that we ought to pronounce an interlocutor in the following terms:—[*His Lordship read the interlocutor as printed infra.*] It is right that I should add that there is nothing to warrant any imputation of dishonesty on the part of the defender.

LORD DUNDAS, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff, dated 26th March 1915: *Find in fact* in terms of the findings in the interlocutor of the Sheriff-Substitute, dated 10th November 1914: Find further in fact (7) that the defender admits that on 15th January 1914 the defender received the packet in question from the bank to be delivered to the pursuer, that it was his duty to exercise reasonable care in executing said commission, and that he failed to do so: *Find in law* in terms of the finding in the Sheriff-Substitute's said interlocutor: Of new grant decree against defender in terms of the craving in the initial writ for the sum of £34, 14s. with interest from 15th January 1914. . . ."

Counsel for the Pursuer (Appellant)—Moncrieff, K.C.—T. G. Robertson. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defender (Respondent)—W. T. Watson—W. Wilson. Agents—Ronald & Ritchie, W.S.

Thursday, December 16.

FIRST DIVISION.

[Scottish Land Court.

MALCOLM *v.* M'DOUGALL.

Landlord and Tenant—Small Holdings—Holding — "Wholly Agricultural or Wholly Pastoral, or in Part Agricultural and as to the Residue Pastoral"—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 35—*Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 26.

Circumstances in which *held* (*diss.* Lord Johnston) that a small thatched cottage with a plot of garden ground and a byre, a detached piece of arable land extending to one rood or thereby used mainly for the cultivation of potatoes, and a one-fifteenth share in a common grazing of 58 acres, let together at a rent of £4, 4s. 6d., constituted a holding within the meaning of the Small Landholders (Scotland) Act 1911.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), sec. 35, enacts—"In this Act . . . '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, 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 offices or other conveniences connected with such dwelling-house. . . . (3) A person shall not be held as 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."

On 24th March 1913 Malcolm M'Dougall, Bellanoch, Argyllshire, applied to the Scottish Land Court to determine whether he was a landholder, or alternatively a statutory small tenant, in respect of subjects occupied by him in the village of Bellanoch, belonging to Colonel Edward Donald Malcolm, C.B., of Poltalloch.

The proprietor objected that the said subjects were not a holding within the meaning of the Act in respect that the arable land and grazing occupied by Malcolm M'Dougall were merely appurtenant to the cottage occupied by him. The application was heard at Lochgilphead on 10th July 1913, when evidence was led and parties heard, and the subjects were afterwards inspected by the Court.

The Land Court on 31st December 1913 pronounced a final order in these terms—". . . Repel the objection stated for the respondent: Find that the applicant is a statutory small tenant in and of the holding described in the application, and that no 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. . . ."

Note. — "The landlord objected to the competency of the application on the ground that the land occupied by the applicant is appurtenant to his cottage, and is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908, and does not therefore come within the scope of the Small Landholders Acts.

"In addition to the garden ground held by the applicant along with his house he has a detached plot of ground of about one-fourth of an acre in extent, used mainly for the cultivation of potatoes and occasionally cropped with other crops, and he has also one-fifteenth share in a common pasture extending to 58 acres or thereby, together with part of a byre. The rent of the whole is £4, 4s. 6d.

"The plot of land held by the applicant along with his house is one of several plots of land. These plots are similar to the 'lotted lands' held by villagers in certain parts of Scotland, and for the reasons stated in the case of *John M'Currach* v. *Countess of Seafield's Trustees*, 1 Scottish Land Court Reports, p. 82, confirmed by the Court of

Session, we have held that such lands fall within the provisions of the Landholders Acts. The present applicant has in addition as a pertinent of his holding a right of grazing in a common pasture, and we have no doubt that his holding is covered by the Acts. As the greater part of the permanent improvements on the holding have been executed or paid for by the landlord the applicant is a statutory small tenant."

At the request of Colonel Malcolm the Land Court stated a Case for appeal.

The Case stated—"3. The *facts* admitted or proved were as follows:—The subjects held and possessed by the said Malcolm M'Dougall from the said proprietor at the commencement of the Act of 1911 (1st April 1912), at the said yearly rent of £4, 4s. 6d., consisted of—(1) Small thatched cottage situated in the village of Bellanoch, with a plot of garden ground and a byre. The said cottage is one of a row of small houses in the said village. (2) A piece of arable land, extending to one rood or thereby, situated in the vicinity of the said village and at a short distance from the cottage. The said ground has been used mainly for the cultivation of potatoes, but occasionally for oats and hay. (3) A one-fifteenth share in the common pasture or grazing known as Bellanoch common grazing, extending to 58 acres or thereby, situated in the vicinity of said village, also at a short distance from the said cottage and arable land. The said subjects have been occupied and possessed by the said Malcolm M'Dougall with his wife and family from year to year as one tenancy at one rent since he became tenant thereof. The said Malcolm M'Dougall has regularly cultivated by himself and his family the arable land mainly for growing potatoes, but also for other crops, except in 1912, when the land was not laid down in crop but allowed to rest. He has not kept a cow on the common grazing during his tenancy. During his tenancy he has been partially employed on a coasting steamer. Prior to Whitsunday 1907 he held the said subjects from year to year without any written lease. Since Whitsunday 1907 he has held the said subjects under missives of let, incorporating articles of set of cottages on the estate of Poltalloch for one year from that term, and thereafter by tacit relocation from year to year at the said rent. A copy of the said missives was produced, and is printed in the appendix and held as part of this case. The piece of arable land held by the said Malcolm M'Dougall is part of land which was originally set apart and laid off by the estate for the purpose of providing lots of arable land for the villagers of Bellanoch mainly for growing potatoes but also for oats and hay. These lots were laid out in the earlier part of last century, and were originally of the extent of about one-seventh of an acre each. The original lots were in some cases divided, and in other cases combined to form larger lots before 1st April 1912. The said 58 acres of common pasture or grazing was also originally set apart, probably at the same time, for the purpose of providing grazing for the cows of the villagers of Bellanoch. For some years the tenants also took in hoggs for winter grazing, but at the commencement of the Act of 1911 the grazing was restricted to cows and was divided into fifteen shares, the souming of each share being one cow. The said lots are also grazed by the tenants' cows in common after the crops are removed. Some tenants had come to hold more than one share at 1st April 1912. The said Malcolm M'Dougall and other tenants sharing in said common pasture have been charged and have paid to the estate part of the expense of maintaining the dykes, of cutting down weeds and bracken, and of cleaning surface drains connected with the said common pasture. The said cottage and also the dykes of the common grazing were erected by the landlord. The said Malcolm M'Dougall executed ordinary repairs on the said cottage and byre. He also made some structural improvements on the said cottage, and other improvements on part of the subjects let. The said land and share of common grazing are as great in extent and value as the land and common grazing of a considerable proportion of the holdings of existing crofters in Argyllshire and other crofting counties. The said cottage in structure, size, and value belongs to the ordinary type of the older dwelling-houses of the smaller holdings of existing crofters in Argyllshire and other crofting counties. 4. The Court were satisfied on the evidence and their inspection of the subjects that the said land and share of common grazing were not in fact merely appurtenant to the cottage, and therefore repelled the objection stated for the proprietor."

The *question of law* submitted for the opinion of the Court was—"Whether, on the facts stated, the Land Court were entitled to hold that the subjects in question constituted a holding within the meaning of the Small Landholders (Scotland) Act 1911?"

The appellant argued—The subjects here were residential mainly, and not "wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." This was the place where the applicant lived with some land attached; he was not an agriculturist who lived there. This was not a holding in the sense of the Agricultural Holdings Act 1908 (8 Edw. VII, cap. 64)—*Mackintosh* v. *Lord Lovat*, 1806, 14 R. 282, 24 S.L.R. 202; *Taylor* v. *Earl of Moray*, 1892, 19 R. 399, 29 S.L.R. 336—nor of the Small Landholders Act 1911 (1 and 2 Geo. V, cap. 49)—*Yool* v. *Shepherd*, 1914 S.C. 689, 51 S.L.R. 639; *Stormonth Darling* v. *Young*, 1915 S.C. 44, 52 S.L.R. 35. *M'Currach* v. *Countess of Seafield's Trustees*, 1914 S.C. 174, 51 S.L.R. 141, on which the Land Court founded, was the converse of the present case.

The respondent argued—The subjects were the whole lands with the house. There were lands, arable and pastoral, distinct from the garden ground attached to the house. There was no minimum holding given in the 1911 Act. Section 26 (1) clearly covered this case, and the occupier was entitled to be declared a statutory small tenant. In any event the question was one

of fact for the Land Court, and it could not be said their finding was unreasonable.

At advising—

LORD PRESIDENT—In this case the Land Court found that the applicant was a statutory small tenant, and consequently they granted him a renewal of his tenancy and fixed for him an equitable rent. Whether he is so or not depends upon the answer to the question—Do the subjects let to him by the appellant constitute a holding within the meaning of the Small Landholders (Scotland) Act 1911? The Land Court answered that question in the affirmative. The point for our consideration is not whether the Land Court decided rightly, but whether on the facts stated they were entitled to reach the conclusion they did. I am of opinion that the facts stated warranted the order pronounced.

For the definition of holding we must turn to the Agricultural Holdings (Scotland) Act of 1908 (8 Edw. VII, cap. 64), which in the 35th section thus defined a holding —it "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." But it must be kept in view that the statute of 1911 clearly contemplates that there may be a dwelling-house on the holding and expressly enacts that the holding includes the site of the dwelling-house. It is further to be observed that the Statute of 1911 is silent on the ratio of value between the dwelling-house and the land as affording a criterion by which to determine whether a holding falls within or outside the operation of the Act. And there is no minimum of extent or value fixed beneath which if the land falls the holding ceases to be within the operation of the Act.

Keeping the statutory enactments in view, therefore, I turn to ascertain what were the facts found by the Land Court. The material facts are as follows:—The subjects let to the applicant comprise a cottage which in structure, size, and value belongs to the ordinary type of the older dwelling-houses of the smaller holdings of existing crofters in Argyllshire and other crofting counties; a byre; one-fifth acre of arable land, described in the minute of let as "potato land"; and one-fifteenth share in a common grazing extending to 58 acres, described in the minute of let as "a cow's grazing." The rent of the holding was £4, 4s. 6d. per annum. But there is no indication in the case of the ratios in which that rent is divided amongst the various subjects comprised in the let. But further the Land Court find that "The said land and share of common grazing are as great in extent and value as the land and common grazing of a considerable proportion of the holdings of existing crofters in Argyllshire and other crofting counties."

Now why does that holding not fall within the operation of the Statute of 1911? Because, says the appellant, the arable land and grazing occupied by the said Malcolm M'Dougall, the applicant, were merely appurtenant to the cottage occupied by him. Obviously, I think, that is an irrelevant objection, because the Statute of 1911 does not anywhere say that if the land is held as appurtenant to the dwelling-house then the holding falls outside the operation of the Act. But if that be a question of fact the Land Court were satisfied on the evidence and their inspection of the subjects that the land and share of common grazing were not in fact merely appurtenant to the cottage.

What does appurtenant to the cottage mean? According to the ordinary acceptation of the term it means that the land was joined to or belonged to the cottage. But if so, the statute does not say that the holding falls outside the operation of the Act of Parliament, because, as I have pointed out, the statute does not prescribe any ratio which the value of the dwelling-house must bear to the land in order to exclude the operation of the Act, and certainly does not say that if land is held along with a cottage or a cottage along with land the holding is excluded from the operation of the Act. If the objection means that the value of the cottage is great in proportion to the value of the land, then I point out that we do not know their relative values, and even if we did we could not in the absence of any statutory provision on the subject say that the Land Court had here reached a result erroneous in law.

So far as I am concerned, all I decide here is that on the facts before us the Land Court was warranted in coming to the conclusion that the subjects let to the applicant did constitute a holding within the meaning of the Statute of 1911, and accordingly that we ought to answer the question put to us in the affirmative.

LORD JOHNSTON—The respondent here, Malcolm M'Dougall, claims to be a statutory small tenant on the estate of Poltalloch, belonging to the appellant Colonel Malcolm, and as such to have his tenancy renewed and an equitable rent fixed by the Land Court. There was no question of eviction on the part of the appellant. The sole motive of the application was to obtain from the Land Court an order turning a yearly tenancy of a cottage and some other rights, which at present I must not call "appurtenant" thereto, into a tenancy for a term of years at a reduced rent. Colonel Malcolm objected to the competency of the application "in respect that the land and grazing rights held by the said Malcolm M'Dougall are merely appurtenant to the house in which he resides, and therefore that the subjects occupied by him do not constitute a holding within the meaning of the Agricultural Holdings Act 1908." The meaning of thus referring to the Agricultural Holdings Act is that the Landholders Act 1911 does not itself define holding directly, but by an oblique reference to the Agricultural Holdings Act; thus, section 26 (3), a person shall not be an existing yearly tenant or a qualified leaseholder, and consequently shall not be a statutory small tenant, under this Act in respect of, *inter alia*, "(*f*) any land that is not a holding within the

meaning of the Agricultural Holdings (Scotland) Act 1908." When the definition of that Act is looked at, the meaning of the appellant's objection is made quite clear, viz., that the land and grazing being a mere appurtenant of a dwelling-house, the holding is not in the sense of the statute wholly agricultural or wholly pastoral, or in part agricultural and in part pastoral. The Land Court have not very happily expressed the appellant's objection. They should have concluded their statement of it "within the meaning of the Small Landholders Acts," but his meaning is made clear by reference to the statute on which he founds, and their understanding is made equally clear by the shape of the question which they put for the Court. The Land Court have repelled the objection stated for the landlord; have found that the applicant is a statutory small tenant in and of the holding described in the application (unfortunately we are not told how the applicant himself describes his holding), and therefore have found him 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 they renewed his yearly tenancy for a period of seven years and reduced his rent from £4, 4s. 6d. to £3, 4s. The landlord required a Case, which has been stated, and the following is the question of law submitted, viz.—"Whether, on the facts stated, the Land Court were entitled to hold that the subjects in question constituted a holding within the meaning of the Small Landholders (Scotland) Act 1911?"

I understand that your Lordships are prepared to answer this query in the affirmative, on the ground that the question whether the subjects held by the respondent off the appellant were a holding in the sense of the statutes was one of fact for the Land Court. This conclusion I regret, and find myself unable to follow.

Before looking closer into the case I think it is necessary, first, to ascertain precisely of what the alleged holding consists, and what are the circumstances presented to us by the Land Court; and second, what are our duties and our limitations as a Court of Appeal.

First, then, I think that I recognise some confusion of mind on the part of the Land Court as to what is the holding with which they are dealing, and that that uncertainty makes them hesitate as to the basis of their judgment, and reduces them to bolster it up by what I am disposed to think is an illegitimate artifice.

What is let to the respondent is defined by a written lease of Whitsunday 1907 for one year, continued since by tacit relocation. It is "the house, byre, potato land, and the grazing of one cow, all as situated in Bellanoch," a small village on the Crinan Canal in Argyllshire. These are the subjects of which the query asks—Do they, on the facts stated, constitute a holding within the meaning of the Act?

What, then, are the facts bearing on the determination of this question? The respondent when at work is a deck hand on board a coasting steamer. When at home he lives in the cottage where his family reside, and where he or they cultivate his potato land. He makes no use of his right of grazing, for he has never during his tenancy kept a cow. The cottage is described as a small thatched cottage, one of a row of small houses in the village of Bellanoch. It was built by the proprietor or his predecessor. The "potato land" of the lease, which is throughout ostentatiously designated by the Land Court as "a piece (or the piece) of arable land," is only one rood or one-fourth of an acre in extent. We are told that this "piece of arable land" is part of land which was originally set apart and laid off by the estate (early in the nineteenth century) for the purpose of providing "arable land" for the villagers, mainly for growing potatoes, but also for oats and hay. When it is added that the lots were originally of the extent of about one-seventh of an acre, even if that be taken as a Scots acre, it is self evident that the Land Court are by an exaggerated use of language pressing the word "arable" into their service. What goes without saying it is, and is confirmed by the history of the occupancy, that the Land Court's piece of arable land was a kindly provision on the part of the estate of an extension to the plot of garden ground or kailyard adjoining the cottage, by the addition to it of another patch at a little distance, where the tenant might raise potatoes for his family, and that as potatoes cannot be grown indefinitely on the same ground, some other crop was sometimes substituted for the good of the ground rather than for anything else, and that it was sometimes fallowed.

The grazing right was again a case of estate provision a hundred years ago for the villagers. It consisted of right to graze, limited to one cow each, on an area of 58 acres in common with fourteen other villagers. To anyone who knows Argyllshire, the fact of the village, the potato land, and the common grazing not being contiguous does not require explanation. In that district you have to take things as they come, and put them to the use for which they are suitable. But again, as bearing upon the crucial question of the case, it goes, I think, again without saying it that the right to graze one cow was not conceived as a common right of pasturage in the ordinary sense, but as merely a "cow's grass" for the special benefit of the indwellers in the cottage. The Land Court, however, would have it otherwise, and so use exaggerated language in their description of the right of pasturage also, talking of souming and so on.

One piece of information the Land Court do not give us, viz., the relative valuation of the house and of the land in the valuation roll. Suppose, for instance, that the valuation of the house, which is a separate item of "lands and heritages" under the Valuation Acts, was, say, 45s., and of the potato land and cow's grass 15s., so that the house was valued at three times as much as the land and right of pasturage, it would illustrate very graphically the true bearing of the question with which we are engaged.

I do not present these as the true figures, though they are not so wide of the mark as to make my illustration fanciful. The true figures were mentioned to us, but not being part of the case I cannot judicially make use of them.

Before I pass from this matter I would add that as Poltalloch is a large estate, there has been provided a set of general "Articles of Set of Cottages on the Estate of Poltalloch." These articles have, of course, to cover a multitude of individual cases, and they contain conditions, two of which it is fair to the Land Court that I quote:—

"15. The land, if any, attached to the cottages shall be cropped as the proprietor or the factor shall direct, and such land must be kept absolutely free from docks, thistles, bracken, ragweed, and the like.

"16. The gardens must be kept in a neat state and free from weeds."

It is on the back of a printed copy of these articles that the respondent's lease is written, and they as well as it are signed by him. They must, however, be read in relation to the actual subjects of the particular lease, and can afford no conclusive proof that a piece of land attached to a cottage is arable in the sense of a statute subsequently passed, or renders the total subject a holding in the sense of that statute if there are preponderating considerations the other way.

Second, I now turn to the duties and limitations of this Court as a Court of Appeal.

Under the Crofters Act 1886 (49 and 50 Vict. cap. 29), section 25, the decision of the Commissioners "in regard to any of the matters connected with their determination" was final. But that did not avoid review where in order to explicate their jurisdiction they determined any question of law. Of appeals in such cases there are plenty of examples.

The Small Landholders Act 1911 turned the Crofters Commission into a Land Court, whose functions, though in substance still mainly ministerial, were conceived by the Legislature to be judicial and were so in form and to a considerable extent in substance. The Act, section 25 (2), gives them "full power and jurisdiction to hear and determine all matters, whether of law or fact, and no other Court shall review the orders or determinations of the Land Court." But this was subject to the proviso that the Land Court may if they think fit, and shall at the request of any party, state a special case on any question of law arising in any proceedings pending before them, for the opinion of either Division of the Court of Session, who are hereby authorised finally to determine the same." No case has yet arisen requiring the consideration of the limits of this proviso. But there is a similar provision in the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule II, section 17 (*b*), substantially repeated from the Act of 1897, viz., that it shall be "competent to either party to require the Sheriff to state a case on any question of law determined by him," and on the effect of this limited provision for review there has been a good deal said, entirely in Scottish cases, as the right of appeal in England is, for some reason unexplained, unlimited—Schedule II, section 4.

A question of pure law is not, though it may do so, very likely to occur.

But a question of law arising on ascertained facts, as for instance what is the sense or meaning of the statute when applied to a specific set of circumstances, that is to say, a mixed question of fact and law, is open to review. It is for the Land Court to ascertain the facts, but their legal deduction from these is not final and may be reviewed. Such an one is the present case. But here I would add two things—(1st) that by no conceivable stretch of their functions can the Land Court make that a question of fact, by calling it a fact, which is not a question of fact but of law or of mixed fact and law; and (2nd) that neither can they make that a fact, by calling it a fact, which is not a reasonable conclusion in fact from the facts which they say have been established before them. Both these things, I think, the Land Court have attempted to do in the present case.

One of the best examples of the case of mixed fact and law is that of *Jackson*, 1909 S.C. 63 and (H.L.) 37 (46 S.L.R. 55 and 901), where a watchman in charge of four trawlers went ashore at night for refreshment and in returning to the boats fell into the water and was drowned. The question was not merely did the accident occur in the course of, &c., but in the course of, &c., in the sense of the statute. The Sheriff had stated as one of the facts proved—"10. That said accident arose out of and in the course of his employment with the defenders." But the Court held that the Sheriff could not, by declaring that his findings were findings in fact, exclude review where they were really findings in law upon an ascertained state of facts.

But the same question, of whether "in the course of the employment," &c., may be in other circumstances purely a question of fact, as was found in the earlier case of *Henderson*, 2 F. 1127 (37 S.L.R. 857). I only refer to this case owing to certain *obiter dicta* of Lord Kinnear, which might be read as meaning that if the Sheriff only says that he decides on fact, that must be accepted as regulating the competency of appeal. I cannot think that that was the meaning of that eminent Judge. What he did hold, in agreement with the rest of the Court, was that the Sheriff had decided on fact alone, and had in the circumstances rightly so decided. If there were any doubt on the question, it is cleared by his Lordship's opinion in the subsequent case of *Vaughan*, 8 F. 464 (43 S.L.R. 351), where in a question of wilful misconduct he says if the Sheriff finds facts and draws from those facts the inference in law that there has been in the sense of the statute wilful misconduct there is a proper case for appeal. Here he has drawn a conclusion from fact only. What he has done is from certain facts to draw an inference of another fact which involves misconduct,

and for that inference in fact there were reasonable grounds to be found in the facts proved.

But the Court has also recognised that they have before them in effect a question of law where they are presented with facts and asked to determine whether on these facts the Sheriff was entitled to draw a conclusion in law. For this it is enough if I refer to the two cases of *Walker*, 1911 S.C. 825 (48 S.L.R. 575 and 741), and *Euman*, 1912 S.C. 966 (49 S.L.R. 693), in the former of which the Lord President (Dunedin) says in a considered judgment of the Court on this point—"There is no doubt that the course of decisions, sanctioned, and indeed I may say encouraged, by the Supreme Court and the House of Lords, has quite finally fixed that although an appeal on a case stated is only competent on a matter of law, yet it will be considered a matter of law whether a finding in law can be reasonably supported upon the evidence adduced." And in the latter the appropriate form of question in point of law was settled for such a case.

I return now to the case before us. I made particular reference to the facts which the Land Court state bearing upon the allotment character of the land and grazing held along with the cottage. For it is, I think, an idea derived from that character that gives the first clue to their chain of reasoning. They seem to have been at first imbued with the idea that if they can only make out that the lands are "lotted lands" they will bring them within the provisions of the Landholders Acts. They say in their judgment that "for the reasons stated in the case of *M'Currach* v. *Countess of Seafield's Trustees*, Scottish Land Court Reports, p. 82, confirmed by the Court of Session, 1914 S.C. 174 (51 S.L.R. 141), we have held that such lands fall within the provisions of the Landholders Acts." And that seemed to the Land Court enough, for they proceed—"The present applicant has in addition as a pertinent of his holding a right of grazing in a common pasture, and we have no doubt that his holding is covered by the Acts." No such *sequitur* can possibly be deduced from the decision at anyrate of this Court. The *Seafield* case is widely apart from the present. There there were truly "lotted lands" of old standing, held on tenure entirely unconnected with the village properties, which were either feus or long leases. The allotments had been so little appreciated that three of them had fallen into the hands of one tenant, who *de facto* did live in his own house in the village though that was no condition of his holding. The allotments which he thus held extended to 12 acres with a rental of £24 a-year, and he cultivated them as a small farm on a six-shift rotation. Anything more divergent from the present circumstances could hardly be imagined. All that this Court held was that it could not understand the ground on which it was sought to be maintained that this was not a holding in the sense of the statute. But it was no judgment, *per aversionem*, that anything which can be described as lotted lands is *ipso facto* within the provisions of the Act. What it really did was not to decide positively that all lotted lands must *ipso facto* be statutory holdings, but negatively that the fact that land was held in allotment did not *ipso facto* introduce any exception from the statutory provisions regarding small holdings.

This judgment of the Land Court was of course written before the Special Case was drafted, and I think that there is evidence that they felt that the above ground of judgment needed something more to make it unassailable, and accordingly they inserted as the concluding and essential finding of the case stated—"4. The Court were satisfied on the evidence and their inspection of the subjects that the said land and share of common grazings were not in fact merely appurtenant to the cottage, and therefore repelled the objection stated for the proprietor." This betrays that the Land Court had awakened to the fact that the real question before them had nothing to do with the lands being lotted lands, but was the true relation between the house and the potato land and cow's grass, as bearing on the statutory though indirect definition of holding, and so they boldly insert the assertion that the lands and share of common grazing were not in fact merely appurtenant to the cottage, with such emphasis on the "in fact" as to indicate that they thought that that finding would close the door to the appellant, for the sense is pretty well knocked out of the question of law which they put if this statement in fact be taken as it was intended. The effort has at least succeeded in focussing attention on the real question in the case.

Taking head 4 by itself, I have no doubt that it contains a statement which is one as much of law as of fact, and that by calling it one of fact the Land Court cannot prevent our reviewing the conclusion which they have drawn, and which they say leads them to repel the appellant's objection to the competency of the application to them, and to find that the subjects in question did in the sense of the statute amount to "a holding." But further, even if it be a question of fact, the Land Court cannot prevent our inquiring whether they had reasonable ground for drawing the conclusion in fact which they say they did.

If the land and grazing were not appurtenant, what were they? The word "appurtenant" is not a usual Scots law term, but it was introduced by the Crofters Act 1886, and its use is quite apt in the present collocation. It is explained in the leading English Dictionary primarily as defining in law "a property or right subsidiary to one which is more important." If we turn to the lease we find the house to be the principal subject. If we look at the articles of set we find the land, if any, spoken of as "attached to the cottages." If we consider the real circumstances of the let of the subjects and the true nature of what is said not to be appurtenant, we find that the let of the land and grazing has no meaning except as an adjunct to the house—is of no value except as subserving the occupation of the house. I cannot conceive of the Land Court really

satisfying themselves in fact that the rood of land and grass for a single cow was, to adopt an Americanism, a farming "proposition" to which the cottage was merely ancillary or appurtenant. Yet if I do not, as they will not have it that the land and grass are merely accessory to the cottage, I must attribute to them the idea that they might be regarded separately—the house as one subject, the land and grass as another—which would be both contrary to the terms of the lease and of the statute. They are one tenancy whether they are a statutory holding or not. I hold that the question of the relation of the subjects of the lease as bearing on the statutory definition is really one of mixed law and fact, and that on the facts stated the cottage is the principal or predominant subject under this lease, and the potato land and cow's grass appurtenant or subsidiary thereto. But even if it be taken as one of fact only I should come to the same conclusion, and not only so, but should hold that on the evidence the Land Court could not reasonably come to the conclusion they did.

If so, the ground of the Land Court's decision as stated by them goes, and the query must be answered accordingly.

But then it may be contended that notwithstanding that the Land Court's judgment is not maintainable, still the statute draws the subjects within the mesh of the statutory "holding," because there is here a bit of land, however small, capable of having the word "agricultural" applied to it; because there is here as a pertinent thereto a right of grazing over another bit of land; and because there is here a house occupied in connection with it; and so these, irrespective of the real nature and co-relation of the subjects, constitute a holding within the letter of the statutes. For taking section 35 of the Agricultural Holdings Act 1908 in conjunction with section 26 (1) of the Landholders Act 1911 as in combination defining a statutory "holding," they only require a piece of land wholly agricultural, and any common grazing and the site of any dwelling-house is deemed to be included—but note, to be included, not in the piece of land but in "the holding." I cannot come to that conclusion, which I think would be a fraud on the statute. The whole conception of the Landholders Acts from beginning to end subsumes a dominant agricultural or pastoral object in the holding, and regards the house, though deemed to be included in the holding, as only a subservient adjunct for effecting that object. That is not the present case, where the house is the dominant subject, and the land not truly an agricultural subject in the sense of the statute but a mere adjunct to the house.

A short reference to the catena of statutes which govern this matter, beginning with the Crofters Act 1886, and ending with the Small Landholders Act 1911, and including, as necessarily connected with these, the Congested Districts Act 1897 (60 and 61 Vict. cap. 53) and the Agricultural Holdings Act 1883 (46 and 47 Vict. cap. 62) (now superseded by the Act of 1908), will explain what I mean. Anyone perusing these must see that the root idea of the whole scheme of legislation is that there should be an agricultural subject, for the benefit of which there may, and in the majority of cases will, exist a dwelling-house and the necessary offices, and that the idea of a dwelling-house as the predominant subject, "equipped" with a patch of potato ground, whether adjoining or separate, never entered or was intended to enter into the sphere of conception.

In support of this, without going into any detail, I would venture to refer to half a dozen different *indicia* which the statutes afford. For example, in the Crofters Holdings Act 1886, section 6 (1), we have such an expression as that "permanent improvements executed" by the crofter, and the first-mentioned in the statutory schedule of such improvements is "dwelling-house," and these improvements must, if they are to be taken into consideration in fixing the fair rent, be "suitable" to the holding. From the context there can be no question that "suitable" to the holding means suitable thereto as an agricultural subject. In section 8 again we have the provision that when a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for permanent improvements only "provided that (*a*) the improvements are suitable to the holding." In the Congested Districts Act 1897, section 5 (4), referring to buildings which the Congested Districts Board may erect or assist in erecting on holdings, it is conditioned that these must be such as "are required for the due occupation of the lands." Without going deeper into the statutes I take it that nothing can be more conclusive than section 32 (11) of the Small Landholders Act 1911 itself. This section is the charter of the statutory small tenant. He is a different person from the crofter, the existing yearly tenant, and the qualified leaseholder of section 2, who alone are "landholders" under the Act. The differentiation between him and the others is that he has not, and that his landlord has, provided the buildings and improvements, whereas with them it is just the reverse. Now in the event of the statutory small tenant coming at any time for a renewal of his tenancy there is this provision made by section 32 (11)—"In the event of the landlord on the renewal of the tenancy failing to provide such buildings as will enable the tenant to cultivate the holding according to the terms of the lease or agreement, or at any time failing to maintain the buildings and permanent improvements required for the cultivation and reasonable equipment of the holding, in so far as the tenant is not required at common law or by express agreement in writing to do so, it shall be lawful for the tenant to apply to the Land Court to so find and declare, and if the Land Court after hearing parties (if they desire to be heard) and after giving the landlord (if he so desires) an opportunity of remedying his failure as aforesaid shall so find and declare, the tenant shall, as from the date specified in the finding, become a landholder," with of course all the statutory rights of a landholder.

Now I ask your Lordships for one moment to consider what is to be the position of things in the tenancy which we are considering if the tenant at the end of seven years comes forward and says "I want a renewal of my tenancy, but this house is not fit for the holding. I must have a new one." Can anyone imagine with such words as these before them—"such buildings as will enable the tenant to cultivate the holding" and "required for the cultivation and reasonable equipment of the holding"—that the Land Court could by any reasonable possibility regard this quarter acre of potato land as agricultural land requiring that a house and offices be rebuilt in order that the holding might be reasonably equipped for the tenant's cultivation? The thing would be a very *reductio ad absurdum* of the scheme of legislation and the Acts which it produced. It could only be reached by a slavish bending of everything to the letter and a total disregard of the object, and therefore the spirit, of the legislation. I think that the Land Court, as reasonable men, must shrink from carrying their present views to the logical extreme of applying them to a question arising under section 32 (11). Neither do I think they ought to have applied them to this question arising under section 32 (4) to (9), which contain the provisions for renewal of the tenancy in the case of statutory small holders, corresponding to those found in the Crofters Act of 1886, sections 1, 5, 6, and 20, and the Small Landholders Act 1911, sections 10 and 13, and probably some other provisions scattered through the Landholders Acts, which regulate the periodical adjustment of matters between the landlord and the landholder.

What has made possible the present question is, I think, the confused method of definition adopted in these statutes, to which I have already referred. The definition of "holding" in the Crofters Act 1886 is repealed. The Agricultural Holdings Act 1908 defines the term for the purposes of that Act as "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 that Act is applicable to agricultural leaseholds in Scotland without limitation. The Landholders Act 1911 has no direct definition of "holding" for the special purposes of the Landholders Acts, which have not a general but a limited application. But section 26 by sub-section (3) (*f*) makes a clumsy adoption of the above definition of the Agricultural Holdings Act 1908, and superadds by sub-section (1) the inclusion in the holding of any right of pasture or grazing land held by the tenant or landholder either in severalty or in common, and the site of any dwelling-house, offices, or other conveniences erected on the holding or held therewith.

This definition, which one has to construct for oneself out of the material thus provided with the appearance of an afterthought in what is really an omnibus clause, must, I think, be read and applied in the light of the Act, or rather series of Acts, to aid in the application of which it is provided. I do not think that you are entitled to pick out of the tenancy a small parcel of land of which it can merely be said that *de facto* it can be tilled, but of such dimensions that it would not admit of the most skilful agriculturalist swinging even a highland plough, and say here we have the body and substance of the holding which the Act requires. It is immaterial that there is common grazing and a house held under the same tenancy. But as there are, they fall into line as "deemed to be included" in the holding. I think that you are bound to look at the definition, as you must look at all provisions of the Acts, in the light of the Acts themselves and their whole scope, and are not entitled merely to apply the letter of the definition to the provisions of the Acts so as by the letter to reduce to absurdity these provisions. In applying definitions one must always keep in mind the saving clause "unless the context otherwise requires." I think that you are bound to look at the tenancy as a whole, and see whether in the sense of the Acts it is really either agricultural or pastoral as these words are commonly understood and applied. If you find that the tenancy is really of a house or dwelling as its predominant subject, with such adjuncts as merely subserve its purpose as a dwelling, then you cannot, on any reasonable construction, apply to such tenancy the provision of the Act intended for a subject properly agricultural or pastoral or mixed agricultural and pastoral.

I am told that there is no indication of any minimum area for the component parts of the definition, indicated or apparently contemplated in the Act. That may be so. But I think that it is not difficult to suggest a criterion for subjects which in the sense of the statute are intended to be covered by the statutory small tenants' provisions, viz., a tenancy where the land is truly the predominant subject—however small it may be—and the dwelling-house and offices merely adjuncts which are required for its occupation as such and "due equipment" for cultivation; or you may put it another way, thus—subjects which, however small they be, and however rude and primitive the mode of exercising the agriculturalist's art, indicate that the occupation of agriculture is exercised within their limits. Here but that the potato land happens to be detached from the house and garden, the whole would be just a house and garden ground.

If there be no minimum enacted for the "land," neither is there any maximum for the dwelling-house. But if they had found a £20 or £25 house with a separate quarter acre for potato ground and a separate cow's grass, I hardly think that the Land Court's judgment would have been what we here find it. Yet, unless they gave effect to the considerations which I have stated, it must have been so.

For these reasons I cannot distinguish this case from that of *Taylor* v. *Earl of Moray*, decided by our predecessors in this Division in 1892, when the Agricultural

Holdings Act of 1883, which in this matter is identical with that of 1908, was in force, and regret that I cannot acquiesce in the judgment which your Lordship has proposed.

LORD SKERRINGTON—The definition of the word "holding" contained in section 35 of the Agricultural Holdings (Scotland) Act 1908, is open to verbal criticism, because it would seem to follow from it that the site of a shed for straw, or of a byre for cattle, or of a farmhouse, must be described as agricultural land or pastoral land as the case may be. But the meaning of the definition is sufficiently clear. In order to discover whether a particular holding does or does not fall within it, one must consider the subject of the lease both as a whole and also in its various parts, including the buildings (if any) situated upon it, and then make up one's mind whether it contains some material element which is neither agricultural nor pastoral—for example, a spinning mill, a smithy, or an hotel. The landlord's counsel relied chiefly upon the case of *Taylor* v. *Murray*, the decision in which proceeded upon the disproportion between the area and annual value of the house and garden on the holding as compared with the area and annual value of a grass park which formed the remainder of the holding. In the present case the landlord has failed, in my judgment, to establish any facts which demonstrate that the small thatched cottage on the holding, with its garden and byre, necessarily constitutes an element neither agricultural nor pastoral, as would a villa residence which no one would regard as pastoral in character merely because a paddock was let along with it. It was contended for the landlord that the arable land and grazing let to the respondent were "merely appurtenant" to the cottage. No such test is to be found in the definition clause of the statute, and it is not clear what exactly was meant by the expression in question. In any case this contention was negatived in fact by the Land Court after an inspection of the subjects.

The LORD PRESIDENT intimated that LORD MACKENZIE, who was absent at the advising, concurred with the majority of the Court.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Dean of Faculty (Clyde, K.C.)—C. H. Brown. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Respondent—Christie, K.C. —A. M. Stuart. Agents—Balfour & Manson, S.S.C.

HOUSE OF LORDS.

Tuesday, February 1, 1916.

(Before the Lord Chancellor (Buckmaster), Lord Atkinson, Lord Shaw, Lord Parker, and Lord Sumner.)

M'KINNON *v.* J. & P. HUTCHISON.

(In the Court of Session, June 5, 1915, 52 S.L.R. 691, and 1915 S.C. 867.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Out of and in the Course of the Employment—Seaman Drinking Water Containing Caustic Soda.*

A seaman while on board his ship at Spezzia was injured by drinking out of a tin which contained caustic soda in solution. The crew were in the habit of putting water supplied by the ship for drinking purposes in places where there was a draught for the purpose of cooling, and this practice was known to the ship's officers. This tin was in such a place. It belonged to another seaman, who used it for making tea, and wanted it cleaned. It was not found that the tin was supplied by the ship, or was similar to tins so supplied or to the tins used by the crew for drinking water, nor was it found that the officers sanctioned an indiscriminate use of tins or that such use existed, nor that such cooling was necessary.

The arbitrator having found that the accident arose out of and in the course of the seaman's employment, *held* that the facts found were insufficient to support his finding in law, and his award *set aside.*

This case is reported *ante et supra.*

The employers, J. & P. Hutchison, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR (BUCKMASTER)—I cannot help regretting that the facts in this case have not been found in a more detailed and decisive form, but they must be accepted as they stand, and I am unable to add that they justify the assumption upon which the judgment of the Judges of the Second Division was based. In the case stated by the Sheriff-Substitute nothing is mentioned as to the character of the tins in which the water was ordinarily cooled, nor as to their ownership, nor again as to the place where it was customary to deposit them. Lord Guthrie, however, came to the conclusion that the following facts were found by the arbitrator:—(1) That the can in question was standing in the usual place where cans were put to cool; (2) that the seaman did not know that the can he drank from belonged to another man; (3) that all the cans were either identical or similar in appearance. And if these assumptions were justified I should not differ from the conclusion at which he arrived.

I have accordingly made the most diligent