was incumbent, therefore, upon the prosecutor to prove the character of the house: and I know no better way of proving the character of a house than by proving the character of the people who frequent the house. The policemen were not asked to express any opinion with regard to the women in question, but to state what they knew about them. It appears to me that that evidence falls within the quality of the evidence which was admitted and held to be quite competent in the case of *M'Laren* v. *M'Leod*, 1913 S.C. (J.) 61, 7 Adam 110, 50 S.L.R. 704. And in particular I adopt the view expressed in that case by my brother Lord Mackenzie, that when you prove the character of the house, the best proof will depend upon the character of the people who frequented the house.

It has been suggested that hardship may possibly arise in cases such as this by people having their character traduced, but it is easy to obviate any injustice of that kind occurring if the people whose names are likely to be mentioned in such a prosecution are given notice and the opportunity of protecting themselves.

I therefore propose to your Lordships that we should answer the question put to us in the negative.

LORD MACKENZIE—I am of the same opinion. The question raised in this case is as to the competency of the evidence. What was put in issue by this complaint, which is couched in statutory form, was the character of the house. It is impossible to form an opinion of the character of the house without forming an opinion as to the character of the persons who frequented the house. The question which was put and which was disallowed was in these terms—"What do you know of the character of the woman?"

Now it seems to me that that was a competent question to put. The evidence upon such a point must necessarily be strictly confined to what is within the knowledge of the witness who was asked the question. I think it is essential that a question of that kind should be allowed in a prosecution of this kind.

The matter of whether there may be hardship or not in a particular case is one which can only be dealt with by the magistrate who tries the case. If it could be shown that an accused in a prosecution of this kind was taken unawares, or that she had no due notice of the case to be made against her, then I have no doubt that the magistrate would grant a continuation. In this case, however, from what is stated in the case, this cannot be suggested.

LORD ANDERSON—I agree.

The Court answered the second question of law in the negative.

Counsel for the Appellant—Watson, K.C. —C. H. Brown, A.-D. Agent—A. Grierson, S.S.C.

Counsel for the Respondent—Maclaren. Agent—John Robertson, Solicitor.

COURT OF SESSION.

Wednesday, December 4.

SECOND DIVISION.

[Scottish Land Court.

PILKINGTON *v.* MURRAY.

Landlord and Tenant — Smallholder — "Holding"—Contents of Holding—Barn, Stable, and Grazing Rights — Crofters' Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29)—*Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26 (1) and (2).

A crofter in the sense of the Crofters' Holdings (Scotland) Act 1886 had grazing rights on land which did not form part of his original croft, and subsequently also acquired the tenancy of a barn and stable adjoining. The whole subjects were worked as one holding, but the different items of rent were entered separately in the landlord's books and receipts granted accordingly. In a stated case under the Small Landholders (Scotland) Act 1911, *held* that the barn, stable, and grazing rights did not form part of the holding.

Process—Stated Case—Findings in Fact—Note—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 25 (2).

Where the findings in a stated case under the Small Landholders (Scotland) Act 1911, section 25 (2), made under reference to a note annexed thereto, differed diametrically from the statements made in the note, *held* that it was incompetent to refer to the note to contradict the facts found in the case.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), section 26, enacts—"(1) For the purposes of the Landholders Acts a holding shall be deemed to include any right to pasture or grazing land held or to be held by the tenant or landholder whether alone or in common with others, and the site of any dwelling-house erected or to be erected on the holding, or held or to be held therewith, and of any office or other conveniences connected with such dwelling-house. (2) A person shall not be admissible to registration as a new holder under this Act . . . in respect of more than one holding, and shall not be held an existing yearly tenant . . . in respect thereof unless such . . . holdings have been worked as one holding."

Alan Douglas Pilkington, Esq. of Sandside, Caithness, *appellant*, being dissatisfied with a decision of the Scottish Land Court in an application by Catherine Murray, *respondent*, dated 4th October 1911, to fix a fair rent, appealed by Stated Case.

The appellant acquired the estate at Whitsunday 1913 by conveyance from his father Thomas Pilkington, Esq. of Sandside, the original respondent in the application, and was sisted as a party thereto.

The schedule to the application contained a specification of the contents of the holding, as including "arable land extending (as

agreed at the hearing) to 4·110 acres with ·440 of an acre outrun, and dwelling-house, byre, barn, and stable, and an interest in grazings at Dachow extending to 16 acres. The rent was stated to be £6, and 'for grazing according to head of cattle—at present £2—making in all £8.'"

The application was made under the Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) to the Crofters Commission, and on the passing of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), passed in virtue of that Act to the Scottish Land Court.

The Case stated—"3. The *facts* found proved or admitted were as follows, viz.—(1) At the passing of the Crofters Act 1886 the applicant's father, the now deceased George Murray, was tenant of the holding, which then consisted of a dwelling-house in Reay village, with byre, offices, and land extending to about 5 acres, situated at a little distance from the house. He also exercised the right of grazing on Dachow. His rent was £6, apart from what was paid for grazing on Dachow. In virtue of the provisions of the Crofters' Holdings (Scotland) Act 1886 the said George Murray became a crofter in respect of said holding. From Whitsunday 1890 the said rent of £6 was reduced to £5, 2s., and this rent continued until Whitsunday 1896, when £1 was added to the rent in respect of interest on the landlord's expenditure of £40 towards the cost of the erection of a new dwelling-house on the site of the former dwelling-house, which had been pulled down. The tenant arranged to pay 5 per cent. interest on £20 of the landlord's contribution, the proprietor providing the other £20 free of interest. (2) At the term of Whitsunday 1896 a holding belonging to Finlay Mackay was given up, and was divided among four crofters, including George Murray, who thus obtained in addition to the subject formerly held by him, (first) arable ground at the yearly rent of £2, 3s. 10d., and (second) a barn and stable at a rent of £1. The different items of rent as well as the interest on expenditure and the rent for Dachow grazing were all entered separately in the landlord's books and receipts granted accordingly. (3) At the term of Whitsunday 1906 the said George Murray gave up the additional arable land which he got in 1896, but retained the tenancy of his original holding and the tenancy of the barn and stable, which he continued to occupy till his death. At Whitsunday 1907 the said Catherine Murray, the respondent, succeeded her father in the tenancy and paid a rent of £5, 12s. for the original holding and £1 for the barn and stable, while she continued to rent a share of the grazing on Dachow. In the following year an abatement of 12s. was given her, making the rent for the original holding £5, while the rent for the barn and stable remained at £1. In 1911 the rent was increased by a sum of 11s. in respect of interest for expenditure by the proprietor on fencing, making the total rent payable for these subjects £6, 11s. In addition the applicant paid a rent of £1 for the grazing of one cow on Dachow grazing. She stated in evidence that the tenants had the use of the grazing by paying according to the number of horses or cows grazed, and that the rate for each cow per annum was £1. She also deponed that her stock on the grazing for the last four years had been one cow. No evidence was led by the landlord as to the conditions on which these grazing rights were held. The respondent's land steward was examined, but he gave no evidence on this point. At the date of the application the applicant accordingly held (1) the original croft and buildings at a rent of £5, 11s., (2) the barn and stable added in 1896 at a rent of £1, and (3) the grazing of one cow on Dachow, for which she paid £1 per annum. The Court found that the whole of these subjects had been worked together as one holding. . . .

"5. On 5th June 1916 the Court issued a final order in the following terms:—'*Edinburgh, 5th June* 1916.—The Land Court having considered the application and inspected the holding, ... Find under reference to the annexed note that the present yearly rent payable for the applicant's holding described in the application is £7, 11s., including therein £1, subject to increase as after mentioned, for her right and interest in the Dachow grazings; that the applicant is satisfied with the said present rent, and therefore find and determine that the said sum of £7, 11s., subject to increase for an additional stock at the present rates so long as these remain unaltered, for Dachow grazing is the fair rent of her said holding: . . .'"

The *questions of law* submitted to the Court were, *inter alia*—"2. On the facts stated, was there evidence upon which the Land Court could competently find that the stable and barn referred to formed part of the holding? 3. On the facts stated (*a*) was there evidence upon which the Land Court could competently find that the applicant's interest in the grazing known as Dachow formed part of the holding; and (*b*) if so, were the Land Court entitled to fix the rent payable therefor according to what was proved to have been the customary method of payment? 4. Was the final order of the Land Court *quoad* the second and third findings or either of them in excess of their jurisdiction?"

Note.—"It is not disputed that the applicant is a crofter under the Act of 1886 and now a landholder under the Act of 1911. This application was presented under the Act of 1886 before the later Act came into operation.

"The application craves in the first place for the fixing of a fair rent, but the applicant is satisfied with the existing rent of her holding. . . .

"As the applicant is satisfied with the existing rent, and the respondent did not ask that it should be altered, it is unnecessary to make the usual form of order fixing a fair rent, but for future reference, and as questions were raised, it is convenient to record the extent of the holding for which the existing rent is paid and the items of which the existing rent is made up. We are satisfied that the holding includes (1) arable land, extending to 4·110 acres; (2) ·440 acre of outrun—4½ acres in all—together

with dwelling-house, byre, barn and stable and other offices; and (3) a right and interest in the Dachow grazings. The yearly rent paid for this holding (exclusive of the sum paid for her right and interest in the Dachow common grazings) for 1908, 1909, and 1910 was £6. This sum of £6 is made up of (1) £4, 12s. for the land and dwelling-house with byre and other offices, subject to an annual abatement of 12s. for damage by flooding; (2) £1 for the barn and stable originally belonging to a croft, which was subsequently divided among four tenants, including the applicant's father; and (3) £1 as interest on part of a sum of money contributed by the landlord towards improvements on the dwelling-house. In 1911 a sum of 11s. was added to the rent as interest on the cost of a fence, making £6, 11s. The annual sum included in the rent for the applicant's right and interest in Dachow common grazings being fixed according to the number of stock grazed, was £1 except in 1910, when, as she kept more stock, it was £2.

"Accordingly the present yearly rent of her holding is £7, 11s, subject to increase for Dachow pasture if she should put on more stock than one cow."

Argued for the appellant—There were no incidents of statutory tenure annexed to the barn and stable. These subjects came to the landlord in 1896 and therefore vested in him in full right of his common law powers. It was impossible to suggest that they fell under the Crofters Act unless the holding was enlarged by mutual agreement. There was, however, no evidence of this. The mere working of the holding as a unit was not enough, and the findings of the Land Court were inconsistent with the contention and supported a separate identity of the croft and a common law tenancy of the byre and stable. Under sections 11 and 12 of the Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), a crofter could have taken steps to have them incorporated, but these sections would not have availed the present tenant, because under no interpretation of the Act could a barn and stable be treated as land. Further, the grazing rights in question were not brought before the Land Court by the application, but were only referred to in the schedule. There were no findings in the case by which the grazing could be held to be part of the holding. It was incompetent to refer to the note to the order to contradict the findings in the case.

Argued for the respondent—The evidence showed that the subjects in dispute had been treated as a croft for the past fifteen years, and the finding of the Land Court, if interpreted by reference to their note, was to that effect. The note was incorporated by the Land Court with their findings by reference, and the respondent was entitled to found on it in explanation of their order. The merits of the question must be decided by the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) which came into operation before the Land Court decided the case, and they were accordingly bound to apply it. Applicant could also be regarded as an existing yearly tenant under that Act, and under section 26 (2) thereof the test in such cases was whether the component parts of the croft had been "worked as one holding." The present case satisfied that test. Enlargement of a holding might take place by agreement with the landlord—Crofters' Holdings (Scotland) Act 1886, section 11—and the facts of the present case might be construed to infer such an agreement. The holding here could also competently include the common grazing—Small Landholders (Scotland) Act 1911, section 26 (1)—and as the note of the Land Court showed had been held by them to include it.

At advising—

LORD DUNDAS—It seems to me to be really lamentable that this small dispute should have dragged its slow length for seven years. As long ago as September 1912 the landlord had without admitting liability constructed a pathway which appears to have figured prominently if not principally as the subject of contention, and he craved the Land Court to have the application finally disposed of. No final order, however, was pronounced until June 1916. There may have been good reasons for this remarkable delay, though no explanation was furnished to us, but I think it may not improbably have caused or contributed to the errors into which the Land Court fell, as I think they fell, in framing their final order. Fully two more years elapsed before the present case was submitted to this Court. [*His Lordship then dealt with the first question of law*].

The second and third questions ask whether, on the facts stated, there was evidence upon which the Land Court could competently find that the stable and barn, and the applicant's interest in the grazing known as Dachow, formed part of the holding. My opinion is clearly in the negative. We must, I apprehend, proceed, as the questions properly indicate, upon the facts found in the case and not upon statements as to the contents of the holding contained in the note by the Land Court to their final order. These statements appear to me to differ diametrically from those in the case. That difference may or may not have arisen, because after the delay of four years, to which I have alluded, the memory of the Land Court as to the facts of this small matter had become dim. But however this may be, the contents of the note cannot, in my judgment, be looked at to contradict the facts found in the case.

The statement of these begins with details of the contents of "the holding" which at the passing of the Crofters Act 1886 were tenanted by the applicant's father, and in respect of which he then became a crofter. The statement proceeds—"He also exercised the right of grazing on Dachow. His rent was £6, apart from what was paid for grazing on Dachow." It seems to me to be plainly found in fact that the right of grazing, whatever it was, was not part of the holding, but distinct from it. In 1896, when Finlay Mackay's holding was divided, the applicant's father obtained a bit of arable ground and the

barn and stable now in question, these latter at a rent of £1. The facts found disclose that "the different items of rent as well as the interest on expenditure and the rent for Dachow grazing were all entered separately in the landlord's books and receipts granted accordingly." When the applicant succeeded her father in 1907 "she paid a rent of £5 for the original holding and £1 for the barn and stable, while she continued to rent a share of the grazing on Dachow." From these and other statements of fact in the case it seems to me clear that we must hold that neither the barn and stable nor the grazing were originally part of the holding, but that they were, and still are, separate subjects held separately and apart from the holding.

I do not think that the finding "that the whole of these subjects had been worked together as one holding" is of any material advantage to the applicant's argument. Subjects held under different and distinct tenures may for convenience or for any reason be worked together, but that fact will not alter their respective characters in law. There is not a shadow of evidence to show that the original croft was ever enlarged so as to comprise either the barn and stable or the grazing, even supposing that these were subjects which could have been susceptible of absorption into a croft.

I have no doubt that we ought to answer the second question and branch (*a*) of the third question in the negative. Branch (*b*) of the third question, if that view be correct, is superseded and does not arise for decision. It follows from what I have said that the fourth question must in my judgment be answered in the affirmative. The result will be that the first finding in the Land Court's order of 5th June 1916 will stand, but the second and third findings are of no force or avail.

LORD SALVESEN—I agree in the opinion which has been delivered. [*His Lordship then dealt with the first question in the case, and continued*—] So far as the barn and stable are concerned the position of matters was that at the date when the Act of 1886 became operative they formed no part of the holding but were part of another holding. That holding was given up by the crofter, and the land reverted to the landlord free from the fetters imposed upon it by the Act of 1886. He could have done with this land just as he pleased. In point of fact what he did was to divide it by giving it upon separate tenures to the remaining crofters. The respondent's father received 2 acres of that croft, plus a barn and a stable which had been used by the crofter who had given up his holding, and he got these subjects upon a separate title of let. It is a novelty to my mind to say that because you let a piece of ground after the date of the Crofters Act to a crofter it automatically becomes part of the croft when the landlord is careful to show that that is not his intention by his exacting a separate rent for it. Whatever was held along with the original holding in 1886 was of course not subject to disposal by the landlord, but that land which he afterwards became entitled to and could deal with as he pleased, should become part of a holding, because he allowed a crofter under a contract of lease to have the use of it, seems to me absolutely unarguable.

With regard to the grazing, I agree with Lord Dundas that there are no facts stated in the case from which the Land Court could deduce the conclusion that a share in the 16 acres of grazing land at Dachow formed part of the original holding. Whether evidence might have been adduced that would have led to a different conclusion we cannot speculate upon. The fact remains that no evidence on the subject was led, and there was nothing to warrant the Land Court in holding that a share, and still less a variable share—variable at the option apparently of the crofter—in a certain grazing formed part of the original holding.

I accordingly agree with Lord Dundas that the second, third, and fourth questions should be answered as he proposes.

LORD GUTHRIE—I concur in the opinion of Lord Dundas.

LORD JUSTICE-CLERK—I agree with Lord Dundas, subject to this observation, that so far as Dachow grazings are concerned I prefer to put my judgment upon the fact that the finding in regard to that matter is not justifiable, in respect that it seems to me perfectly plain from the pleading and from the argument at our bar that this question of the Dachow grazings was never raised in a controversial sense before the Land Court, and accordingly no judgment on that question should have been given.

The Court answered the second question of law and branch (*a*) of the third question in the negative, and the fourth question in the affirmative.

Counsel for the Appellant — Moncrieff, K.C. — Gentles. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Mitchell—Valentine. Agents — Robert Stewart & Scott, S.S.C.

Friday, December 13.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

SHANKLAND & COMPANY *v.* ROBINSON & COMPANY.

War — Process — Application — Courts (Emergency Powers) Act 1917 (*7 and 8 Geo. V, cap.* 25), *sec.* 1 (2).

The Courts (Emergency Powers) Act 1917, section 1 (2), enacts—"Where upon an application by any party to any contract whatsoever the court is satisfied that . . . owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of any ship or other property any term of the contract cannot be enforced without