"The Land Court refuse to insert in the Case the explanations noted above, which are accurate statements of fact.

"The Land Court also refuse to insert the fact that the statement on behalf of the proprietors was made before the application now in question was lodged. This application was throughout treated as one of very special circumstances, having no relationship or resemblance to other holdings in Arran."

Argued for the appellants—The subjects were not a holding. They consisted of two different subjects which had come to be held by the same persons, but they were held under different demises. To make one holding, one demise, not several, was necessary. (2) The order of the Land Court was incompetent. The respondent's application was on the footing that they were small landholders—the Land Court had altered that into an application as statutory small tenants. The appellants had never been heard upon that amendment.

Argued for the respondents—(1) No doubt the subjects were held under different demises, but they were all held on yearly tenancies and had not been kept distinct. But even if they were regarded as separate entities there was nothing in the Acts to restrict a statutory small tenant to one holding though a landholder could not hold more than one holding. (2) The Land Court was quite entitled to make the alteration they had made in the application. They had complete control of their own procedure.

At advising—

LORD PRESIDENT—In this case, in accordance with my opinion in *M'Neills'* case, I consider that the Land Court ought to receive evidence relative as to the revenue derived from letting the dwelling-house in Alma Terrace. It is a circumstance of the case, holding, and district to be considered in fixing an equitable rent for the holding. The other questions raised in the appellants' note relate to facts or procedure with which this Court has no power to interfere.

LORD JOHNSTON concurred.

LORD MACKENZIE—The amendment appears to be within the power of the Land Court, but the rights of the landlord under section 32 (4) of the Act of 1911 must be reserved.

LORD SKERRINGTON—In the case on the application of Helen Fullarton and others, the subjects consist of (*a*) a dwelling-house let along with certain shares of grazing-land, and (*b*) a field of three acres at some distance from the former subjects. The two subjects have been separately let to the same tenants, but they have been worked and possessed as one holding. By section 26 (1) of the Act of 1911 a dwelling-house is included in a holding, and by section 26 (2) the subjects (*a*) and (*b*), since they are worked as one holding, both fall under the Act. The appellants' contention to the contrary is in my opinion unfounded.

The next question is, whether the Land Court was entitled to declare that the applicants were statutory small tenants, and to fix an equitable rent, in view of the fact that the applicants claimed only to be landholders. Undoubtedly there has been an irregularity of procedure, but the effect in my opinion is not to nullify what has been done, but to entitle the appellants to be heard in support of any objections which they may wish to state against the renewal of the tenancy as provided by section 32 (4) of the Act of 1911.

The Court answered the first and second questions of law 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.

Wednesday, February 20.

FIRST DIVISION.

[Scottish Land Court.

DUKE OF HAMILTON'S TRUSTEES *v.* M'KELVIE.

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

Held that in fixing the fair rent of a small holding the Land Court was entitled to take into consideration the fact that the holding being situated close to a grouse moor was open to the risk of damage to crops from game.

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 . . ., 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 Mrs Mary M'Kelvie, *respondent*, tenant of a holding at Kilpatrick, Blackwaterfoot, Arran, of which the appellants were proprietors, for an order fixing a first fair rent for the holding, took a Case for the opinion of the Court.

The Case set forth—"5. The holding is situated in immediate vicinity to one of the sporting moors of the estate. The crops upon it are exposed to injury or destruction from game, chiefly grouse. In consequence of this situation trouble and inconvenience in

watching and otherwise protecting the crops against injury are caused to the tenant, and the letting value of the holding is thereby diminished. . . . In fixing such fair rent the Court took into account as circumstances of the case and holding that the holding was situated in immediate proximity to a sporting moor, that the crops thereon were exposed to injury or destruction by game, and that this situation involved trouble and inconvenience to the tenant in watching and otherwise protecting the crops against injury by game and diminished the letting value of the holding. The Court held that the right of the tenant to recover damage for specific injury to crops by game, under the limitations and conditions contained in section 9 of the Agricultural Holdings Act 1908, and section 10 (3) of the Small Landholders (Scotland) Act 1911, did not exclude these circumstances from being taken into account."

On 23rd June 1913 the Land Court pronounced an order which fixed the fair rent of the holding at the annual sum of £13.

The *questions of law* included—"2. Were the Land Court entitled in fixing a fair rent for the holding to take into account, as circumstances of the case and holding, that the holding by its situation was and is exposed to injury to crops by game, and required watching by the tenant in order to prevent such injury being done, and that the letting value of the holding was thereby diminished?"

The appellants lodged a note, which set forth, *inter alia*—"4. The [second] question of law is whether the Land Court was right in fixing a fair rent to hold that the letting value of the holding was diminished by what they consider to be its exposure to injury to crops by game. The Land Court refuse to state the fact that the applicant did not prove any damage."

Argued for the appellants—The risk of damage to crops by game should not have been taken into account in fixing a fair rent. In any event there was no evidence upon which the Land Court could have proceeded in that matter. The Land Court had not indicated by how much they had reduced the rent for that reason. If in any year damage by game occurred the tenant could recover compensation—Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), section 9—and have it fixed by an arbiter. The appellants should be in a position to state to the arbiter that the tenant's rent had been reduced by a certain amount to provide for that contingency. But standing the order of the Land Court they could not do so, with the result that the tenant would get double payment by having his rent reduced and at the same time receiving compensation. The right of the landlord to hunt, shoot, fish, &c., was preserved—Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), section 1 (7)—and so was the tenant's right to compensation for game damage—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 45), section 10 (3). The latter being secured, the value of the holding as a lettable subject was not impaired by risk of game damage.

Argued for the respondent—The fact that a tenant might after negotiation, or even after an arbitration, secure compensation for damage done by game, did not exclude the risk of game damage as an element to be considered in fixing a fair rent, for there could be no doubt that a prospective tenant would prefer a holding where there was no risk of game damage to one in which he would be exposed to that risk with a claim for compensation. Further, the latter would be more costly to run, as the tenant would have to incur expense in watching, &c. The decision of the Land Court was right.

At advising—

LORD PRESIDENT—The exposure of the crops on the holding to damage by game is certainly a circumstance to be considered in fixing a fair rent.

LORD JOHNSTON concurred.

LORD MACKENZIE—The second question should be answered in the affirmative. The view taken by the Land Court is that the tenant has to protect his crops from injury by game. This is a question of fact. The question of law is whether this is an element they were entitled to take into consideration in fixing the rent. I think it is. The compensation that the tenant may recover under statute is something different. The cost of watching is one thing; the damage done, if the watching proves ineffectual, is another. In working the Act, however, it is obvious, unless care is taken, that the tenant may be paid twice over for the same thing.

LORD SKERRINGTON—Whether in fixing a fair rent the Land Court was entitled to take into account that the holding is exposed to injury by game, and requires watching by the tenant in order to prevent such injury, I see no reason why this circumstance ought to be ignored.

The Court answered the second question of law 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 Respondent—Chree, K.C.—J. A. Christie. Agents—Balfour & Manson, S.S.C.