accordingly I think this proposal is reasonable, and that the motion should be granted.

LORD MACKENZIE—I agree. The mere fact that there are certain inaccuracies in the print does not make the case one in which there was any failure to lodge timeously.

LORD SKERRINGTON—I agree.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Allow the appellants to box and lodge corrected prints of the record containing the amendments made on the initial writ, the expense thereof to be borne by the appellant: Find the respondent entitled to the modified sum of two pounds two shillings of expenses, and decern against the appellant for payment accordingly."

Counsel for Pursuer (Appellant)—A. A. Fraser. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender (Respondent)—W. A. Fleming. Agents—Thomson, Dickson, & Shaw, W.S.

Thursday, May 21.

FIRST DIVISION.

[Scottish Land Court.

YOOL *v.* SHEPHERD.

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

"All and whole the buildings (with water-wheel, shaft, and spur-wheel) of the carding-mill at Miltonduff, . . . with the croft of land and houses attached thereto," were let at a yearly rent of £19, 5s., and it was admitted that the rent might fairly be held to have been £10, 5s. for the mill and £9 for the land and dwelling-house. In an application by the tenant to the Land Court to fix an equitable rent and to fix the period of renewal of his tenancy, *held* (*rev.* the Land Court) that the subjects in question did not comprise a "holding" in the sense of the Agricultural Holdings (Scotland) Act 1908, sec. 35 (1), not being "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral," and accordingly were excluded from the operation of the Small Landholders (Scotland) Act 1911 by section 26 (3) thereof.

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

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 26 (3), enacts—"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."

Thomas Yool, Kirkhill, near Elgin, *appellant*, being dissatisfied with a decision of the Scottish Land Court in the matter of an application by William Shepherd, Carding-Mill, Miltonduff, Elgin, *applicant and respondent*, to the Land Court to fix an equitable rent for certain subjects and to fix the period of renewal of his tenancy thereof, requested the Land Court to state a Case for the opinion of the Court.

The Case stated, *inter alia*—"1. William Shepherd, along with Alexander Lawson Fraser, entered into a lease with William Stuart, of Miltonduff, then proprietor of the subjects dealt with in the after-mentioned application to the Land Court, under which they became tenants of the said subjects for the space of ten years from and after the term of Whitsunday 1892 as regards the houses, grass, and pasture land, and land intended for green crop, and the separation of the crop of that year from the ground as regards the land under grain crop, at a *cumulo* yearly rent of £19, 5s. [The subjects let were thus described in the lease—'All and whole the buildings (with water-wheel, shaft, and spur-wheel) of the carding-mill at Miltonduff, as presently occupied by Alexander Macdonald, with the croft of land and houses attached thereto, extending to nine acres and nine poles or thereby of arable land, and three roods and fourteen poles or thereby of pasture, conform to plan prepared by Peter MacBey, land surveyor, Elgin, in the year Eighteen hundred and sixty-six.'] Thomas Yool, respondent in said application, became proprietor by purchase of the estate of Miltonduff, including said subjects, from William Stuart's trustees before the passing of the Small Landholders (Scotland) Act 1911.

"2. When the lease expired the tenants continued to occupy under tacit relocation, but Alexander Lawson Fraser retired from the occupancy some years ago, and the applicant continued as sole occupant.

"3. On 29th April 1912 the said William Shepherd presented an application to the Land Court to fix an equitable rent for the subjects described in said lease, subsequently amended by the Court by adding a conclusion to fix the period of renewal of his tenancy thereof. The respondent therein, Thomas Yool, pleaded, *inter alia*, that the application was incompetent, . . . (*b*) because the subjects were not a holding as defined by the Small Landholders Act 1911. . . .

"6. It was admitted by joint-minute of admissions that the mill presently existing on the land in question was originally a carding-mill, spinning-mill, weaving-mill, and waulkmill, and that no part of it was

then used as a dwelling-house; that these buildings are now solely used as a carding-mill, spinning-mill, and woollen-mill; that the said mill was built or restored and adapted for the above purposes by William Skene, who was tenant of the land at the time, and who had various similar mills in different parts of the country.

"7. It was further admitted by the said joint-minute that when respondent purchased the lands of Miltonduff, of which the subjects in question form a part, the whole of the buildings on said subjects were the property of the trustees of the late William Stuart, from whom the respondent purchased the same, and were included in the sale and conveyance to him and are now his property; that when the applicant and the said Alexander Lawson Fraser became tenants of the subjects they paid nothing for the buildings either to the then proprietor or to the outgoing tenant, and that the outgoing tenant made no claim to such buildings.

"8. It was further admitted by the said joint-minute that during the whole period of the existence of the applicant's lease the looms and working plant other than the water-wheel and shafting which belonged to the landlord have been provided by the tenant.

"9. It was further admitted by the said joint-minute that on one or two occasions the tenant of the subjects had sub-let the mill separate from the croft, and on these occasions the sub-tenant has lived in part of the mill, but the croft and mill have never been let as separate subjects by the landlord.

"10. It was further admitted by the said minute that the proportion of the cumulo rent paid by the applicant for the subjects might fairly be held to have been £10, 5s. for the mill and £9 for the land and dwelling-house.

"11. In an earlier lease granted by the Honourable George Skene Duff of Miltonduff, then proprietor of the estate, to James Walker, of these subjects for nineteen years from Whitsunday 1871 at a similar rent of £19, 5s. sterling, subject to the general regulations and conditions of let of the farms, crofts, and possessions on the estate of Miltonduff, the subjects are described as 'all and whole the carding-mill of Miltonduff and land and others attached, forming the mill croft, in the parish of Elgin and county of Moray.

"12. Neither party tendered or adduced at the hearing any evidence except the two leases above referred to and the said joint-minute. The statements in the following article (13) are, so far as relating to the working and the equipment of the mill and its relation to the holding, the result of observation by the Court at inspection of the subjects.

"13. This holding extends to nearly 10 acres, of which about 9 acres are arable land and 3 roods are pasture. The buildings comprise a dwelling-house, steading, and the mill. The said mill consists of a single building, containing one large room and a small store on ground floor and a loft above. It is worked by the tenant and his family. The looms and working plant substantially consist of one power loom, one handloom, and a set of two carding machines in the large room on the ground floor, and one spinning-jenny in the loft. The water power is used for driving these machines except the handloom. The industry carried on is mainly the weaving of blankets, but tweeds are also manufactured. It is similar in character to the home industries, such as weaving and spinning, which are commonly carried on by the smaller landholders in many parts of Scotland. Without some auxiliary or subsidiary occupation a holding of this size would not yield a livelihood to the tenant and his family. The carrying on of this industry does not interfere with the proper cultivation and management by the tenant and his family of this holding, which is well farmed and stocked. The mill occupies a very small area of the holding. If the mill and holding were separated, the mill would lose most in letting value. The holding is situated in a district entirely rural, occupied by farms and small holdings. The Court was satisfied that this industry is an auxiliary or subsidiary occupation of the tenant, and that, taken as a whole, the subjects are principally agricultural in character."

On 5th April 1913 the Land Court pronounced the following order:—"*Edinburgh, 5th April* 1913.—The Land Court having resumed consideration of this application, repel the objections taken for the respondent to the competency of the application: Find that the applicant is a statutory small tenant in and of the holding described in the application, and that no reasonable ground of objection to the applicant as tenant has been stated: Therefore find that he is entitled, in virtue of the 32nd section of the Act of 1911, to a renewal of his tenancy and to have an equitable rent fixed; and having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at two years, and the equitable annual rent payable by the applicant at fourteen pounds sterling, each to run from the term of Whitsunday Nineteen hundred and twelve: Find no expenses due to or by either party.

"N. J. D. KENNEDY.
ALEX. DEWAR.
E. E. MORRISON."

Note. — "Both parties agreed that the whole subjects, including the building used as a carding, spinning, and woollen mill, should be held and dealt with as one subject. The applicant contended that the use by him of this building did not take the holding out of the Act. The respondent contended that it did, as in his view the croft and dwelling-house and steading were merely pertinents or accessories of this mill. In the circumstances, particularly in view of the facts that this mill was originally built or restored and adapted for the above purposes, not by the landlord but by a former tenant, in order to carry on a home industry, and that it has been for many years, and was at the date when the Act of 1911 came into operation, so used and carried on by the present applicant, and that the

whole looms and working plant, other than the water wheel and shafting, have been provided by the applicant, we are of opinion that it is a pertinent of the holding.

"The dwelling-house and steading are old and in bad repair, and the rent has been fixed after taking their condition into account.

"To allow the proprietor an opportunity of executing substantial repairs on the dwelling-house and steading the period of renewal is fixed for two years only."

The *question of law* for the opinion of the Court was—"Whether on the facts stated the Land Court was entitled to hold that the subjects in question were not excluded from the provisions of the Small Landholders (Scotland) Act 1911 by reason of the existence and use of the said mill which forms part of the said subjects?"

Argued for the appellant—The subjects did not fall within the definition of "holding" in the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), sec. 35 (1), which was adopted in the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), section 26 (3). The mill was not a mere appanage or pertinent of the croft, but the most important part of the subjects let. Reference was made to the following authorities — *Mackintosh* v. *Lord Lovat*, December 18, 1886, 14 R. 282, 24 S.L.R. 202; *Taylor* v. *Earl of Moray*, January 23, 1892, 19 R. 399, 29 S.L.R. 336; *Marquis of Breadalbane* v. *Orr*, July 3, 1896, 4 S.L.T. 75; *Gilmour* v. *Peterson*, February 26, 1901, 3 F. 569, 38 S.L.R. 384.

Argued for the respondent (the applicant)—The Land Court on the evidence and after inspection were entitled to find that the mill was a mere pertinent or accessory of the land. This was a finding in fact, and the Court could not interfere unless there was no evidence on which that finding could be supported.

LORD PRESIDENT—It is quite certain that the Land Court is final upon all questions of fact, and that our functions are confined exclusively to reviewing their orders upon questions of law. But, accepting the facts as found in the stated case before us, I have no hesitation in coming to the conclusion that it is impossible to hold that the subjects to which this application relates fall within the provisions of the Small Landholders (Scotland) Act 1911.

The question whether they do so or not depends entirely upon the answer to this further question—do they constitute a holding in the sense of the Agricultural Holdings (Scotland) Act 1908, because it is certain that these subjects are excluded from the Statute of 1911 if they do not constitute a holding within the meaning of the Statute of 1908.

Now by the Statute of 1908 a holding in the sense of that Act means any piece of land which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, and it appears to me to be out of the question to say that the subjects to which the application here relates are either wholly agricultural or wholly pastoral, or partly the one and partly the other. From the lease, which is before us, it appears that they are described as "All and whole the buildings (with water-wheel, shaft and spur-wheel) of the carding-mill at Miltonduff, as presently occupied by" a certain person, "with the croft of land and houses attached thereto." It further appears that they have been treated as a *unum quid* by the successive tenants who have occupied them. It further appears that the rent, being £19, 5s. in the old lease, may be fairly apportioned thus—£9 to the agricultural part of the subjects and £10, 5s. to the mill. And it is nothing to the purpose to say that because the mill was originally constructed by a tenant of the subjects and not by the landlord, and because the machinery which is at present in the mill, including the looms, was provided by the existing tenant, therefore the mill must be regarded as entirely subsidiary, and the holding ought to be regarded as purely agricultural, or partly agricultural and partly pastoral.

The Land Court seem to have thought that they had decided this question when they came to the conclusion, upon the facts stated, that the mill was a pertinent of the subjects. But that does not lead to the conclusion that the subjects fall within the Statute of 1911. What meaning can be attached to the expression "pertinent" I do not know, but, using the expression in its ordinary sense, I should be very far from holding that a portion of the subjects to which the greater part of the rent effeirs, and which is obviously the more valuable part of the subjects, could be called a pertinent of the other portion.

Whether that be so or not, however, it is not decisive of the question before us. That question, I repeat, must be decided entirely upon a consideration of the question whether the definition of the Statute of 1908 applies to the subjects in question. I am of opinion that it does not, and therefore that we ought to answer the question put to us in the negative.

LORD MACKENZIE — I am of the same opinion. The Land Court has held that the subjects in question were not excluded from the provisions of the Small Landholders (Scotland) Act 1911. In my opinion they were.

The material statutory provisions in connection with this question are the Small Landholders Act 1911, sec. 26, which provides that "a person shall not be held to be an existing yearly tenant or a qualified leaseholder under this Act" in respect of ((3) (*f*)) "any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908." Turning to the Agricultural Holdings (Scotland) Act 1908 the real question in this case turns upon section 35, which provides 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, 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 or employment held under the landlord."

I do not find in the print before us that the Land Court applied their minds to this section upon which the whole question turns. It is not mentioned in the notes which have been printed. If they had applied their minds to that question I am quite unable to see how they could have arrived at the conclusion that the subjects here in question were either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, when they were dealing with a lease which let "All and whole the buildings (with water-wheel, shaft, and spur-wheel) of the carding-mill at Miltonduff, as presently occupied by Alexander Macdonald, with the croft of land and houses attached thereto," and when it appears that the buildings are used as a carding-mill, spinning-mill, and woollen mill, and when the apportionment of the rent between the mill and the land and dwelling-house is £10, 5s. for the mill, and £9 for the land and dwelling-house. And accordingly in my opinion there are no facts in the present case which would entitle the Land Court to take the view they did and hold that these subjects fell under the provisions of the Small Landholders (Scotland) Act of 1911.

LORD SKERRINGTON—I agree.

LORD JOHNSTON was absent.

The Court answered the question of law in the negative.

Counsel for the Appellant—Wilson, K.C. —D. M. Wilson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Applicant (Respondent)—Anderson, K.C.—R. C. Henderson. Agent—James Scott, S.S.C.

Wednesday, May 27.

FIRST DIVISION.

COATS' TRUSTEES, PETITIONERS.

Trust—Nobile Officium—Special Powers—Power Given to Trustee to Purchase Trust Property.

A testator by his trust-disposition and settlement directed his trustees to divide the residue of his estate in certain proportions, and empowered them in the case of property not readily divisible to value the same and assign it according to such valuation as part of any share. The trustees were also given power to sell all or any part of the trust estate by public roup or private bargain.

The trustees having presented a petition for special powers, the Court *authorised* certain pictures specified in an inventory and valuation by Messrs Christie, Manson, & Woods to be sold by public roup at Messrs Christie, Manson, & Woods' at prices not less than those specified in the inventory, and under the express condition that a certain one of the trustees (who was a son of the testator) as an individual was to be entitled to bid at the sale for all of the pictures or such as he might desire.

William Hodge Coats, John Alexander Spens, and Ernest Symington Coats, the testamentary trustees acting under the trust-disposition and settlement of Archibald Coats of Woodside, dated 6th November 1901, presented a petition to the First Division of the Court for special powers.

The petition set forth, *inter alia*—"3. By said trust-disposition and settlement the testator, after providing for payment of his debts and funeral expenses, and the expenses of executing the trust, and of certain legacies and provisions, provided, *inter alia*, as follows, *videlicet*—'(*Fifth*) I direct my trustees as soon as possible after my decease, after paying over or providing for the aforesaid debts, legacies, and provisions, to make a division of all the residue of my real, heritable, personal, and moveable property and estate in the following proportions, and subject to the provisions after specified. . . . And I suggest to my trustees that the principle of the aforesaid division shall be so carried out by my trustees that each of my said children shall receive as nearly as may be a proportion corresponding to the amount of their shares respectively of each stock, security, or other asset forming part of my estate, and in the case of any heritable, real, or other property which may not be readily divisible the same shall . . . be valued by my trustees and shall be assigned by them according to such valuation as part or of any share so sold or disposed of as they according to the best of their judgment shall decide.

"4. By the eleventh purpose of said trust-disposition and settlement the testator empowered his trustees to sell all or any part of the trust estate either by public roup or private bargain. . . . .

"6. The testator left moveable estate of the value over £1,000,000, as well as considerable heritable estate. Part of his moveable estate consists of a valuable collection of pictures. The petitioners have had an inventory and valuation of the most valuable pictures in the collection made by Messrs Christie, Manson, & Woods, London, which is dated 28th May 1913. . . . The total value put upon the pictures in said inventory and valuation is £34,577, but in respect that the collection comprises, *inter alia*, pictures by artists whose works generally fetch high prices, there is a possibility that some, at all events, of the pictures might realise at a public sale higher prices than those put thereon in said inventory and valuation.

"7. The petitioners obtained said inventory and valuation with the view of obtaining guidance as to the value of said pictures and the proper course to follow in dealing with them. They proposed to assign the said pictures according to said valuation to the petitioner William Hodge Coats, who with his wife and son lived with the said now deceased Peter Mackenzie Coats at Woodside aforesaid, where said pictures