation of the land, is embraced in a statutory holding. Unless therefore such a building may be excised from the land held on such tenancy the tenant cannot become a landholder or statutory small tenant.

Section 33 of the Act of 1911 provides for the keeping of a register of small holdings, in which are entered all holdings within the meaning of the Agricultural Holdings Act 1908, which either do not exceed 50 acres, or if exceeding 50 acres are of less than £50 annual value. A person is not a landholder or statutory small tenant merely because he is entered on this register. The landlord and tenant may agree, or the Land Court may decide that he is. If in determining this question the Land Court have no power to excise a disqualifying subject from what would otherwise be a statutory holding many small holdings will be completely excluded from the benefits of the Act, for as I read the provisions of section 7 as to the creation of new holdings they would not apply to subjects on the register of small holdings. I do not think that the powers of the Land Court are so restricted.

Sub-section 6 of section 26 provides that "the holding of any existing yearly tenant or qualified leaseholder within the meaning of this Act shall not for the purposes of the Landholders Acts be deemed to include any lands or heritages at the commencement of this Act forming part of such holding and occupied by a sub-tenant of such existing yearly tenant or qualified leaseholder, whether paying rent or not." These words appear clearly to contemplate excision and not to necessitate exclusion of the whole subjects. If the sublet subject is a dwelling-house a reference to this provision would justify an affirmative answer to the question put. But as this sub-section gives the Land Court power to excise without entirely excluding, I think a similar power must be inferred as regards some if not all of the heads of sub-section 3 of section 26. It is said in the appellants' case that the Land Court have been in the habit of excising from a small holding land within burgh under (*c*) and treating the remainder as a statutory holding. I find no provision in the statute to prevent their doing so or following a similar course in connection with a portion of the subjects that is not part of a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908. The reason why the sublet portion is excluded appears to be that it forms no part of the agricultural or pastoral subjects as occupied by the tenant I do not see any good reason why it should be competent to excise from the subjects of a tenancy a dwelling-house that had been sublet leaving the remainder a statutory holding, but not similarly to excise a dwelling-house that is used for the accommodation of lodgers or for letting purposes during a restricted period of the year. The difficulties suggested by the respondents under section 13 as to the meaning of present rent are similar in both cases. I think, however, that they are apparent and not real. Under section 14 the Land Court adjusts the rights of parties in the event of an existing yearly tenant or a qualified leaseholder or a statutory

small tenant becoming a landholder. I am for answering the question in the affirmative.

LORD ANDERSON—This Stated Case raises a question of serious import to landholders in Arran, and, indeed, to all who are concerned for the smooth and efficient working of the Small Landholders Act. It may be suggested that the question of law raises nothing more than the point of competency. In my apprehension it does more. If it is held to be competent to excise extraneous or superfluous subjects from a holding, then the duty of the Land Court is plainly to excise all such subjects in all cases. The Land Court will not properly discharge its duty if it allows to be retained as part of a statutory holding subjects which might competently be excised.

There are three possible views as to the question raised—(1) that excision is competent, and that what is not excised may be declared to be a statutory holding; (2) that excision is incompetent, but that if superfluous subjects are on the holding no statutory holding can be created—this result is reached by a literal reading of the definition of "holding" in the Agricultural Holdings (Scotland) Act 1908, section 35; and (3) that excision is incompetent, but that a statutory holding may be created although there are superfluous subjects on the holding. This last is apparently the view taken by the Land Court, and is reached through a liberal construction of the foresaid definition of "holding." This construction seems to be in harmony with the decisions referred to in the sequel. I find myself in agreement with the Land Court on this matter.

On many agricultural holdings in Arran extra dwelling-houses have been erected, by the letting of which during the summer months the agricultural tenants make a substantial addition to their modest incomes. These houses have been built—in some cases entirely, in others mainly, in all at least partially—at the cost of the tenant. They have not been constructed by the instrumentality of any legal compulsitor against the wishes of the landlords. On the contrary, the landlords have in all cases consented to what was being done, and have generally aided the tenant by a grant of money or materials. The extra dwellings so erected have been invariably regarded as forming an integral part of the holding; they have not been made the subjects of a separate tenure nor of a distinct rent. The holding, including these dwellings, has been leased at a specific annual sum in name of rent.

The tenants of these dwellings, who are otherwise qualified to become statutory small landholders, naturally desire to obtain for subjects created in whole or in part by the labour and money of themselves or their predecessors the statutory title of tenancy, which is practically indefeasible. If this is to be refused to the tenants (on the footing that the first of the foresaid possible views affords the correct solution of the problem), then they will be as to these extra dwellings at the mercy of the landlords. They will require to arrange terms of tenancy by agreement with the landlords if they desire to continue their possession of the extra dwellings. If they do not succeed in this the dwellings will doubtless be let to other tenants, who will thus occupy what are in actuality parts of the statutory holding. The statutory tenants will in the latter eventuality be deprived of the means of earning a substantial part of their livelihood.

Hardship to the landlords cannot be successfully pleaded in support of the appellants' case. The landlords have in many cases made advances towards the cost of these dwellings, but they will obtain a return for these advances in the shape of rent, the view of the First Division being, as I understand, that the Land Court in fixing a statutory rent must take into account the existence of these extra dwellings as lettable subjects, keeping in view, it may be, the extent to which the tenant has contributed towards their cost.

If the ground occupied by these buildings had been vacant it would undoubtedly have formed part of the statutory holding. This ground has been covered with buildings with the assent of the landlords. It seems to me in these circumstances that the landlords are barred from attempting to exclude the portions of the land so occupied from the statutory holding.

In considering whether or not any building is unnecessary for the purposes of a holding it must be kept in mind that present circumstances may change. It is quite conceivable that the landholder may determine to adopt intensive culture for his holding. This would involve considerable additional labour for which the extra buildings would supply the requisite accommodation. The buildings would in that event become necessary for the proper cultivation of the holding. Again, it might be thought advisable to remove the extra buildings. In that event the statutory holder would be debarred from cultivating, as part of his statutory holding, available agricultural land lying in its midst.

The Land Court took the view that the applicants were entitled to obtain a statutory title to these extra buildings as an integral part of the existing holding. That Court considered itself debarred from dividing up a single holding into several. As I have said, I am of opinion that the Land Court was right in following this course.

The question to be determined is whether there is any statutory warrant for dividing up a holding preponderatingly agricultural in character into a number of separate divisions or parts, one and only one of which may be declared to be a statutory small holding.

I am of opinion that there is no statutory warrant for such procedure.

The solution of the question depends on a consideration of certain provisions of three statutes—(1) the Small Landholders (Scotland) Act 1911, (2) the Agricultural Holdings (Scotland) Act 1908, and (3) the Crofters Holdings (Scotland) Act 1886.

The first of these statutes contains no definition of "holding" or "small holding,"

but by section 26 (3) (*f*) incorporates by reference the definition of holding in section 35 of the Agricultural Holdings (Scotland) Act 1908. The appellants contend for a strict construction of this definition, and lay stress on the term "wholly." This contention carries them too far, as a rigid construction of the definition would exclude all buildings, and the appellants concede that necessary buildings fall to be included. The true view seems to be that implied in the decisions founded on by the parties, to wit, that the preponderating character of the holding determines whether or not it is an agricultural holding—*Macintosh*, 14 R. 282; *Taylor*, 19 R. 399; *Fool*, 1913 S.C. 689; *Stormonth Darling*, 1915 S.C. 44; *Malcolm*, 1916 S.C. 282. It has never hitherto been contended that an agricultural holding is really of a composite nature—in the main agricultural, and for the rest, something else.

This view appears to be confirmed by a consideration of the provisions of the following sections of the Act of 1908—sections I (I), 10, 17 (1), 18, and 19.

As regards the Small Landholders (Scotland) Act 1911, the enactments of sections 1 and 2, as limited by the provisions of section 26, appear to me to point to this—that the term "holding" means what is *de facto* possessed by an applicant at the date of his application, subject to the definite exceptions set forth in section 26.

The respondents were at the date of their application, in the language of section 2 (*a*) of the 1911 Act, "existing yearly tenants," not only of the agricultural part of their holding but of the extra dwellings thereon, which therefore ought to share the fate of the main part of the holding.

This view appears to be fortified by a consideration of the terms of the following sections of the 1911 Act, sections 13, 32 (4) (7) (9), and 33.

The appellants' contention is entirely based on the provisions of section 26. Certain of the cases there enumerated (apart from sub-head (*f*) which has already been dealt with), *e.g.* (*c*) (land within a burgh), and (*e*) (land forming part of a glebe), undoubtedly point to excision. The appellants' argument accordingly is—here is statutory justification for excision, and therefore there ought to be excision in the present case. That argument appears to me to be unsound. The Legislature has sanctioned excision in certain definite cases, but this does not imply that the Court can excise in any case not falling within the statutory exceptions. The opposite conclusion to that contended for by the appellants appears to me to be the proper conclusion. If the declared object of the Act—to encourage the formation of small holdings—is to be fulfilled the statutory exceptions ought to be regarded as an exhaustive enumeration of the cases in which excision is competent, and any other excision should be held to be incompetent.

If the question of law is answered as contended for by the appellants it seems to me that the Court will be doing something more than construing the Act of 1911—it will be legislating by adding an additional head to section 26 (3), to wit, "(*j*) any part of a holding which is not adapted and used for the business of agriculture." The Legislature could easily have inserted such a clause had it been desired to make the law what is now contended for. That no such clause is in the Act appears to me to be a conclusive reason for negativing the contention of the appellants.

Finally, a consideration of the provisions of section 6 of the Crofters Holdings (Scotland) Act 1886 seems to support the contentions maintained on behalf of the respondents.

I am for answering the question of law in the negative.

LORD SANDS—The question of law submitted for the consideration of the Whole Court is—Whether the said dwelling-house or other building, with the pertinents and site, may competently be excised from the land held on such tenancy, leaving the remainder a statutory holding under the said Act?

An affirmative answer to this question would be plain as to its results, but a simple negative would be ambiguous.

There are three possible views—(1) that excision is competent and the remainder is a statutory holding, (2) that excision is incompetent and the whole is a statutory holding, (3) that excision is incompetent and the whole is not a statutory holding.

A negative answer to the question stated would be negative of (1), but would be consistent with the affirmance of either (2) or (3).

I understand, however, from the provisional opinions of their Lordships of the First Division, which I have had an opportunity to read, that their Lordships are satisfied that there is here a statutory holding, and that the opinion of the Consulted Judges is desired upon the question as to what upon that footing is the content of the holding.

By section 26 of the Small Landholders (Scotland) Act 1911 it is provided—"(3) A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of— . . . . . (*f*) any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908."

The said Act provides (section 35)—"'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. . . . 'Tenant' means the holder of land under a lease."

In my opinion, for the purposes of the Agricultural Holdings Act, the piece of land held under a lease is to be regarded as a *unum quid*, at all events where its parts are coterminous and the whole is let under one lease for a cumulo rent. I do not think that any other construction of the Agricultural Holdings Act is admissible. Some of its most important provisions, such as those regulating the determination of the tenancy and bequest of the lease, would be unworkable under any other hypothesis. That Act did not create or contemplate a statutory tribunal like the Land Court, with power to make equitable readjustments.

This conclusion is confirmed by the consideration that the Acts have now been thirty-four years in operation, and this construction has never been questioned either in decision or in practice.

I am further of opinion that the word "wholly" must be construed according to its ordinary meaning, and must not be read as equivalent to "mainly." The only qualification I deem admissible is that it must be read reasonably, and that the application of a few square yards to a non-agricultural use of an incidental character, such as a public weighing machine, or a roadman's house, or a rural post office, on some corner of a large farm, might be disregarded.

I summarise the two propositions derived from the Agricultural Holdings Act as follows—(1) Where a self-contained piece of land is let under a lease for a cumulo rent this piece of land must be regarded as a *unum quid* in determining whether it is a "holding" within the meaning of that Act. (2) To satisfy the definition the whole of such land embraced within the lease must be either agricultural or pastoral land or land devoted to a purpose which is subservient to the agricultural or pastoral use of the remainder.

Turning now to the Small Landholders Act I proceed to consider whether what for shortness I shall call the *unum quid* rule as formulated above applies under that Act. Section 26 (6) shows clearly that there may be an exception to that rule, for it directs that lands which are sub-let are to be excepted and the remainder is still to be treated as a statutory holding. It appears to me that this sub-section is not conclusive, and that taken by itself it furnishes an argument to both sides. On the one hand it shows that there is nothing sacrosanct in the *unum quid* rule, and that excision is not repugnant to the general scheme of the Act. On the other hand it may be contended that where excision is intended the Legislature makes this clear.

The other important sub-section of section 26 is (3), which excepts certain lands from the operation of the Act. Each of the clauses of this sub-section begin with the words "any lands." It is impossible, in my view, to construe these words uniformly. They must be construed *secundum materiam subjectam*. In 3 (*a*), dealing with the limit of rent, "any land" must mean "any holding," not "any part of a holding," otherwise a small holding might be carved out of any farm. Again, the second "any land" in (*b*), dealing with monuments, must be construed as "any part of a holding," So, too, in (*g*), "any land being woodland," for woodland alone could hardly constitute a holding, though for pastoral purposes it might fall within one but for this exclusion. It would be unreasonable to suggest that the presence of a standing stone or a small roundel might deprive a farm of the character of a holding, and therefore I think that exclusion of these parts must have been contemplated. I do not propose to examine all the exceptions in sub-section (3). Some of them are puzzling, as, for example, the exception "any pleasure ground or other land used for the amenity or convenience of any residence or farm steading," which, *prima facie*, would seem to imply that if the farmer has a shrubbery or a bowling-green this is to be excepted from his holding. The explanation of the enumeration is, I think, to be found in the fact that it was to serve a double purpose, and was to be used under sub-section (4) to define the land that was not to be compulsorily taken for the creation of new holdings. (This may perhaps explain why land which is sub-let is dealt with in a separate sub-section, for there is no reason why such land should not be taken for a new holding.) The application of the provisions to existing holdings wherever it is applicable cannot, however, be controlled by this consideration, and reading the enumeration of exceptions as a whole I can come to no other conclusion than that excision is sanctioned in certain cases.

It appears to me that once it is ascertained that a part of the subjects of tenancy may be excised the principle of *unum quid* cannot be strictly applied in importing the negative definition of holding in the Agricultural Holdings Act into the Small Landholders Act. When a part has been excised it is no longer a holding within the meaning of the Agricultural Holdings Act, for whether the whole subject of the tenancy be or be not a holding under the Agricultural Holdings Act, a part of it is not a holding under that Act. In my view, therefore, it is necessary to construe the Small Landholders Act as directing that certain lands shall be excised, and that thereafter the question shall be considered whether the remainder, if let as a separate subject, would be a holding within the meaning of the Agricultural Holdings Act.

These considerations are not conclusive of the particular question raised under the Stated Case. It may be that though excision is competent in some cases the peculiar phraseology of sub-section (3) (*f*), and the relation of that sub-section to the Agricultural Holdings Act, forbid excision of such subjects as are specified in this case, and require that the whole subjects of tenancy shall be treated as a *unum quid*. But once the *unum quid* rule is found not to be generally applicable under this Act the way may be opened up for the liberal construction which their Lordships of the First Division are prepared to put upon the Act, viz., that the presence of non-agricultural or pastoral elements within the subjects of tenancy is not fatal to the application of the Act. This construction appears to me to involve a recognition of the competency of excision. Otherwise there would be here a holding falling under the Act which is not wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, and that as it appears to me would be contrary to a plain statutory requirement. That requirement, reading into section 26 (3) (*f*) the words incorporated by reference from the Agricultural Holdings Act, excludes from the operation of the Small Landholders Act—Any land which is not a 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.

In the view of the terms of this provision it appears to me that to treat the whole, including the non-agricultural or pastoral parts, as a statutory holding would be not a construction of the provision but a disregard of it, which would be warranted only by some clear repugnancy in some other provision, the position of which in the statute gave it an overriding character.

The conclusion I have indicated does not imply that wherever agricultural or pastoral land has been let along with other subjects these may be excised and the agricultural or pastoral land treated as a holding under the Act. This might lead to very inconvenient and unreasonable results. When it has been found expedient as a matter of estate management to let a piece of agricultural or pastoral land along with another subject, *e.g.*, a hotel, a mansion-house, the shootings of the estate, a coal mine, a quarry, or a factory, it might be a serious invasion of reasonable proprietary rights to split the tenure, and to deprive the proprietor of freedom to continue to let the subjects together. Where, for example, it has been found convenient to let some fields or a small farm along with a hotel it might be most inconvenient that when the tenancy of the hotel came to an end the ex-tenant should have a right to stick to the land as a separate holding.

It does not, however, appear to me that recognition of the competency of excision necessarily implies that a statutory holding can always be found where there is some agricultural or pastoral land of less than £50 of annual value within the subjects of tenancy. It may be that where the dominant purpose of the tenancy is non-agricultural or pastoral no portion of the land included within it and let along with it for ancillary purposes or other reasons of convenience is to be regarded as wholly agricultural or wholly pastoral. Thus it may be that whilst a small farm to which a smithy has been attached may be a holding after the smithy has been excised, a small farm which has been attached to a distillery, a hotel, or the shootings on a grouse moor cannot be so treated. The converse, I need hardly say, does not in my view apply. The residential or industrial character of the dominant purpose of tenancy may deprive any land within it of the character of being wholly agricultural or pastoral. But the dominant purpose of a tenancy as agricultural or pastoral cannot give to the residential or industrial subjects within it the character of being agricultural or pastoral unless their use is entirely subservient to the agricultural or pastoral use of the remainder. The dominant purpose of a tenancy as residential or industrial may forbid even a turnip field within it to be treated as wholly agricultural, but the dominant purpose of a tenancy as agricultural or pastoral cannot make a public sawmill within it agricultural or pastoral. If there is here a statutory holding, *i.e.*, a holding wholly agricultural or pastoral, it can only be after the sawmill is excised.

I am accordingly of opinion that the question as stated for the opinion of the Whole Court ought to be answered in the affirmative.

Since the foregoing opinion was written I have had an opportunity of reading the opinions of my brethren. In view of the opinions of Lord Salvesen, Lord Cullen, and Lord Ormidale I think it right to emphasise my understanding of the question upon which the opinion of the Consulted Judges was desired, as explained in the second paragraph of this opinion.

At advising—

LORD PRESIDENT—The difficulties which I felt and expressed on the questions remitted to the Whole Court have been removed by the excellent argument stated in the minute of debate for the appellants. That excision is competent under the Act is, I think, made clear from the terms of section 26 (6) relative to parts of a holding in the occupancy of a sub-tenant; and that the Land Court has the requisite power to make the adjustments rendered necessary by excision is clear from section 14 of the Act. My view is that we have here to deal with a *casus improvisus*, and that "excision" is the practical way out of the difficulty. I accordingly agree with what I understand to be the opinion of the majority of the Whole Court. On the other questions raised in this case and the remaining cases I remain of the opinion which I formerly expressed. [*His Lordship then proposed answers to the various questions in the cases.*]

LORD JOHNSTON—I understand that the answers which your Lordship proposes should be given to the various questions in these cases have been adjusted with counsel for the parties in view of the judgment of the Court on the main question. If so, I have no responsibility for these answers. My judgment stands upon the opinion which I have delivered, and which was communicated to the parties at an earlier stage of the case.

LORD SKERRINGTON—Upon the question of general importance and interest—the question of the competency of what has been conveniently called excision—I regret that I disagree with your Lordships and with the majority of the Consulted Judges. I have no doubt as to the expediency and reasonableness of excision in cases like those now before us, but nothing that I have heard either from your Lordships or from the Consulted Judges has removed my legal difficulty in having recourse to it in these particular cases. It is easy to find in the statute authority for resorting to excision in other cases, but where I fail to see eye-to-eye with your Lordships is in understanding how the fact that excision is permitted and, indeed, directed in certain definite cases justifies us in extending the process to a different case. Accordingly I adhere to my original opinion on this question, in which I am confirmed by the opinions of Lord Cullen, Lord Ormidale, and Lord Anderson.

LORD MACKENZIE—I adhere to the opinion which I previously expressed, and I agree with the proposed answers in so far as they are consistent with the views therein expressed.

The Court (in *M'Neill's* case) answered questions 2 (*a*) and (*b*) in the affirmative, question 2 (*c*) in the negative, and question 3 in the affirmative.

Counsel for the Appellants—The Lord Advocate (Clyde, K.C.) — C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Chree, K.C. —J. A. Christie. Agents—Balfour & Manson, S.S.C.

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*Wednesday, February* 20.

## FIRST DIVISION.

[Scottish Land Court.

## DUKE OF HAMILTON'S TRUSTEES *v.* MACKINNON AND ANOTHER.

(*Vide Duke of Hamilton's Trustees* v. *M'Neill, supra.*)

*Landlord and Tenant—Small Holdings— "Holding" — Contents of Holding — Extra Buildings — Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (3) (*f*)—*Agricultural Holdings (Scotland) Act* 1908 (8 *Edw. VII, cap.* 64), *sec.* 35 (1).

*Held* that a dwelling-house, occupied by one of two joint-tenants on subjects on which there was another small dwelling-house occupied by the other joint-tenant, which would have been sufficient as the dwelling-house of the subjects if the subjects had been occupied by a single tenant, when the less commodious house would have been useful and suitable for servants' accommodation, was not an extra dwelling-house requiring to be excised before the subjects could be considered a holding under the Small Landholders (Scotland) Act 1911.

*Landlord and Tenant — Small Holdings —Fair Rent—Circumstances to be Taken into Consideration—Improvements Executed by Tenant in Implement of Obligation under his Lease—Crofters Holdings (Scotland) Act* 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 6 (1).

In implement of an obligation under a lease of a holding, dated in 1835, the tenants of the holding constructed drains and brought uncultivated land into cultivation. The proprietors made deductions from the rent from time to time for cutting some of the drains and supplied materials for others. In an application by the tenants to fix a fair rent for the holding, *held* that the improvements executed by them and their predecessors in the same family were a circumstance to be taken into consideration in fixing the fair rent though executed under the obligation in the lease.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), as amended by the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), enacts — Section 6 (1) — "The landlord or the [landholder] may apply to the [Land Court] to fix the fair rent to be paid by such [landholder] to the landlord for the holding, and thereupon the [Land Court], after hearing the parties and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the [landholder] or his predecessors in the same family, may determine what is such fair rent, and pronounce an order accordingly." Section 34—". . . 'Permanent improvements' means improvements specified in the schedule to this Act." Schedule — "*Permanent Improvements.* — . . . 3. Subsoil or other drains."

[*Reference is made to the preceding case of the Duke of Hamilton's Trustees* v. *M'Neill.*]

The Duke of Hamilton and others, the testamentary trustees of the late Duke of Hamilton, *appellants*, being dissatisfied with a decision of the Scottish Land Court in an application by Peter Mackinnon and his son Donald Mackinnon, *respondents*, joint-tenants of the holding at Corriecravie, belonging to the appellants, for an order fixing a first fair rent for the holding, applied for a case for the opinion of the Court.

The Case set forth—"4. The whole buildings on the said holding have been erected and maintained by the tenants and their predecessors in the same family, with the aid of contributions of (1) materials, or money for the purchase of materials, by the estate for the buildings erected in and after 1898, and (2) some wood for the renewal of the older existing offices in 1884 and 1894. The buildings on the holding include two dwelling-houses. One is a small old house which has been and is occupied as his dwelling-house by the joint-tenant Peter Mackinnon. This house was built by the tenants' predecessors in the same family, and has been since maintained without any contribution by the estate. The other house has been and is occupied as his dwelling-house by the other joint-tenant Donald Mackinnon. It was built in 1898 in substitution for a then existing dwelling-house, with the aid of a substantial contribution by the estate in respect of wood, slates, and cement, and has been maintained by the tenants without any contribution from the estate. It is the more commodious house, and is suitable to this holding as the dwelling-house of one of the joint-tenants. It would be sufficient as the dwelling-house of the holding if the holding were occupied by a sole tenant. If the existing joint-tenancy should come to an end the small house occupied by the said Peter Mackinnon would be suitable and useful for the accommodation of a hired servant or servants for the working of this holding. While joint-tenancy continues both these dwelling-houses are suitable to and reasonably required for this holding as dwelling-houses for the joint-tenants. Neither of these dwelling-houses is an extra