LORD MACKENZIE—I adhere to the opinion which I previously expressed, and I agree with the proposed answers in so far as they are consistent with the views therein expressed.

The Court (in *M'Neill's* case) answered questions 2 (*a*) and (*b*) in the affirmative, question 2 (*c*) in the negative, and question 3 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.* MACKINNON AND ANOTHER.

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

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

Held that a dwelling-house, occupied by one of two joint-tenants on subjects on which there was another small dwelling-house occupied by the other joint-tenant, which would have been sufficient as the dwelling-house of the subjects if the subjects had been occupied by a single tenant, when the less commodious house would have been useful and suitable for servants' accommodation, was not an extra dwelling-house requiring to be excised before the subjects could be considered a holding under the Small Landholders (Scotland) Act 1911.

Landlord and Tenant — Small Holdings —Fair Rent—Circumstances to be Taken into Consideration—Improvements Executed by Tenant in Implement of Obligation under his Lease—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 6 (1).

In implement of an obligation under a lease of a holding, dated in 1835, the tenants of the holding constructed drains and brought uncultivated land into cultivation. The proprietors made deductions from the rent from time to time for cutting some of the drains and supplied materials for others. In an application by the tenants to fix a fair rent for the holding, *held* that the improvements executed by them and their predecessors in the same family were a circumstance to be taken into consideration in fixing the fair rent though executed under the obligation in the lease.

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, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the [landholder] or his predecessors in the same family, may determine what is such fair rent, and pronounce an order accordingly." Section 34—". . . 'Permanent improvements' means improvements specified in the schedule to this Act." Schedule — "*Permanent Improvements.* — . . . 3. Subsoil or other drains."

[*Reference is made to the preceding case of the Duke of Hamilton's Trustees* v. *M'Neill.*]

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 Peter Mackinnon and his son Donald Mackinnon, *respondents*, joint-tenants of the holding at Corriecravie, belonging to the appellants, for an order fixing a first fair rent for the holding, applied for a case for the opinion of the Court.

The Case set forth—"4. The whole buildings on the said holding have been erected and maintained by the tenants and their predecessors in the same family, with the aid of contributions of (1) materials, or money for the purchase of materials, by the estate for the buildings erected in and after 1898, and (2) some wood for the renewal of the older existing offices in 1884 and 1894. The buildings on the holding include two dwelling-houses. One is a small old house which has been and is occupied as his dwelling-house by the joint-tenant Peter Mackinnon. This house was built by the tenants' predecessors in the same family, and has been since maintained without any contribution by the estate. The other house has been and is occupied as his dwelling-house by the other joint-tenant Donald Mackinnon. It was built in 1898 in substitution for a then existing dwelling-house, with the aid of a substantial contribution by the estate in respect of wood, slates, and cement, and has been maintained by the tenants without any contribution from the estate. It is the more commodious house, and is suitable to this holding as the dwelling-house of one of the joint-tenants. It would be sufficient as the dwelling-house of the holding if the holding were occupied by a sole tenant. If the existing joint-tenancy should come to an end the small house occupied by the said Peter Mackinnon would be suitable and useful for the accommodation of a hired servant or servants for the working of this holding. While joint-tenancy continues both these dwelling-houses are suitable to and reasonably required for this holding as dwelling-houses for the joint-tenants. Neither of these dwelling-houses is an extra

dwelling-house. In cases of joint-tenancies and of tenancies in runrig on the Arran estate the joint-tenants, or tenants in runrig, have usually each a separate dwelling-house on the holding. 5. This holding was possessed for nine years from and after Martinmas 1835 on the lease, dated 22nd and 23rd September 1835, incorporating printed articles and conditions of sett of sundry lands, farms, lots, or divisions of farms, and other possessions in the island of Arran, dated 11th September 1835. . . . The said lease was lodged. By the said conditions of sett it was agreed, *inter alia*, that the tenants in place of the present irregular mode of having their green and white crops and grass in a multiplicity of detached ridges and patches should lay off their possessions with regular fields or sub-divisions of such extent and form as should be pointed out by the factor or overseer, and cultivate the same in rotation therein described. The said conditions also contained provisions as to making stone drains, and further provided that as certain parts of the lands were then waste and uncultivated the tenants should cultivate and make arable yearly such portions as should be pointed out by the factor or overseer of Arran, not exceeding certain proportions, and should further cultivate and drain all baulks, ridges, and patches or unarable ground betwixt or at the ends of the arable lands in their possession, and remove all loose cairns of stone and brushwood 'so that the present fields, which are only partly arable,' may be completely cultivated, wrought, and managed in a uniform manner. After the said lease expired the tenancy of this holding was held from year to year until the Small Landholders Acts applied to the holding. 6. Improvements were executed on the land of this holding by the tenants and their predecessors in the same family after possession under the said lease began. Among other improvements they made stone drains during the period from 1830 to 1863 inclusive, and made tile drains during the period from 1896 to 1906 inclusive, and brought uncultivated land into cultivation. The estate made an allowance to the tenants in the form of deductions from the rent from time to time for cutting the stone drains, and supplied the tiles used in making the tile drains. No other allowance or contribution or expenditure was made by the estate towards any improvement on the land. 7. No evidence was led or tendered by either party with regard to the summer-letting of either of the said dwelling-houses or the revenue which might be derived therefrom, except that £3, 10s. had been added to the rent of the holding in 1900, as set forth in next article, in respect of summer letting. The letting by tenants of the dwelling-house or dwelling-houses on holdings or parts of them to summer visitors has been a recognised usage in Arran for a considerable period before the passing of the Act of 1911. The said dwelling-house occupied by Donald Mackinnon is suitable for letting to summer visitors in whole or in part, and the Court inferred in fact that it had been in whole or part let by the tenants before the passing of the Act of 1911 to summer visitors, and would continue to be so let as opportunity arose. It was not disputed that the letting by tenants of dwelling-houses on their holdings to summer visitors, though not in itself a use of such dwelling-houses for any purpose of agriculture, was a customary and reasonable use of these dwelling-houses. Such letting is not inconsistent with the working and cultivation of the holding. . . . 10. At the hearing upon evidence on 3rd and 4th January 1913 in the whole applications before the Court the proprietors maintained that all improvements performed by tenants in virtue of specific obligations by such tenants to perform them contained in leases, under which the then lands were possessed by them or their predecessors, or other written agreements between landlord and tenants, could not be reckoned as improvements executed by the tenants to be taken into account in fixing a fair rent under the Act.

"The following *order* was pronounced by the Land Court in this application:—'*Edinburgh, 23rd June* 1913.—The Land Court having considered this application, find and declare that the applicants are joint-landholders within the meaning of the Acts, 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 applicants or their 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 twenty-one pounds sterling.'

"The Court did not exclude from consideration in fixing the fair rent improvements executed by the tenants or their predecessors in the same family on the holding after the commencement of the lease referred to in article 5. Assuming, but not deciding, that such improvements or any of them were executed in virtue of the said lease, and that the said lease contained a specific agreement in writing under which the tenants or their predecessors were bound to execute such improvements, the Court held that in fixing a fair rent under section 6 (1) of the Act of 1886 improvements executed in virtue of such a specific agreement in writing were not excluded from consideration, although such improvements would fall to be excluded from consideration in determining a claim for compensation on renunciation or removal under section 8 (c) of the same Act."

The *questions of law* included—"2. Were the Land Court bound to exclude from the said holding for the purposes of the Landholders Acts the dwelling-house occupied by the joint-tenant Donald Mackinnon. . . . 4. Are the Land Court bound in fixing a fair rent to exclude from consideration as tenant's improvements such improvements as were executed on the holding by the landholder or his predecessors in the same family in virtue of a specific agreement in writing under which the landholder or his said predecessors were bound to execute said improvements?"

The *note* of the Land Court (issued in con-

nection with the case of *M'Alpin*) dealt with the point of improvements as follows:—"II. A second question which has been raised relates to the fixing of a fair rent for the holding of a landholder under section 6 (1) of the Act of 1886. Are improvements which have been made by the tenant or his predecessors in the same family to be reckoned not as tenant's improvements but as landlord's improvements where they have been made in virtue of a specific written agreement with the landlord to make them, although neither payment nor fair consideration has been received for them?

"Now the opinion of the Crofters Commissioners, which Sir David Brand delivered on 20th December 1886, on the construction of section 6 (1), has been followed in the administration of the Crofters Act. It is fully reported in the first report of the Crofters Commission 1887, pp. 101-2. It deals not only with the general purpose of section 6 (1) of the Act of 1886 but with this particular question. It was argued then, as has been argued to us, that the Court cannot take into account as tenant's improvements in fixing a fair rent any improvements which, though in fact made by the tenant or his predecessors in the same family, have been executed in virtue of any specific agreement in writing binding the tenant or such predecessors to execute these particular improvements. Now the whole object of this section is to arrive at a rent which in the opinion of the Court is fair between the parties for the particular holding at the time of the application and for seven years afterwards, and so on periodically. In arriving at this determination they are to consider all the circumstances of the case, holding, and district. Evidently they are to place weight upon them in proportion as they affect the question of fairness between landlord and tenant. Now the question what improvements have in fact been effected by the tenant or his predecessors is pointed out by the section as special matter for consideration. It is material to notice that the words referring to improvements are emphasising and not limiting or conditioning words. There is no direction to exclude any kind of tenant's improvements in considering on what improvements it is fair that he should not be rented. As Sir David Brand pointed out, there is no direction to exclude from consideration as tenant's improvements, improvements executed by the tenant in virtue of any agreement in writing, or, to put the point in other words, there is no direction to count as landlord's improvements any improvements so executed. The argument comes to this, that we must by construction import into this section from sections 8 and 9 of the Act of 1886 the third of the statutory conditions expressly laid down by these latter sections, which must be satisfied in order to entitle the tenant to compensation on renunciation or removal as the case may be. It seems clear that if the Legislature had intended that such improvements should in fixing a fair rent be excluded from consideration as tenant's improvements section 6 (1) would have been conceived in practically the same terms as sections 8 and 9. One main purpose of section 6 is that the landholder shall not be charged rent on his own improvements for which he has not in fact received an equivalent. The principle of section 6 (1) is that he is entitled to the use and profit of what is made, provided or supplied, not by the landlord but by himself or his statutory predecessors. The sole purpose of sections 8 and 9 is to determine for what improvements compensation is payable by the landlord, and these are limited to improvements which satisfy the specific conditions of these sections, and are included in the appended schedule and assessed, as directed by section 10, according to the value of them to an incoming tenant.

"As Sir David Brand pointed out, the first question which has to be considered under section 6 (1) in dealing with improvements is—What are the improvements which in point of fact have been executed by the tenant or his predecessors in the same family? Secondly, Have the tenant or his statutory predecessors in fact received a fair equivalent for these specific improvements, or any of them, either by payment for them or by other special consideration or benefit allowed by the landlord in respect of them? Mere 'technical consideration' is not enough. If so they have been purchased by the landlord and therefore count as his improvements on which it is fair that the tenant should pay rent in proportion to their condition and value at the time when the fair rent is fixed and for the septennial period then beginning. The fact that improvements were executed under a specific agreement in writing to execute these particular improvements is a circumstance to be considered, but no more than a circumstance.

"We may add that there are many kinds of improvements which a tenant may have made for his own comfort or convenience or for special purposes on which it is not fair that he should pay rent because he has made them at his own expense, yet equally fair that he should not be entitled to compensation on quitting his tenancy. One landholder may specially devote himself to milk cows and erect a model byre, another to horses and erect a model stable, a third may specially apply himself to horticulture and erect greenhouses, as he has a right to do under section 10 of the Act of 1911. He will not get compensation for these improvements on quitting his holding except to the extent of their value to an incoming tenant; but that is certainly no reason why a rent should be imposed on him while he is tenant in respect of these improvements.

"Let us next consider whether the Act of 1911 throws any light on the construction of section 6 (1). By this Act of 1911 tenant's improvements are directed to be taken into account for two other purposes. By section 2 (1) (iii) (*a*) permanent improvements constitute the test which determines whether a yearly tenant or qualified leaseholder of a holding becomes a landholder or is deemed to be a statutory small tenant. The tenant becomes a landholder if he or his predecessors in the same family have 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 his predecessor in title payment or fair consideration therefor.* Again, the Act of 1911 in laying down directions in section 32 (8) for determining the equitable rent of the holding of the statutory small tenant especially enacts that no rent shall be allowed in respect of any improvements made by or at the expense of the tenant or any predecessor in title for which payment or fair consideration has not been received from the landlord or his predecessor in title.

"There is no exclusion in either section from tenant's improvements of improvements executed by virtue of a specific agreement to execute them. On the contrary, the Legislature has confirmed Sir David Brand's interpretation of section 6 (1) as meaning that the tenant ought not in fairness to be rented on improvements for which a fair equivalent has not been received from the landlord, when for these two new purposes the Legislature has specifically enacted what by reasonable interpretation has been held the sound construction of section 6 (1) in the earlier Act of 1886.

"We may add that after excluding tenant's improvements on which the tenant is not to be rented, the most important element in arriving at the fair rent is what the landholder working the holding by himself or his family and such hired labour as may be required, with reasonable skill and industry can make out of the holding.

"It has been argued in some cases for the landlord that when the existing rent is not greater than the value of the gross annual produce of the holding after deduction of necessary outlays only the existing rent is a fair rent.

"On the other hand, it has been argued in some cases for the tenant that a fair rent should not exceed the annual sum which the tenant can reasonably afford to pay, not only after defraying all reasonable outlays and expenses of working the holding and a reasonable profit for the tenant, but also after providing for the maintenance of the tenant and his family from the produce of the holding irrespective of the extent of the holding.

"We think that both arguments are unsound. The main point, after determining on what the tenant is to be rented, is to find what is a fair division between the landlord and the tenant of the annual net profits or what are estimated to be the ordinary annual net profits of the particular holding, taking into account the quality and situation of the land and all existing buildings and other improvements which are to be reckoned as landlord's improvements, on the footing of the holding being worked with reasonable skill and industry during the period for which the rent is fixed.

"Adam Smith first pointed out clearly the basis on which the natural rent of land is usually arrived at. He points out that in adjusting the terms of the lease the landlord endeavours to leave the tenant no greater share of the produce than is sufficient to keep up the stock from which he furnishes seeds, pays the labour, and purchases and maintains the cattle and other instruments of husbandry, together with the ordinary profits of farming stock in the neighbourhood. 'This is evidently the smallest share with which the tenant can content himself without being a loser, and the landlord seldom means to leave him any more' (Wealth of Nations, Book I, ch. 11; Roger's edition, vol. i, pp. 151-2). The principle that rent is a portion of the produce of the holding after proper deductions are made is substantially adopted by Hunter (Law of Landlord and Tenant, vol. i, p. 273) and by Professor Bell (Principles, section 1178). 'Rent,' according to Hunter, 'is the portion of the produce or its value which remains for the landlord after all the outgoings of cultivation are defrayed, including the profits of the capital employed according to the ordinary rate of the profits of stock.' Professor Bell makes it an essential part of his definition of an agricultural lease. Agricultural lease is an agreement entered into for the raising of a gross produce to be divided after defraying necessary charges between the landlord who furnishes the land and the tenant who supplies capital, industry, and skill."

Argued for the appellants—[*On the question of the inclusion in or excision from the holding of one of the dwelling-houses, see M'Neill's case supra*]—The improvements in question were executed by the tenant in implement of an obligation under his lease. Those improvements did not fall to be considered in fixing a fair rent under the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), section 6 (1). The whole policy of the Landholders Acts was to secure allowances to landholders in respect of improvements for which they had not received consideration—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), section 2 (iii) (*a*), and section 32 (8). "Paid for by the crofter" in section 6 (1) of the Act of 1886 meant paid for out of the crofter's own pocket—those words did not apply when the tenant paid for the improvements and was thereafter repaid what he had expended by the landlord. On that point the appellants had the judgment of the Land Court in their favour—that judgment proceeded on the footing that there had been payment but it was not in full. "Executed" must be read similarly; the improvements must have been executed by the tenant without any agreement for consideration. That was consistent with the whole policy of the Acts, which was to secure compensation for tenants who had improved their holdings of their own accord. Where, however, a tenant was bound by his lease to execute improvements, there at once arose a presumption that he had received full consideration in the lease for the obligation he had undertaken. Indeed the lease was conclusive on that matter, but if it merely raised a presumption there was no averment and no evidence to rebut that presumption. *Earl of Galloway* v. *M'Clelland*, 1915 S.C. 1062, 52 S.L.R. 822, applied; *Wilkie* v. *Hill*,

1916 S.C. 892, 53 S.L.R. 728, was distinguished, as it was a decision upon section 32 (8) of the Act of 1911, or, if it did apply, it was wrongly decided. *Smith* v. *Marquis of Aberdeen*, 1916 S.C. 905, 53 S.L.R. 685, was distinguished, for there the buildings were not put up under an obligation to do so.

Argued for the respondents—The improvements though executed under the obligations in the lease were to be taken into consideration in fixing the rent. In fixing the fair rent all the circumstances of the case had to be taken into consideration—section 6 (1) of the 1886 Act. One of these circumstances was that the improvements had been in fact executed by the tenant. Another was that the improvements had been executed under an obligation in the lease. But the latter was not in itself conclusive, for the Land Court had also to consider whether full consideration for the execution of the improvements had been given under the lease. It did not necessarily follow that full consideration had been given—in some cases it might not have been given, and if not the Land Court was entitled to take that fact into consideration in fixing the fair rent. If the appellants were right the Land Court could review the bargain of the parties on the matter of rent but not on the matter of improvements. The argument for the respondents was the view taken by the Crofters Commission, and if that view were unsound the Act of 1911 would presumably have dealt with the matter expressly. Further, that was the interpretation adopted with respect to the statutory small tenant—*Wilkie's* case (*cit.*) and the Act of 1911, section 32 (8). Yet the statutory small tenant was one who had not made the larger part of the improvements. Section 8 (*c*) of the Act of 1886 implied that but for that section those improvements could have been claimed for on removal. *Wilkie's* case (*cit.*) and *Smith's* case (*cit.*) were in the respondents' favour. *M'Lelland's* case (*cit.*) was distinguished—it related to improvements of a different kind under a different Act.

At advising—[*On the inclusion of the dwelling-houses, see M'Neill's case*]—

LORD PRESIDENT—The question next in importance in this case relates to improvements on the holding executed by the tenant in compliance with a specific agreement in writing. I am of opinion that this is one of the circumstances of the case and holding which must be considered by the Land Court in fixing a fair rent. It will be for the Land Court to give such weight to this circumstance as they in their discretion think fit. The reasoning on this head in the note to *M'Alpin's* case I consider to be sound. [*His Lordship thereafter dealt with matters which are not reported.*]

LORD JOHNSTON concurred.

LORD MACKENZIE—[*His Lordship dealt with a matter which is not reported*]—(2) If it be proved that the tenants made the improvements the fact that they did so under contract is no bar to their being taken into consideration in fixing the fair rent under section 6 (1) of the 1886 Act, which is the provision applicable to this case. The Land Court has to ascertain whether the tenant has received fair consideration for the improvements. Reference is made to the case of *Wilkie* v. *Hill*, 1916 S.C. 892, 53 S.L.R. 728, which was decided with reference to the position of a statutory small tenant under section 32 (8) of the Act of 1911. The problem to be solved under section 6 (1) of the 1886 Act is similar.

LORD SKERRINGTON—The case on the application of Peter and Donald Mackinnon raises a general legal question of some importance, viz., whether in fixing a fair rent the Land Court ought to regard as improvements made by the landlord improvements which in fact were executed by the landholder or his predecessors in the same family, but in implement of a specific written obligation to that effect. A landholder cannot on his renunciation or removal from the holding claim compensation in respect of such improvements. That is expressly enacted by section 8 (*c*) of the Act of 1886. Section 6 of the same Act, which authorises the fixing of a fair rent, contains no similar exclusion of improvements executed in implement of a written obligation, and it seems to me impossible to read any such words into the section. It will in every case be for the Land Court to consider whether the tenant or his predecessors have received fair value for the improvements which they were taken bound to execute. If that question is answered in the affirmative there is nothing in section 6 which forbids the Land Court to require the tenant to pay a fair rent for the farm as so improved. Conversely, if the question is answered in the negative, the Land Court is not bound to compel the tenant to pay rent in respect of improvements executed at the expense of himself or his predecessors. In short, the position is much the same as when the Land Court has to fix an equitable rent in the case of a statutory small tenant in pursuance of section 32 (8) of the Act of 1911 as interpreted in the case of *Wilkie* v. *Hill*, 1916 S.C. 892, 53 S.L.R. 728.

The Court answered the second and the fourth questions of law in the negative.

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Counsel for the Respondents—Chree, K.C.—J. A. Christie. Agents—Balfour & Manson, S.S.C.