Counsel for the Second Parties — Moncrieff, K.C. — J. H. Henderson. Agents —Bell, Bannerman, & Finlay, W.S.

Counsel for the Third Parties — Chree, K.C. — Shiell. Agents — Sharpe & Young, W.S.

Counsel for the Fourth Parties — Macquisten. Agent—J. D. Rutherford, W.S.

Friday, December 12.

FIRST DIVISION.

[Scottish Land Court.

HOWATSON v. M'CLYMONT.

Landlord and Tenant — Small Holding — Business Primarily Pastoral—Permanent Grass Park Tenanted by Dairykeeper — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (3) (*g*).

Two enclosures of "permanent grass park," 10 and 3½ acres in extent, on which there were no buildings, were used by the tenant, a dairykeeper, for the grazing and feeding of five cows and one horse. In his dairy business, which had existed before he got the enclosures, he sold the milk produced by his own five cows, and the milk, which he bought, of other ten cows belonging to neighbouring farmers. The horse was used for the purpose of the holding and for conveying the milk to market.

Held (*diss.* Lord Ormidale) that the subjects were not "held for the purpose of a business or calling not primarily agricultural or pastoral" within the meaning of section 26 (3) (*g*) of the Small Landholders (Scotland) Act 1911, and consequently were not excluded from the operation of the Act.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts — Section 26—"(3) A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of—(*g*) any land . . . being permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral, including that of butcher, cattledealer, and the like. . . . (10) A person shall not be subject to the provisions of this Act regarding statutory small tenants who in terms of this section would be disqualified from being an existing yearly tenant or a qualified leaseholder."

Charles Howatson of Glenbuck, Ayrshire, being dissatisfied with a decision of the Scottish Land Court in the matter of an application by John M'Clymont, tenant of a holding known as Tollparks, Kirkburnhead, on the estate of Turdoes, in the county of Ayr, requested the Court to state a Case for appeal.

The Case stated — "1. On 24th January 1913 John M'Clymont, dairykeeper, Kirkburnhead, Muirkirk, in the county of Ayr, applied to the Scottish Land Court to be declared a landholder, and to have a first fair rent fixed for a holding known as Tollparks, Kirkburnhead, in the parish of Muirkirk and county of Ayr, belonging to Charles Howatson of Glenbuck, Ayrshire.

"2. At the hearing in Kilmarnock, on 3rd March 1913, the application was of consent of parties converted into one by the applicant to be declared a statutory small tenant, and to have the period of renewal of his tenancy and a first equitable rent fixed in terms of section 32 of the Small Landholders (Scotland) Act 1911.

"3. The landlord objected to the competency of the application on the ground that the holding being permanent grass parks used for the purposes of a dairy business not primarily agricultural or pastoral, is excluded from said Act by section 26 (3) (*g*) thereof. . . .

"4. After hearing evidence and inspecting the holding the Land Court issued an interlocutor in the following terms: — '*Edinburgh, 25th* April 1913. — The Land Court having resumed consideration of this application, repel the objection to competency stated for the respondent at the hearing, that the holding consists of permanent grass park held for the purposes of a business not primarily agricultural or pastoral (section 26 (3) (*g*) of the Act of 1911): Find that it is not proved to the satisfaction of the Court that the applicant or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or permanent improvements on the holding without receiving from the landlord payment or fair consideration therefor (section 2 (1) (iii) (*a*) of the Act: Find that the respondent has not stated any objection to the applicant under section 32 (4) of said Act: Therefore find that the applicant is a statutory small tenant in and of the holding described in the application, and that he is entitled, in virtue of the 32nd section of said Act, to a renewal of his tenancy of the said holding and to have an equitable rent fixed: And having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at seven years, and the equitable rent payable by the applicant at thirteen pounds, ten shillings sterling, each to run by consent of parties from the term of Whitsunday 1913: Find no expenses due to or by either party.

'ROB. F. DUDGEON.
'NORMAN REID.'

"5. The said Charles Howatson, the landlord, respectfully submits that the Scottish Land Court has misinterpreted the statute, and that the foregoing decision is wrong in law in repelling the objection to competency, and in finding that the tenant is a statutory small tenant in and of the said holding, the landlord's contention being that a dairyman using permanent grass parks for the purposes of his dairy business is, within the meaning of the statute, in the same position as a butcher or cattledealer using such parks for the purposes of his business.

"6. The following are the *facts* proved so far as bearing on the said objection to competency:—The holding in respect of which the application was made consists of two fields, one extending to 10 acres and the other to 3½ acres, held by the applicant on yearly tenancy at a rent of £20. He became

tenant of the first field about eighteen years ago, and of the second field some years later. There was no written lease. The tenant was not at liberty to break up any part of these fields without the landlord's consent. A part of the holding extending to about 1 acre had been formerly broken up by him with such consent, but at and since the commencement of the Small Landholders Act these fields have been in permanent pasture. The fences are maintained by the tenant. There are no buildings on the holding. The holding is used by the applicant for the grazing and feeding of his stock. His regular stock consists of five cows and a horse. He cuts hay on the field of 3½ acres and feeds his stock with it.

"7. The applicant is, and has for the last twenty-two years been, a dairykeeper, supplying the village of Muirkirk with milk. In his dairy business he sells milk produced by his own five cows, and the milk of other ten cows belonging to neighbouring farmers which he buys from them. His horse is used for the purposes of his holding, and also for conveying the milk to the village of Muirkirk."

The *question of law* for the opinion of the Court was—"Whether, on the facts above set forth, the Scottish Land Court was bound to hold that the said subjects were permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral within the meaning of section 26 (3) (*g*) of the Small Landholders (Scotland) Act 1911, and therefore excluded from the operation of the Act?"

Argued for the appellant—The business for the purposes of which the subjects were held was the business of dairykeeping. That was a business not "primarily" pastoral, any more than was that of a butcher or cattle-dealer. The pasturing of the five cows and one horse was neither the most important part of the business nor the earliest in point of time. The milk produced by the cows fed on the land in question was less than that bought for the dairy.

No appearance was made for the respondent and applicant.

LORD PRESIDENT—The question in this case is whether the applicant is a statutory small tenant within the meaning of the Small Landholders (Scotland) Act 1911.

He is a tenant from year to year of two fields extending to 13½ acres. These fields are now and have for some time back been laid down in permanent pasture. He uses them for the purpose of feeding five cows, the milk of which he sells. It is contended that he does not come within the meaning of this Act, and that he cannot be denominated a statutory small tenant in respect that he holds the fields for a business which is not primarily pastoral, and that he is therefore excluded from the benefit of the Act by virtue of the provisions contained in section 26 (3) (*g*).

I am of opinion that this contention is unsound, that the applicant is exactly in the position of a small dairy farmer who grazes cows upon his fields and sells the milk from a dairy situate on his farm, and therefore that the business which he carries on is not merely primarily pastoral but is exclusively pastoral.

The contrary is maintained on the ground that he not only sells milk which is yielded by the five cows fed in these two fields, but also the milk from ten cows which are grazed elsewhere. In my opinion that circumstance has no bearing on the question which we have to consider. He is, as I think, none the less engaged in a business which is purely pastoral, so far as the tenancy of these two fields is concerned, because he also sells milk given by cows that are fed on other fields. It appears to me that we have really nothing to do with the destination of the milk yielded by the cows that are fed upon the fields in question, and that we have before us a typical case of a small dairy farmer.

The exception to which the 26th section (3) (*g*) applies is, I think, the case of a man carrying on the business of butcher, who hires grass fields in the vicinity of his slaughter-house into which he temporarily turns cattle on their way from the grazing to the slaughter-house, for custody or keeping, or feeding, as the case may be—a purpose which is strictly subordinate to and incidental to his business as a butcher. But when a man grazes cows upon a field and sells the milk, whether it be from a dairy on or off the holding, and whether it be milk from cows grazed elsewhere as well as from cows grazed on the holding, it appears to me that he is using his field for a purely pastoral purpose.

I am of opinion, therefore, that the final order pronounced by the Land Court in this case was correct, and that we ought to answer the question of law put to us in the negative.

LORD SKERRINGTON—The respondent is a dairykeeper at Kirkburnhead, Muirkirk, and he was on 1st April 1912 tenant under the appellant of two fields of 10 and 3½ acres respectively, which were then and have since been in permanent pasture. The Small Landholders (Scotland) Act 1911 is declared by section 26 (3) (*g*) not to apply to a person who is a tenant of "any land . . . being permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral, including that of butcher, cattle-dealer, and the like." The Land Court has decided that the respondent's holding does not fall under this exception, and has accordingly found that he is a statutory small tenant, and, as such, entitled to have an equitable rent fixed and his tenancy renewed in terms of section 32 of the Act. The appellant contends that, on the facts set forth in the case, the Land Court was bound to hold that the permanent grass parks in question were held by the respondent for the purposes of a business which was not primarily agricultural or pastoral.

The milk which the respondent retails in the village of Muirkirk comes from two sources. He buys the milk of ten cows from neighbouring farmers, and he owns five cows which graze on his holding, and which

are also fed on the hay which he cuts on the 3½ acre field. In addition to the five cows the respondent has a horse which is grazed and fed on the holding. It is used for the purposes of the holding, and also for conveying "the milk," which I understand to mean the produce of the whole fifteen cows, to the village of Muirkirk. Nothing in my opinion turns upon this point. From the foregoing statement it will be seen that the respondent carries on what may be regarded as two businesses, though I prefer to regard them as two branches or departments of the same business. One department is purely commercial, and consists in the purchase of milk and its re-sale at a profit. So far as appears, the respondent does not separate the cream from the milk which he buys, nor does he churn any part of it into butter. The other department is akin to the business of a dairy farmer, and consists in the production and sale of milk obtained from cows which belong to the respondent, which graze upon the holding, and which also eat the hay grown and cut upon one of the parks. I should not describe the respondent as a dairy farmer, because on such farms there are generally buildings for the accommodation of the tenant and live stock, and also ground which can be cultivated in order to produce food stuffs other than meadow grass. But this distinction does not seem to me to be material so far as regards the present question.

The appellant's counsel argued that the respondent's business was not "primarily agricultural or pastoral," in the first place, the commercial part of it was of older standing than the other department, and in the second place, because two-thirds of the milk sold in the business was procured by purchase and not by anything akin to farming. In my view the word "primarily" as used in this part of the statute does not refer either to the date at which a particular branch of a business was established or to the special manner in which the owner of the business chooses to conduct it. The statute, in my opinion, regards certain businesses as not being primarily agricultural or pastoral because they are not ordinarily so regarded, and because they do not ordinarily involve the occupation of land for agricultural or pastoral purposes. For example, the business of a butcher is not generally regarded as either agricultural or pastoral, although a butcher may find it convenient to rent a field as a resting-place for his stock on their way from the market to the slaughter-house. Again, a village butcher might sell no meat except what came from animals which he himself had kept or bred upon a small holding. In such a case the time and capital expended on the keeping or breeding of live stock might much exceed that expended upon their slaughter and the sale of their meat. I do not think that considerations of this kind would be relevant for the purpose of showing that the business of a particular butcher was primarily pastoral. On the other hand, it would not necessarily follow that a grass park was held for the purposes of a butcher's business merely because the tenant happened to be a butcher and occasionally slaughtered a beast which he had kept on his holding. The question would be one of fact for the Land Court.

Applying this view of the meaning of the statute to the facts of the present case, I am of opinion that the grass parks tenanted by the respondent are held by him for the purposes of a business which is primarily pastoral, viz., the sale to the public of milk obtained from cows pastured and fed upon the holding. The business as ordinarily conducted does not make it necessary for the tenant to buy and sell milk not produced upon the holding. It is, therefore, primarily a pastoral business, and I do not think it material to inquire whether the milk produced upon the holding is sold along with or even mixed with other milk purchased by the tenant, or whether a separate account is kept of the price of the milk produced on the holding. Further, I do not think it necessary to inquire whether the respondent would continue to produce milk upon his holding if he did not see his way to increase his profits by buying and selling a much larger quantity of milk which had no connection with the holding. For these reasons I think that the question of law should be answered in the negative. It would be improper to express an opinion upon different cases which may in the future come before the Land Court for decision, but obviously everything must depend upon the special facts of each particular case. Different considerations might apply if a tenant did not sell the milk produced upon his holding, but consumed it in some business not primarily pastoral which he carried on elsewhere, *e.g.* as an hotel-keeper or as a manufacturer; or again, if the tenant being the owner of a large herd of cows did not allocate to the holding a stock suitable to its size, but used the holding as a supplementary food supply for the whole of his herd.

LORD ORMIDALE—The question submitted for the opinion of this Court arises out of an application by John M'Clymont, who is designed in the case stated by the Land Court as a dairykeeper, to be declared a statutory small tenant, in terms of section 32 of the Small Landholders (Scotland) Act 1911. The answer to the question depends on the construction or meaning to be given to section 26 (3) (*g*) of that Act, which provides that "A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of any land . . . being permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral, including that of butcher, cattle dealer, or the like."

From the facts set forth in the Special Case it is clear that the holding of the applicant consists of permanent grass park. There is no dispute about that. Can it be predicated of this permanent grass park that it is held for the purposes of a business or calling not primarily agricultural or pastoral? If it can, then the applicant shall not be held an existing yearly tenant. What are the other facts stated in the case? There

are no buildings on the holding. The holding is used by the applicant for the grazing and feeding of his stock, which consists of five cows and a horse. "The applicant is and has for the last twenty-two years been a dairykeeper, supplying the village of Muirkirk with milk. In his dairy business he sells milk produced by his own five cows, and the milk of other ten cows belonging to neighbouring farmers, which he buys from them. His horse is used for the purpose of his holding and also for conveying the milk to the village of Muirkirk."

Now from these facts it appears to me that the applicant has a business or calling, and only one business or calling, that, namely, of selling milk. Does he hold the permanent grass park for the purposes of that business or calling? In my opinion he does. The only purpose for which he grazes the permanent grass park with cows is to obtain from them milk to be sold to the customers of his dairy.

Can it be said that this business or calling of selling milk as carried on by the applicant is primarily pastoral? In my opinion it cannot. The greater part of the milk which he sells is purchased by him in the first instance, and then resold to his customers. It seems to me that with respect to that milk his business is a purely commercial or mercantile undertaking or venture, and cannot be described as primarily agricultural or pastoral, and certainly not in any other sense than the business of the butcher or cattle dealer referred to in the statute can be so described. If so, does the fact that in addition to the milk which is bought in the first instance from other people he sells milk which is the produce of cows belonging to himself and grazed on the permanent pasture held by him make any difference? In my opinion it does not. It seems to me that it is a mere accident that some of the milk retailed by him to his customers is the produce of cows belonging to the applicant, provided that the true inference from the facts stated is that the milk is disposed of by him along with other milk in the course of a business which is, to borrow a word from the statute, primarily mercantile or commercial, and such is the only inference which it seems to me is warranted by the circumstances disclosed in the present case. I do not read the facts set forth as instructing that the applicant is a dairy farmer, and I offer no opinion one way or another as to the applicability of the section to such. I am prepared to answer the question of law submitted to this Court in the affirmative.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court answered the question of law in the negative.

Counsel for the Appellant—Chree, K.C.—Macquisten. Agents—Connell & Campbell, S.S.C.

Friday, December 19.

FIRST DIVISION.

[Scottish Land Court.

MARQUIS OF BREADALBANE *v.* ROBERTSON.

Landlord and Tenant—Insurance—Small Holding — "Present Rent" — Tenant's Share of Fire Insurance Premium — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 13 *and* 26 (3) *and* (10).

The Small Landholders (Scotland) Act 1911, sec. 13, defines "present rent" as "the yearly rent, including money and any prestations other than money."

In an application by a tenant of a holding for an order under the Small Landholders (Scotland) Act 1911 fixing a first fair rent, the proprietor objected to the competency of the application, on the ground that the Act did not apply (sec. 26 (3) and (10)), as the "present rent" of the holding exceeded £50. The sum entered in the valuation roll for the holding was £50, 1s. 10d., the 1s. 10d. being the proportion payable by the tenant of the premium of a fire insurance policy effected by the proprietor over farm buildings.

Held (*diss.* Lord Johnston) that the tenant's proportion of the premium was not part of the "present rent" within the meaning of section 26, sub-section 3 (10), of the Act.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 13, so far as necessary, is quoted *supra in rubric*. Section 26 enacts—". . . (3) A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of (*a*) any land the present rent of which within the meaning of this Act exceeds £50 in money. . . . (10) A person shall not be subject to the provisions of this Act regarding statutory small tenants who in terms of this section would be disqualified from being an existing yearly tenant or a qualified leaseholder."

This was a Special Case stated by the Scottish Land Court at the request of the Marquis of Breadalbane, *appellant*, in an application under the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) by Donald Robertson, tenant of the holding of Moiearlanich, Killin, *respondent*, for an order fixing a first fair rent for the holding.

The Case stated—"1. Donald Robertson, farmer, residing at Easter Moiearlanich, in the parish of Kenmore and county of Perth (the applicant), was at the commencement of the Small Landholders (Scotland) Act 1911, on first April 1912, the resident and cultivating tenant from year to year of the holding of Easter Moiearlanich, situated in said parish and county, in the tenancy of which he succeeded his father. The holding has been occupied by the same family since about 1827, and the written lease last granted was in favour of the applicant's father, dated 20th and 24th July 1846. The period of en-