Wednesday, February 20.

FIRST DIVISION.

[Scottish Land Court.

DUKE OF HAMILTON'S TRUSTEES *v.* FULLARTON AND OTHERS.

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

Landlord and Tenant—Small Holdings—Holding—Two Parcels of Land Held on Different Titles—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26.

Landlord and Tenant—Small Holdings—Procedure — Alternative Conclusion to Application Added by Land Court without a Hearing—Applications as Landholders by Persons in Fact Statutory Small Tenants.

The occupiers of a dwelling-house with contiguous garden and offices and certain rights of grazing in adjacent lands, also of three acres of land detached but within two miles of the dwelling-house, separately let, applied to the Scottish Land Court to fix a first fair rent for the holding. The two sets of subjects had been and were worked together. The tenants and their predecessors in the same family had not executed the greater part of the improvements, and accordingly they might be statutory small tenants but not landholders, though their application was made as landholders. The Land Court amended their application by adding an alternative conclusion for an order that the applicants were statutory small tenants and for consequent orders. *Held* (1) that the subjects in question were one statutory small tenancy, (2) that the amendment was within the power of the Land Court.

Landlord and Tenant—Small Holdings—Rent—Statutory Small Tenant—Equitable Rent—"Circumstances of the Case, Holding, and District"—Summer-Letting—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 32 (8).

Held, applying the *Duke of Hamilton's Trustees* v. *M'Neill, supra*, that summer-letting was a "circumstance of the case, holding, and district" within section 32 (8) of the Small Landholders (Scotland) Act 1911 to be taken into account in fixing the equitable rent of a statutory small tenant.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 26—"(2) A person shall not be admissible to registration as a new holder under this Act in respect of land belonging to more than one landlord, or in respect of more than one holding, and shall not be held an existing yearly tenant or qualified leaseholder in respect thereof unless such land or holdings have been worked as one holding."

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 Helen Hendry Fullarton and others, her sisters, *respondents*, tenants of subjects at or near the village of Brodick belonging to the appellants, for an order fixing a first fair rent for those subjects, applied for a Case for the opinion of the Court.

The Case set forth—"4. At the commencement of the Small Landholders Act 1911 (1st April 1912) the said applicants occupied and possessed from year to year, and had continuously occupied and possessed from year to year since the death of their mother Mrs Janet Fullarton in 1906, the following subjects:—(1) Dwelling-house, known as No. 7 Mayish Cottages, with contiguous garden ground and offices, including byre, and also a stable adjacent to the said house but not contiguous, the said garden ground and sites of said house and offices extending to about 1 rood, and two one-fifth shares of the fields known as Alma fields contiguous to said dwelling-house, garden ground, and offices, held and used by the applicants in common with three other tenants on the same estate as pasture or grazing land, extending to about 11 acres. (2) Field at Low Glencloy, near Douglas Row, situated within less than two miles from the first-mentioned subjects, extending to about 3 acres.

"5. No buildings have been erected on any part of the Alma fields or on the Low Glencloy field. From a date earlier than 1858 until the present time the Alma fields have been pasture or grazing land divided into five shares. The souming has been five cows, or one cow to each share. It has been held in common sometimes by five, latterly by four tenants on the estate resident in the neighbourhood. Since 1893 there have been four tenants holding this pasture or grazing land in common—three holding a one-fifth share each, and the fourth (being the applicants' father, mother, and themselves) holding two one-fifth shares.

"6. It was admitted that the said Mrs Janet Fullarton was the recognised tenant of all these subjects from the death of her husband, the applicants' father John Fullarton, in March 1896 until her own death in 1906. It was admitted that her said husband was at his death the recognised tenant of all the said subjects. These had been acquired by him at different dates between 1855 and 1893, as stated in next article.

"7. The dwelling-house and land, now garden ground and sites of byre and offices, contiguous to the dwelling-house were let to John Fullarton in 1855, on his removal from a holding on the same estate in consequence of the merging of certain small holdings into large farms. The dwelling-house is one of a row of cottages which were built by the proprietor in and after that year and called Alma Terrace. The house was not then internally completed. John Fullarton completed it, and afterwards built an addition to the dwelling-house internally connected with it, which addition was referred to in the evidence as the summer-house, in order to provide accommodation for his family of seven children, and also built a byre, rebuilt by Mrs Janet Fullarton during her ten-

ancy, stable and whole offices, all at his own expense. In 1858 he acquired the first one-fifth share of the said Alma fields common grazing, which had been given up by one of the tenants of said fields, in respect of which £2, 10s. was added to the yearly rent. In 1893 the second one-fifth share in the said Alma fields, which had been given up by one of the other tenants of said fields, was acquired by him, and a further sum of £2, 10s. was added to the rent. In 1858 the Low Glencloy field was let from year to year to John Fullarton and Donald Fullarton for the purposes of a butcher's business which they carried on as partners. In 1880 Donald Fullarton ceased to have an interest in that business, and thereafter John Fullarton was the sole tenant of this field. At or before his death it had ceased to be used for the purposes of a butcher's business. Before 1889 John Fullarton became tenant of the site adjacent to his dwelling-house on which the stable and shed stand. These were erected by him at his own expense.

"8. In 1889 Mr Ligertwood, on the instructions of the then proprietors, valued, for the purpose of readjustment of rents, a number of holdings on the Arran estate, including the whole subjects held by John Fullarton, other than the Low Glencloy field. On 9th February 1889 the estate factor intimated to John Fullarton that the new rent proposed by Mr Ligertwood for his holding was £11, 10s. and £1 for killing-house, total £12, 10s., and requested him if agreeable to continue tenant of his holding and to sign an enclosed agreement to pay the proposed new rent. John Fullarton agreed to pay the proposed new rent of £12, 10s. This rent was fixed for and included the whole subjects then possessed by him, and now occupied and possessed by the applicants, other than (1) the Low Glencloy field, and (2) the second one-fifth share in the Alma fields, which had not then been acquired. When this second one-fifth share was acquired the rent was increased by £2, 10s. At later dates 5s. was deducted for a site resumed from the Alma fields, and £1 was added for water-supply, which made the yearly rent payable for the whole subjects, other than the Low Glencloy field, £15, 15s. payable half-yearly, which was the rent of these subjects at 1st April 1912.

"The yearly rent of the Low Glencloy field was originally £2, 10s. payable half-yearly. In consequence of reductions for resumptions of portions at various dates, the latest being in 1911, this rent became £2 before the commencement of the Act of 1911. The rent of this field has been paid at the same terms and along with the rent of the whole other subjects. The total rent payable for the whole subjects accordingly was £17, 15s. Separate receipts have been granted for the Low Glencloy field and for the other subjects. The form of receipt granted for the rent of the Low Glencloy field to John Fullarton, and after his death to Mrs Janet Fullarton, and since her death to the applicants, has continued to bear the original heading 'Dr. Messrs J. & D. Fullarton, Low Glencloy.' . . .

"10. The applicants remained unmarried and lived as one family with their mother, the said Mrs Janet Fullarton, and assisted her in the management and working of the subjects until her death in 1906. The remaining daughter lived elsewhere. Since her death they have had continuous occupation and possession of the said whole subjects under the proprietors. . . .

"11. The said whole subjects have been since John Fullarton's death at latest possessed and worked together as one holding by Mrs Janet Fullarton, and since her death by the applicants, and used for ordinary agricultural and pastoral purposes. The usual stock kept by the applicants is two cows. The Low Glencloy field has been usually cropped in corn, potatoes, and hay. The said field and the common grazing have been worked together from the offices connected with the dwelling-house. . . .

"13. This application to the Land Court as presented craved an order fixing a fair rent for the applicants as landholders. It contained no conclusion for an order fixing an equitable rent and the period of renewal of the applicants' tenancy as statutory small tenants in the event of its being found that the greater part of the existing permanent improvements had not been made by the applicants or their predecessors in the same family. Nearly all the applications from the Arran estate were in this form.

"At the first of the Court's sittings to hear these applications including the present application the agent, who appeared for the proprietors in all the applications from their Arran estate, stated to the Court, that if the Court should in any case come to be of opinion that the applicant was not entitled to be a landholder because the Court was not satisfied that the greater part of the permanent improvements on the holding had not been provided or paid for by the applicant or his predecessors in the same family, the proprietors would take no objection to the application being dealt with by the Court as if the application had been in the form appropriate to statutory small tenants. This statement was not subsequently qualified in any way, and the hearing of the applications, including the application of the present applicants, proceeded on that footing. Accordingly the Court in respect of this statement not being satisfied that the greater part of the existing permanent improvements on these subjects had been provided or paid for by the applicants or their mother or father, found that the applicants were statutory small tenants, and fixed an equitable rent and period of renewal therefor, as set out in the order of 14th March 1914. No motion or suggestion was made to the Court by any of the parties that further evidence or debate in this application should be taken or heard, and no motion for a rehearing has been made.

"14. The following *order* was pronounced in the application—'*Edinburgh, 14th March* 1914.—The Land Court having inspected the subjects and resumed consideration of the application and the evidence adduced, find that at the commencement of the Small

Landholders (Scotland) Act 1911 the applicants were resident and cultivating joint-tenants of the subjects described in the application: Find that the said subjects have been worked as one holding by the applicants and their predecessors in the same family, and were so worked at and since the commencement of the said Act: Find that it is not proved to the satisfaction of the Court that the applicants or their predecessors in the same family have provided or paid for the greater part of the buildings and other permanent improvements on the holding without receiving from the respondents or any predecessors in title payment or fair consideration therefor; amend the application by adding an alternative conclusion for an order that the applicants are statutory small tenants and for consequent orders: Find and declare that the applicants are statutory small tenants within the meaning of the said Act in and of the said subjects, and that no ground of objection to the applicants as tenants has been stated under section 32 (4) of the said Act: Therefore find that they are entitled in virtue of the said section to a renewal of their tenancy and to have an equitable rent fixed, and having considered all the circumstances of the case, holding, and district, including the condition and value of the improvements made by the applicants and respondents respectively or their respective predecessors in title, have determined and do hereby fix and determine the period of renewal at seven years and the equitable annual rent payable by the applicants at twelve pounds sterling, each to run from the term of Martinmas Nineteen hundred and twelve."

The *questions of law* included—"1. Were the Land Court entitled to hold that the subjects specified in article 4 are a holding within the meaning of the Small Landholders (Scotland) Act 1911? 2. Assuming the first question to be answered in the affirmative, were the Court entitled to find that the applicants were statutory small tenants within the meaning of the Small Landholders (Scotland) Act 1911 at the commencement of the Act"?

The *appellants* lodged a note, which set forth—". . . The subjects consist of (1) A dwelling-house forming one of a row of eight continuous houses in Alma Terrace, Brodick, with adjoining garden and byre. (2) A field at Low Glencloy a considerable distance away from Alma Terrace. (3) In addition to these subjects the applicants graze two cows in a field near Alma Terrace.

"The history of these subjects is as follows:—In 1855 the applicants' father, who was a butcher in Brodick, became tenant of the dwelling-house and garden. There was no byre then on the subjects.

"In 1858 the Low Glencloy field was let to the firm of J. & D. Fullarton, butchers, for the purposes of their business at a rent of £2, 10s., the applicants' father being one of the partners of that firm.

"In 1860 the applicants' father obtained permission to graze one cow in the said Alma field at a separate rent of £2, 10s.

"In 1894 the applicants' mother (their father not being then alive) obtained permission to graze a second cow for a separate rent of £2, 10s.

"It is these different subjects and rights of grazing which the applicants now claim as a statutory holding. It will be seen that historically they are all different subjects, and that when the tenancy of the house commenced neither it nor the tenant had any connection with an agricultural subject or with the other subjects referred to in the application. The Land Court in the reasoned opinion which they issued with reference to their order did not mention these facts and they refuse to mention them in the Stated Case. On the other hand the Court states at the commencement of article 7 that the applicants' father became tenant of the said house 'on his removal from a holding on the same estate in consequence of the merging of certain small holdings into large farms.' The applicants' father was never a tenant of any subjects on the Arran estate until he became tenant of the said house in 1885, and no suggestion was made at the hearing that he had been a tenant prior to 1855.

"In 1889 there was a revaluation and readjustment of rents in some portions of Arran and the rent of the house and garden and the one cow's grazing (the second cow's grazing not having then been granted to the applicants' mother) was fixed at £11, 10s., £9 for the house and £2, 10s. for the one cow's grazing. When the second cow's grazing was given the rent became £14, subsequently increased to £15 owing to the introduction of a water supply, of which £10 represented the rent of the house and garden and £5 the rent of the two cows' grazing.

"14. The next question of law which arises is whether the order is incompetent in respect that it declares the applicants to be statutory small tenants and fixes an equitable rent without any such application being before the Court.

"The Land Court refuse to insert that question in the case, and they justify the procedure which has been followed by the explanations in article 13 of the case.

"The statement made on behalf of the proprietors therein referred to was not as stated by the Court, but was to the effect that if an applicant during the course of the proceedings desired to amend his application so as to include an alternative crave to be declared a statutory small tenant, the proprietors would take no objection to the application being so amended by the applicant. No such application to amend was made in this case and the application was taken to avizandum on the footing that the applicants were applying to be declared landholders and to have a fair rent fixed. The Court did not before issuing judgment give the proprietors an opportunity of stating objections or considering whether objections should be stated, to the applicants as statutory small tenants, or give the parties an opportunity of leading evidence as to an equitable rent.

"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