*Wednesday, February 20.*

## FIRST DIVISION.

[Scottish Land Court.

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

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

*Landlord and Tenant—Small Holdings—Holding — Disproportion between Land and Buildings thereupon—Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (3)—*Agricultural Holdings (Scotland) Act* 1908 (8 *Edw. VII, cap.* 64), *sec.* 35 (1).

*Landlord and Tenant—Small Holdings—Tenant—Widow of Deceased Tenant Sitting on in Subjects after Husband's Death —Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 2.

*Landlord and Tenant—Small Holdings—Improvements — Works Executed by Deceased Husband of Tenant while a Sub-Tenant — Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 2 (*i*), (*iii*) (*a*) *and* 32 (8).

The tenant of certain subjects died in March 1911 intestate survived by a widow and three sons. His lease expired at Martinmas 1911. His widow sat on in the holding. She presented an application under the Small Landholders Act 1911, which came into operation on 1st April 1912. The sons and the proprietors had never challenged her right to sit on. The subjects carried various buildings which were valued in the valuation roll at £30, while the land was valued at £5. Of those buildings the dwelling-house was suitable as the dwelling-house for the subjects, but a smaller dwelling-house would have been adequate. It had usually been let in whole or in part during the letting season to summer visitors. Certain of the improvements on the subjects had been provided by the deceased husband while he was in possession of the holding as sub-tenant holding off a tenant of the subjects. *Held* (1) (*dis.* Lord Johnston) that the Land Court was entitled to hold that the subjects were a holding within the meaning of the Landholders Act; (2) that the widow was tenant of the holding at 1st April 1912 in the sense of the Act of 1911; and (3) that her husband as sub-tenant of the holding was not her predecessor in the same family, and the improvements provided or paid for by him as sub-tenant fell to be excluded in determining whether the subjects were the holding of a landholder or a statutory small tenant and in fixing the fair or equitable rent of the subjects as a small holding.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 2 (1)—"... The word 'holding' means and includes ... (*ii*) As from the commencement of this Act and subject as hereinafter provided every holding which at the commencement of this Act 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 (hereinafter referred to as an existing yearly tenant); (*iii*) ... Provided that such tenant from year to year ... (*a*) shall ... be held an existing yearly tenant ... within the meaning of this section in every case where ... it is proved to the satisfaction of the Land Court that such tenant ... 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 ... but shall ... in respect of the holding be subject to the provisions of this Act regarding statutory small tenants. ... (2) In the Landholders Acts the word 'landholder' means and includes ... every existing yearly tenant."

Section 26 (3)—"A person shall not be held an existing yearly tenant or a qualified leaseholder in respect of ... (*f*) any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908."

Section 32—"With respect to statutory small tenants the following provisions shall have effect— ... (8) In determining the rent the Land Court ... 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 or lessee: Provided that they shall allow no rent in respect of any improvements made by or at the expense of the tenant or any predecessor in title for which he or his predecessor ... has not received payment or fair consideration. ..."

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 Duke of Hamilton and others, 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 Hamilton, *respondent*, widow of the late Adam Hamilton, for an order determining whether she was a landholder or a statutory small tenant of a holding known as Burnside, Glencloy, Brodick, of which the appellants were proprietors, and for an order fixing a fair or alternatively an equitable rent, applied for a Case for the opinion of the Court.

The Case set forth—"5. The subjects, in respect of which the said application was made extend in all to slightly over three acres. The buildings upon the land are, and were at 1st April 1912, (1st) one dwelling-house of seven small apartments and a kitchen; (2nd) byre, milk-house, a shed, hen-house, store room, and other offices,

The land, other than sites of buildings, extends and extended at 1st April 1912 to three acres or thereby of arable ground. A part of this ground has been regularly cultivated for many years, including 1912, as garden ground, chiefly for the growth of vegetables. The remaining and larger part of this ground has been regularly ploughed and cropped in corn, hay, potatoes, and occasionally turnips, for several years, including 1912. The stock which has been usually kept consists of one cow and some poultry. The said land was not garden ground only appurtenant to the dwelling-house. It was not land used merely for the amenity or convenience of a residence. It was used for feeding stock and raising agricultural produce for the subsistence of the tenant and his household. Some of the produce was disposed of to summer visitors. It was cultivated and used in the same way as small holdings of this size are ordinarily cultivated and used by the tenants.

"These subjects were returned to the assessor by the proprietors and entered in the valuation roll for 1912–1913 as 'House, Burnside,' and their yearly rent or value was returned and entered at A £5: £30.

"6. The existing offices are suitable to and not larger than are required for the adequate working and cultivation of the land.

"The existing dwelling-house is suitable to the land as the dwelling-house of a resident and cultivating tenant.

"A dwelling-house containing fewer apartments would be adequate for the requirements of a holding of this size. The existing dwelling-house was reconstructed, enlarged, and improved by Adam Hamilton mainly for the purpose of providing better accommodation for himself and his family. These alterations, particularly internal improvements, such as the introduction of a water supply into the house, also tended to make the house fitter for letting to summer visitors.

"7. The applicant's late husband Adam Hamilton was tenant from year to year at the annual rent of £30 (which continued to be the rent at the date of this application) of this whole land under the proprietors from Martinmas 1892 until his death in March 1911. Until Martinmas 1892 the said land had been part of the farm of Glencloy on the same estate, which farm John Watson, the applicant's brother, held under lease from the proprietors from 1873 or thereby until Martinmas 1892.

"8. In 1878 the said Adam Hamilton had become sub-tenant of this land, with the buildings then upon it after-mentioned, from year to year, under the said John Watson, at a yearly rent of £35. This sub-tenancy continued until Martinmas 1892. In 1892 the land occupied by Adam Hamilton was flooded by the adjacent burn, overlaid with sand, stones, and debris, and materially deteriorated. It was then agreed between the then proprietors and Adam Hamilton that he should become principal tenant of this land from Martinmas 1892. Adam Hamilton cut a new channel for the burn, so as to prevent future flooding thereafter, and cleared the ground. It was not ascertained whether the new channel was completed before Martinmas 1892 or after it. At Martinmas 1892 the proprietors reduced the rent of the farm by £30, 8s. In 1878 the land was rough pasture, and the only buildings then upon it were a cottage with a small barn annexed to it. This cottage and barn had been recently built, partly out of an old cot-house, by a certain Mrs Hair and her husband for their own occupation during the summer months, by arrangement with the said John Watson. This arrangement ceased before Adam Hamilton's tenancy began. John Watson paid Mrs Hair the sum of £100 for the said house and small barn. The said rent was adjusted at £35 between John Watson and Adam Hamilton and was paid by Adam Hamilton for the purpose of repaying John Watson the said sum of £100. The said cottage forms part of the structure of the existing dwelling-house, and the barn above mentioned has been converted into the kitchen of the existing dwelling-house.

"9. The whole of the existing buildings other than the dwelling-house have been erected by the said Adam Hamilton since Martinmas 1892, when his tenancy under the proprietors began at his own expense. The existing dwelling-house is partly the cottage built by Mr and Mrs Hair, as reconstructed, enlarged, and improved by Adam Hamilton. The reconstruction, enlargement, and improvements were executed by Adam Hamilton after 1892 during his said tenancy under the proprietors and also at his own expense. During his sub-tenancy of the said subjects before 1892 Adam Hamilton brought about an acre of the land into cultivation as garden ground at his own expense, and used the remainder as pasture for his cow. The remainder was brought into cultivation by him also at his own expense during his tenancy under the proprietors. All the existing permanent improvements have been provided by Adam Hamilton except the said portions of the existing dwelling-house which were built by Mr and Mrs Hair.

"All the existing buildings and improvements, &c., on the land have been maintained by the said Adam Hamilton and by his widow, the applicant, after his death, solely at their own expense, with the exception that the estate repaired part of the road to the holding after the flood in 1892. No other expenditure has been made by the estate on the said land or buildings, and no payment or consideration has been received by the said Adam Hamilton or the applicant in respect of the buildings and other permanent improvements executed thereon.

"10. Adam Hamilton died in March 1911 intestate, survived by his widow, the applicant, and by their three sons and one daughter. The year of tenancy current at his death ended at Martinmas 1911. The applicant from the date of her husband's death continuously resided on and occupied the whole subjects tenanted by him. She cultivated the land with the aid of occasional hired labour chiefly for carting and plough-

ing, paid the rates, paid the rent to the proprietors, acted and was treated by the proprietors as tenant. The daughter resided in family with her; the sons, who are all captains in the mercantile service, have resided, one or more of them, with her at intervals. Neither the eldest son, James Hamilton, nor any of the other children have claimed or taken occupation or possession of the said subjects as heir-at-law of their father or otherwise. None of them acted or was treated as the tenant of said subjects. At 1st April 1912 the applicant was the actual resident and cultivating tenant of these subjects.

"The application, after the hearing on 14th November, was continued in order that the parties might endeavour to come to an agreement as to whether the applicant or the heir-at-law of her said husband was to be held the landholder of these subjects as at 1st April 1912, if the subjects should be found to be a holding within the meaning of the Act of 1911. Before the hearing on evidence the heir-at-law and his two brothers lodged written consents for any right or interest they might have to the applicant being found to be the landholder in the said subjects.

"11. The said dwelling-house, or the greater part of it, has been usually let furnished each summer to summer visitors. Sometimes it has been let for the whole summer letting season, which begins in June and ends in September. In recent years it has not been let for longer than eight or ten weeks. . . .

"12. The following *order* was pronounced by the Land Court:—'*Edinburgh, 16th March* 1914.—The Land Court having inspected the holding, and resumed consideration of the application and the evidence adduced, find and declare that the applicant is a landholder within the meaning of the Small Landholders (Scotland) Acts 1886-1911, in and of the holding specified in the application; and having considered all the circumstances of the case, holding, and district, including any permanent or unexhausted improvements on the holding and suitable thereto, executed or paid for by the applicant or her 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 two pounds sterling. . . .'

"14. In determining that the said subjects were at 1st April 1912 the holding of a landholder, not of a statutory small tenant under the Small Landholders Act 1911, and in fixing a fair rent therefor, the existing improvements which had been made by Adam Hamilton both (1) during his possession as sub-tenant of John Watson, and (2) during his immediately succeeding possession as principal tenant, were taken into account as improvements provided by him. Those portions of the existing dwelling-house which had been originally built by Mrs Hair and her husband were also taken into account, as paid for by the said Adam Hamilton, in determining both the said matters. If the existing improvements which were made by Adam Hamilton during his said sub-tenancy, and also the said portions of the existing dwelling-house, or any of them, had been excluded from consideration as improvements respectively provided and paid for by Adam Hamilton, and had been taken into consideration as provided or paid for by the proprietors, the fair rent would have been increased in proportion."

The *questions of law* included—"2. Were the Land Court entitled to find that the said subjects were a holding within the meaning of the Landholders Acts? 3. Were the Land Court, (*a*) in determining whether the said subjects were the holding of a landholder or of a statutory small tenant at 1st April 1912, and (*b*) in fixing a fair rent for the said subjects as a landholder's holding, bound to exclude from consideration as tenant's improvements, and include as landlord's improvements, existing improvements which were (1) provided, or (2) paid for by the said Adam Hamilton during his sub-tenancy of the said subjects before Martinmas 1892?"

The *note* of the Land Court was—"The objection is taken by the estate that the subjects occupied by the applicant are not a holding within the meaning of the Small Landholders Acts 1886 to 1911. It is maintained that the land is a mere adjunct or accessory of the dwelling-house. This is a somewhat special case.

"The subjects consist of (1) a dwelling-house of seven small apartments with kitchen, (2) a byre, a milkhouse, henhouse, hayshed, and other offices, and (3) about three acres of arable land, a small part of which is cultivated as a garden. One cow has always been kept. The arable land has been regularly cultivated—partly by hired labour—in corn, potatoes, hay, and occasionally turnips. This land was cleared of whins and reclaimed from rough pasture by the applicant's husband Adam Hamilton. All the buildings and offices have been erected or paid for by him. The estate has contributed nothing except repairing part of the road.

"Adam Hamilton was from 1878 or 1879 until 1892 a sub-tenant of this land from his brother-in-law John Watson, then tenant of the farm of Glencloy, in which this land was until 1892 included. Mrs Hair, whose husband was a partner of John Watson, had built a small cottage and a bit of a barn, which form part of the existing dwelling-house, the barn having been converted into its kitchen.

"John Watson paid Mrs Hair £100 for this cottage and barn. Adam Hamilton paid to John Watson, as sub-tenant of this land and the cottage and barn, a yearly sum of £35 until 1892, when the farm fell out of lease and he became a tenant holding these subjects directly from the estate at a yearly rent of £30, which has continued to be the rent. The rent of the farm was reduced by £30 when Adam Hamilton became tenant of these subjects under the estate. The yearly sum paid by Adam Hamilton to John Watson was fixed and paid for the purpose of repaying John Watson the sum which John Watson had paid to Mrs Hair for the cottage and offices erected by her. Since the sub-tenancy ceased John Watson does not appear to have made any claim for any fur-

ther payment, or for any compensation in respect of the said cottage and offices.

"Adam Hamilton, after he became tenant under the estate, reconstructed and enlarged the cottage which Mrs Hair had erected, introduced a water-supply into the house, and built the existing byre, milkhouse, hay-shed, and other offices, solely at his own expense. He also erected a deer fence round the land, and cut a new channel for the burn to prevent flooding, but it is not clear whether these two improvements were made shortly before or after his tenancy under the estate began. The tenancy has been held from year to year. There has never been any written lease or agreement.

"On these facts the main question is—whether these subjects are a holding within the meaning of the Small Landholders Acts 1886-1911? They are certainly not 'garden ground only appurtenant to a house.' They are by use and character agricultural. The extent of cultivated land is larger than one finds in a considerable proportion of crofters' holdings in the Western Highlands and Islands, which are landholders' holdings under the Small Landholders Acts 1886-1911.

"In the next place, the fact that the dwelling-house and buildings have been provided or paid for and the land reclaimed by a tenant or his predecessors in the same family is entitled to some weight in considering whether the subjects are agricultural or pastoral on the one hand, or on the other hand urban or mercantile.

"This is a usual incident of a small agricultural or pastoral tenancy, though only held from year to year; it is practically unknown in urban or mercantile subjects unless the tenant has obtained a long lease, or stipulated for compensation at the termination of his tenancy.

"Further, as we have pointed out in many cases, there is no limit of size or extent in the Agricultural Holdings Acts, nor is there any minimum limit of size or extent in the Small Landholders Acts 1886-1911. In the Small Holdings Act 1892 (E. & S.), the limits prescribed for a small holding are 'exceeding one acre and not exceeding fifty acres, or the annual value of £50.' The Small Landholders Act of 1911 has (with a qualification as to common pasture) adopted this maximum limit, but prescribes no minimum.

"That there is a dwelling-house on the land clearly does not exclude any subjects from the operation of the Small Landholders Acts. If so, the fact that the dwelling-house is of a substantial kind, and contains accommodation for an average family according to modern standards of propriety and comfort, cannot be sufficient to exclude. In the large majority of small holdings of 10 or 12 acres of arable land or under the separate value of a modern dwelling-house approaches, and often exceeds, the separate value of the offices and cultivated land.

"If the subjects taken as a whole were substantially a villa, with garden ground only, or with garden ground and policy, or pleasure ground, as adjuncts or accessories for the better enjoyment of the dwelling-house, or if the land were used wholly or mainly for the purposes of a business not agricultural or pastoral, then they would not fall within the operation of the Small Landholders Acts.

"In the case of *Mackintosh* v. *Lord Lovat*, 14 R. 282, 24 S.L.R. 202 (under the Agricultural Holdings Act 1883), the two fields in question were clearly let and possessed as accessories of the hotels let to the tenant.

"In the case of *Taylor* v. *Earl of Moray*, 19 R. 399, 29 S.L.R. 336, the land consisted of a garden and a field, extending to slightly over half an acre, which was not cultivated. The tenant was a travelling grocer, and used the whole subjects and offices, including stable, van-sheds, &c., mainly for the purpose of his business. Accordingly the subjects let to him were held not to be subjects wholly agricultural or pastoral, or partly agricultural and partly pastoral. The only English decision on a similar question under the same definition in the English Agricultural Holdings Act 1883 (section 54) is *Morley* v. *Jones*, 1888 (32 Sol. Journal 630), where the subjects consisted of a dwelling-house and general shop and five acres of grass land, and it was held that the land was merely auxiliary to the house and shop.

"In the present case the facts are materially different. If the question had been raised in 1893, before the small cottage was reconstructed and enlarged by the tenant, there can be little doubt that these subjects taken as a whole would have answered the description of a holding under the Agricultural Holdings (Scotland) Act 1883, which is repeated in the Agricultural Holdings (Scotland) Act 1908.

"Does the fact that the tenant subsequently, while not changing the character and use of the land, has enlarged and improved at his own expense the dwelling-house, so as to provide better accommodation for himself and his family in accordance with modern standards, take the subjects out of the class of holdings defined by the Agricultural Holdings (Scotland) Act of 1883 and the Agricultural Holdings (Scotland) Act of 1908?

"It may be that under the Small Landholders Acts the tenant of these subjects, though found to be a landholder, will not be entitled to full compensation for the dwelling-house on renunciation or removal, on the ground that the dwelling-house is somewhat larger than is required for the holding. It may be that a house of five rooms (instead of seven) would have been adequate for the holding. We are not prepared to lay down that for a household of six persons (which was the number in this case, and is rather under than over the average rural family)—father, mother, three sons and a daughter—a house of five or six small rooms and kitchen is in excess of modern standards of propriety and comfort however small the holding may be.

"Accordingly we are of opinion that the dwelling-house is not the principal subject to which the land and agricultural offices are accessory, but is the dwelling-house of an agricultural holding.

"The dwelling-house, or part of it, has been annually let furnished to summer

visitors for periods in recent years not exceeding eight or ten weeks. That is an ordinary and reasonable use of the dwelling-house which by custom a tenant, and by section 10 of the Act of 1911 any landholder, is entitled to make. During the remainder of the year the house is occupied solely by the applicant and one or more members of her family. Further, as these subjects are a holding within the Small Landholders Acts 1886-1911, then in respect that the dwelling-house has been provided or paid for by the deceased Adam Hamilton, the applicant's husband, without receiving from the estate payment or consideration therefor, it is the tenant's permanent improvement on which no tenant is to be rented whether the tenant is a landholder or a statutory small tenant.

"In the present case every existing improvement on the holding has been provided or paid for by Adam Hamilton without any payment or consideration received from the estate therefor, except the repair of part of a road already mentioned. The fair rent of £2 sterling is therefore the fair annual value of the land (including sites of dwelling-house and offices) without the tenant's improvements, but taking into account the natural quality of the land and the advantages of its situation in the neighbourhood of the village.

"The applicant's three sons have renounced in her favour all right and interest to claim the succession to this tenancy, and no objection was taken to her being found to be the landholder of these subjects if they were a holding within the Small Landholders Acts."

The appellants lodged a *note*, which was in the following terms:—"3. To enable the leading question of law to be properly considered, it is necessary that the case should contain a precise statement of the facts as to the history of the subjects and as to their character. . . .

"The subjects consist of—(1) The principal dwelling-house. (2) A second dwelling-house (which the Land Court refuse to refer to in the case). (3) A byre, &c. (4) A piece of land extending to 3·274 acres, of which the garden represents 1·139 acres, and the sites of the houses ·257 acre, the remainder being used partly for the grazing of the applicant's cow, and partly for growing potatoes and turnips, and to a very small extent corn.

"The history of these subjects is as follows:—

"In 1878 the applicant's husband, Adam Hamilton, who was a shipmaster, became sub-tenant of part of these subjects (not the whole as stated by the Land Court) under the tenant of the farm of Glencloy.

"At that date there was upon the subjects a cottage and small barn built by a previous sub-tenant, who lived there during the summer months up to the time when Hamilton became sub-tenant.

"Subsequent to 1878 Hamilton obtained from the said tenant right to graze a cow in an adjoining field of 3·017 acres, for which he paid to him a further rent of £5, making a total rent of £30.

"While Hamilton was sub-tenant he enclosed part, extending to 1·139 acres of the said field, of which he made the garden already referred to.

"As at Martinmas 1892 Hamilton became principal tenant of the subjects, including the cow's grass, at the same annual rent of £30, the rent payable for the farm of Glencloy by the tenant thereof being at the same time reduced by £30.

"During his whole period of occupation, both as sub-tenant and principal tenant, Hamilton followed the career of a shipmaster, and the said house was his family house, and he paid to the appellants without question the rent of £30.

"It will thus be seen that when Hamilton's occupation of the subjects commenced in 1878 their only connection with an agricultural subject was that they were held on sub-tenancy from the farmer at Glencloy, and that Hamilton was in no sense an agricultural holder either then or throughout the period of his principal tenancy.

"4. In articles 5 and 8 of the Case the Land Court state the facts in an inaccurate and misleading manner and refuse to state them accurately as set forth in the immediately preceding article of this note.

"They further refuse to insert in article 5 of the Case the statement of the following facts which were proved—(1) That the subjects have always been entered in the valuation roll with the rental allocated therein for the purposes of the Valuation Acts thus —£5 as the annual agricultural value, and £25 as the annual non-agricultural value, and as tenanted and occupied by Adam Hamilton and owned by the trustees of the late Duke of Hamilton. (2) That the proprietors' and tenants' rates have been paid in accordance with the said allocation of rental.

"10. The next question of law to be noted is also one which the Land Court refuse to state, viz., Whether their order is incompetent or invalid in respect that the applicant was not the tenant at 1st April 1912.

"The Land Court admit (article 4 of the Case) that at the hearing on 14th November 1912 the proprietors maintained that the applicant was not the tenant, but they justify their refusal to state the question of law now by inserting a statement in said article that at the general hearing held in Edinburgh on 3rd and 4th January 1913 upon the general questions arising out of all the applications (numbering about 150) 'no objection was taken to the applicant being found to be the landholder in the subjects if these subjects were decided to be a landholder's holding within the meaning of the Acts 1886-1911.'

"As bearing on this question, the Land Court state in article 10 of the Case that after the hearing on 14th November 1912 the application was continued in order that 'the parties might endeavour to come to an agreement as to whether the applicant or the heir-at-law of her said husband was to be held the landholder of the said subjects as at 1st April 1912 if the subjects should be found to be a holding within the meaning of the Act of 1911,' and that before the general hearing the heir-at-law and his two

brothers lodged written consents to the applicant being found to be the landholder.

"The reason alleged for the continuation of the application is inaccurate, and in any event the Land Court have not suggested that any agreement was come to, and they refuse to state the fact that the consents referred to were lodged on 28th December 1912. The reason for the application being kept open was to give the applicant a further opportunity of tendering herself as a witness and of obtaining and lodging consents by her sons as they were not parties to the application, but the Land Court refuse to insert that explanation.

"The facts relevant to the merits of the legal question whether the applicant was the tenant at 1st April 1912 purport to be stated in article 10 of the Case. In that article the Court erroneously state that the applicant 'acted and was treated by the proprietors as tenant,' and they refuse to insert therein and in other articles of the Case where the explanations require to be made the following proved facts:—*Article* 5. 'Since Adam Hamilton's death "the heirs of Adam Hamilton" have been entered in the valuation roll as tenants and occupiers.' *Article* 8. 'Since his death the heirs of the late Adam Hamilton, shipmaster, have been treated as the tenants.' *Article* 9. 'After his death his heirs were treated as the tenants as regards rent and rates, and any maintenance, except what was done by the estate, was paid for by them.' *Article* 10. 'The applicant paid the rates levied on Adam Hamilton's heirs, and paid the rent to the proprietors as from "the heirs of Adam Hamilton."'

"The Court in this article refuse to describe the applicant as the 'occupant' of the subjects and insist on describing her as 'tenant.'"

Argued for the appellants—(1) The subjects were not a holding, for they were not wholly agricultural or wholly pastoral, neither were they in part agricultural and pastoral as to the residue—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), section 26 (3) (*f*), and Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), section 35 (1). The subjects were originally residential, and the value of the house was still so much larger than the value of the remainder of the subjects that their character was still residential. Further, the subjects had never been held on the uniform type of lease which was always made the tenant's title in the case of agricultural holdings in Arran. *Malcolm* v. *M'Dougall*, 1916 S.C. 283, 53 S.L.R. 224, was distinguished, for in that case the holding did not begin as a residence merely. (2) The respondent was not a tenant of the holding when the Act of 1911 came into operation on 1st April 1912. Her husband was a yearly tenant at the date of his death in March 1911. He died intestate. The respondent had merely continued to sit on. On her husband's death the holding passed to her husband's heirs-at-law who were in existence. She was not an heir-at-law nor was she a legatee of the holding, and she never in any way had been recognised by the appellants as tenant, *e.g.*, she received no receipts for rent. (3) Further, the major part of the improvements had not been made by the appellant or her predecessor in the same family—Act of 1911, section 2 (iii) (*a*), and Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict, cap. 29), section 6 (1). The respondent herself had not made the improvements. The main improvements were made before 1892. Prior thereto the respondent's husband who made the improvements was not tenant of the holding but merely a sub-tenant, and consequently was not the respondent's predecessor in the holding. Those improvements could not be taken into account in fixing the rent.

Argued for the respondent—(1) The subjects constituted a holding. That question was one of fact on which the Land Court was final. *Malcolm's* case (*cit.*) covered the present case. The mere fact that the subjects were at first residential did not prevent them becoming a holding later, for the use of the subjects might change. (2) The respondent was a tenant when the Act came into operation. Either she was successor to her husband or was a new tenant. As a successor the only person who could challenge her title was the heir-at-law, and he had not done so. As a new tenant she had continued in the farm after her husband's death, and there had been no attempt by the appellants to remove her. If she was not the tenant then the appellants had failed to state who was the tenant. Upon the facts the Land Court was entitled to come to the conclusion they had reached. (3) As regards the improvements, both prior to 1892 and thereafter, the improvements had in fact been made by the respondent's husband. It was immaterial that some or even the greater part of them had been made by him while he was a sub-tenant. The Act of 1911 did not require uniformity of title. Prior to 1912 the improvements had been made by the tenant and he was the appellant's predecessor in the same family.

At advising—

LORD PRESIDENT—My opinion in the case of *M'Neill*, *supra*, applies to this case. Accordingly I consider that here a similar remit should be made, if desired, with a view of ascertaining the revenue derived by the tenant from summer letting in order that it may be considered as a "circumstance of case, holding, and district" in fixing the amount of the fair rent. On the question whether the expression "predecessor" in the same family includes a sub-tenant, my view is that it does not. On this head I agree with the reasoning in Lord Skerrington's opinion, which I have had an opportunity of considering.

LORD JOHNSTON—With regard to the case of Mary Hamilton, I differ from your Lordships in thinking that the case of Mary Hamilton does not fall under the statute, and I do so for this reason—I of course must accept the decision in the Poltalloch case, *Malcolm* v. *M'Dougall*, 1916 S.C. 283, 53 S.L.R. 224, but I am quite clear that this is a totally different case from that, and that in Mary Hamilton's case the

house is so much a predominant subject that the holding is not either agricultural or pastoral or partly agricultural and partly pastoral, but is truly a residence, and a commodious and rather comfortable residence, with a small portion of ground attached to it.

LORD MACKENZIE—(1) The main question is what is meant by "predecessor in the same family," as used in section 2 (1) (iii) (*a*) of the 1911 Act. In my opinion it refers to a tenant, not a sub-tenant. Sub-tenants are excluded from the benefits of the Landholders Acts (section 26 (6)). (2) On 1st April 1912 the applicant was the widow of the last tenant, and there is no evidence that the tenancy was diverted from the last heir. (3) Though the value of the agricultural part of the holding is only £5, while the non-agricultural part is worth £25 yearly, the case of *Malcolm* v. *M'Dougall*, 1916 S.C. 283, 53 S.L.R. 224, is an authority for what the Land Court has done.

LORD SKERRINGTON—The case relating to the application of Mrs Mary Hamilton raises a question of some general importance. Both in determining whether a tenant is a landholder (Act of 1911, section 2 (1) (iii) (*a*)) and also in fixing a fair rent (Act of 1886, section 6) the Land Court is directed to consider whether improvements have been provided or paid for by the landholder or his "predecessor in the same family." Does a member of the landholder's family, who was only a sub-tenant at the time when he made the improvements, fall within the category of a predecessor? Though these sections do not use the expression "predecessor in title" which occurs in section 32 (8) of the Act of 1911, I do not think that the word "predecessor" as used in the two first-mentioned clauses includes a sub-tenant. The predecessor of a principal tenant is *prima facie* himself a principal tenant, and not a sub-tenant deriving right from the principal tenant. In this connection it may be noticed that the Landholders Acts do not include sub-tenants among the persons whom they profess to benefit. It was so decided in cases under the Crofters Act 1886—*Livingstone* v. *Beattie*, 1891, 18 R. 735, 28 S.L.R. 518, and *Dalgleish* v. *Livingston*, 1895, 22 R. 646, 32 S.L.R. 347—and the Act of 1911 contains nothing to indicate a different intention. Accordingly I am of opinion that the Land Court erred as regards this matter. In a case recently before us, and now again in dependence before the Land Court (*Rogerson* v. *Viscount Chilston*, 1917 S.C. 453, 54 S.L.R. 366), improvements had been made by a sub-tenant, but by arrangement (it was averred) with the landowner, and in contemplation of the sub-tenant becoming principal tenant. Our present decision does not touch such a case.

In their note relative to the same application (that of Mrs Mary Hamilton) the appellants attempt to raise several other questions, only two of which need here be noticed. They maintain in the first place that the subjects are not a holding within the meaning of the Landholders Acts, if the value and size of the houses as compared with the land are kept in view. The decision in the case of *Malcolm* v. *M'Dougall*, 1916 S.C. 283, 53 S.L.R. 224, meets this objection.

The appellants next maintain that the applicant Mrs Hamilton was not the tenant of the holding when the Act of 1911 commenced on 1st April 1912. Her husband, who held the subjects as yearly tenant, died in March 1911 intestate, and survived by his widow, three sons (captains in the mercantile service), and a daughter. The year of the tenancy current at his death ended at Martinmas 1911. The question therefore is whether on the facts as proved or admitted the Land Court was entitled to find that the applicant was the tenant for the year from Martinmas 1911. The appellants do not relevantly aver in their note that at any time prior to Martinmas 1911 the heir-at-law did anything either personally or through his mother acting as his authorised agent which would have the legal effect of making him tenant in place of his deceased father. Accordingly there was no room for tacit relocation as between the heir and the appellants—*Wilson* v. *Stewart*, (1853) 16 D. 106. Nor do the appellants aver any express location by them of the subjects as from Martinmas 1911 in favour of the persons whom they vaguely describe as "the heirs of Adam Hamilton." Lastly, the appellants do not aver that the applicant falsely represented herself to be the authorised agent for the heir-at-law, and that in consequence of the erroneous belief so induced they permitted her to occupy and cultivate the farm after Martinmas 1911. It is true that the receipts for the rent due at Whitsunday and Martinmas 1911 were made out in the name of "the heirs of Adam Hamilton," but that was quite in order, as the late tenant's whole estate, both heritable and moveable, was liable for that rent. Though the subsequent receipts for rent were in the same terms, that circumstance is immaterial in view of the fact that the applicant was in lawful possession of the farm from Martinmas 1911 upon no conceivable title except as a yearly tenant.

The Court answered the second and third questions of law in the affirmative.

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