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 Branch (*b*) of the third question, if that view be correct, is superseded and does not arise for decision.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

serious hardship, the court may, after considering the circumstances of the case and the position of the parties to the contract . . ., suspend or annul the contract, or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit."

Held (*dis.* Lord Guthrie) that an application in the sense of the Courts (Emergency Powers) Act 1917, section 1, sub-section (2), meant an independent application, and that the Act could not be invoked by means of a plea-in-law and relative averments by the defenders in the record in an action at the instance of the other parties to the contract.

The Courts (Emergency Powers) Act 1917 (7 and 8 Geo. V, cap. 25), sec. 1 (2), *is quoted supra in rubric.*

Shankland & Company, merchants and contractors, Glasgow, *pursuers*, brought an action against John Robinson & Company, Wigan, *defenders*, for payment of the sum of £587, 10s., the price of a traction engine alleged to have been purchased by the defenders from the pursuers at a sale by auction on 17th January 1918. It was not disputed that at the sale the defenders made a bid for the traction engine of £587, 10s., and that the hammer fell on their bid.

The defenders averred, *inter alia*—"(Stat. 8) On 19th January the defenders wrote to the auctioneers asking them to instruct the pursuers to have the goods loaded on railway immediately, and also wrote the Traffic Department at Cupar Station to see the goods forwarded. The Traffic Department replied on 21st January that the 'traction engine awaits permit from military.' The defenders wrote the auctioneers, as the pursuers' agents, on 24th January—'We have a note . . . saying that the traction engine cannot be removed until permit is obtained from the military authorities, and we understood that the same could be removed right off.' . . . (Stat. 9) In point of fact the Government authorities on behalf of the Army Council and/or the Ministry of Munitions had forbidden, under the powers of the Defence of the Realm Regulations, that the traction engine in question should be removed by the pursuers from the place of sale, and the pursuers were never in a position to, and did not ever in fact, tender delivery to the defenders. Following on their embargo on removal the said authorities commandeered or 'impressed' the engine, and it is now the property of the Government and at work in their service in Scotland. The said engine when so commandeered was still the property of the pursuers. In any event it is no longer in the power of the pursuers to implement the bargain by tendering the real subject of sale at said auction, namely, a traction engine capable of being put to the defenders' uses, which in the full knowledge of the pursuers were commercial uses in England."

The defenders *pleaded, inter alia*—"8. The defenders being in any event entitled to have the alleged contract of sale annulled under provisions of the Courts (Emergency Powers) Act 1917, section 1, sub-section (2), decree of absolvitor should be pronounced.'

On 22nd November 1918 the Lord Ordinary (ORMIDALE) repelled, *inter alia*, the eighth plea-in-law for the defenders, and *quoad ultra* allowed the parties a proof of their averments, the defenders to lead in the proof.

In a *note* the Lord Ordinary stated—"The effect of the Courts (Emergency Powers) Act 1917, section 1 (2), cannot in my judgment be considered in these proceedings."

The defenders reclaimed, and argued—There was before the Court an application in the sense of the Courts (Emergency Powers) Act 1917 (7 and 8 Geo. V, cap. 25), section 1 (2). The action for the price was an application by a party to the contract, viz., the pursuers, and in that application the defenders had competently pleaded the Act. Alternatively, the defenders' eighth plea-in-law could itself be regarded as an application in the sense of the Act. The defenders' averments in support of the plea-in-law were therefore relevant. The words "application" and "court" were used in the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), and as used there were construed with reference to the relative Act of Sederunt dated 28th September 1914, but no Act of Sederunt had been passed with reference to the Act of 1917, and the Court was not therefore restricted in its interpretation of the Act. No benefit could ensue from the duality of proceedings involved in a separate application, the sole warrant for which was an interpretation by the Court of the word "application" without the warrant of an Act of Sederunt. There was no hardship in raising the question by a plea-in-law without the artificial severance of proof involved in a separate application. Indeed, standing the Lord Ordinary's interlocutor repelling the defenders' eighth plea, it seemed more than doubtful that the question could be subsequently raised by a separate application. The present was a typical case for the application of the Act, seeing that hardship had resulted to the defenders in respect that they were asked for payment without the concurrent condition implied by the Sale of Goods Act, viz., delivery, being fulfilled.

Argued for the respondents—There was here no proper application before the Court nor anything to show on what grounds it was made. The defenders should either have presented an application to the Inner House before the action was raised or have lodged a minute in the process craving the Lord Ordinary to grant relief under the Act. In *Charles Schofield & Company, Limited*, v. *Maple Mills, Limited*, 1918, 34 T.L.R. 423, where the Act was invoked, it appeared that there was an independent application before the Court. In any event the present case was not a suitable one for the application of the Act. The intervention contemplated by the Act was to a contract which was still in process of performance, and not, as in the present case, to a contract which had been entirely fulfilled. The defenders had not set forth on record any serious hardship

peculiar to them, and the result of applying the Act in their favour would only be to transfer the same hardship to the pursuers. This was not the kind of case contemplated by the Act. As a matter of fact, however, there was no restriction as to proof in the interlocutor reclaimed against and the defenders were not prejudiced thereby.

LORD-JUSTICE CLERK—According to the view I take this case raises purely a question of procedure. Under the Courts (Emergency Powers) Act 1917, which amended the Courts (Emergency Powers) Act 1914, separate remedies were given, but so far as these remedies are concerned there was no provision made for any Act of Sederunt being framed by the Court to regulate the procedure. Accordingly no Act of Sederunt has been framed for the 1917 Act, and in my opinion no Act of Sederunt was necessary. It is quite true that the Statute of 1917 like that of 1914 uses the expression "application," which is not a *vox signata* according to our law. It does not seem to me to be a technical term at all. "Application" means that a person applies to the Court, and whatever the form of the application may be so long as it in substance complies with what the statute entitles one to ask I do not think there is any necessity for defining "application" at all.

But then Mr Moncrieff presented an argument founded upon the terms of section 1 (2) of the Act of 1917, which enacts that "Where, upon an application by any party to any contract whatsoever, the Court is satisfied" of certain things, it may do certain other things, and he contended with force that in this case there was an application to the Court in respect that the pursuer, the seller, had raised an action for payment of the price, and that that action was an application to the Court in the sense of the statute. Then he said that that being an application to the Court he was entitled to raise any question under the Defence of the Realm Act 1917 which he thought proper, to state such facts as he thought necessary to enable the point to be raised—with a proper plea—to get a proof upon these facts, and to ask the judgment of the Lord Ordinary upon that aspect of the case if in the end it became necessary to do so.

While recognising the force of the argument I have come to be of opinion that it is not sound. I do not think that "application" in the 1917 Act can bear the interpretation which Mr Moncrieff seeks to put upon it. On the contrary, I think "application" means an independent application by a person who wants to take the benefit of the 1917 Act, and who, professing to proceed under that Act, asks the remedy which the Act gives him so far as he thinks necessary. Therefore I do not think that the appropriate form of bringing before the Court the question whether the contract by reason of the Act of 1917 should be annulled has been taken by the defenders in this action. I think that if we gave effect to the view contended for the result would be that the merits of the question of whether the annulling of the contract under that Act were justified or not would be subject to review first from the Lord Ordinary to this Court and then from this Court to the House of Lords.

I do not think that the questions which are raised under these emergency statutes were intended to result in ordinary forms of litigation in which there are pleadings and proofs and appeals. I think it was intended to dispose of such questions summarily on the statements of the parties and on the views which the Court took of the facts so far as they could be gathered from those statements. In my opinion the Lord Ordinary was right in repelling the plea as he did. But, on the other hand, I think it right to say that, as I read the interlocutor, so far as the allowance of proof is concerned, the whole of the averments of the parties were remitted to probation. It was conceded by Mr Watson that according to his view that was so, and that the interlocutor of the Lord Ordinary as it stands infers no limitation of the proof, but that both parties, while certain of their pleas are repelled, are not in any way to be restricted in the amount of the proof to be allowed, except as they would be in an ordinary case, by the averments which they have made.

I also think it right to say that in repelling plea 8 I do not think we are interfering in the least with what appears to me to be the undoubted right of the defenders to apply to the Court to have the point as to the effect of the Act of 1917 considered and, so far as the Court think proper, given effect to according to the nature of the application which may be made to the Court, and the view which the Court takes of what in the circumstances is the proper course to follow in regard to it.

The result therefore, in my opinion, is that, subject to the views I have expressed as to the allowance of proof and as to the power of the defenders to make an application, if and when they think proper under the 1917 Act, I think the reclaiming note ought to be refused.

LORD DUNDAS—I am of the same opinion, and I concur substantially in all that your Lordship has said.

Mr Moncrieff maintained that the action now depending before us was in itself an "application" within the meaning of the Act of 1917. I do not think that will do. He maintained, alternatively, that the eighth plea-in-law for the defenders constituted in itself an application in that sense. I do not think that will do either. It seems to me that the "application" referred to must be an application under the 1917 Act; but then, as your Lordship has pointed out, there is nothing to prevent Mr Moncrieff, if so advised, from making such an application—and he might conveniently do so—to the Lord Ordinary before whom the case is depending in the Outer House. It is not necessary for us to define or assert the exact form in which such an application should be made—whether it should be by way of note or minute in the process of this action, or by way of a separate document bearing to be an application in terms of the 1917

Act. It seems to me that the Lord Ordinary was right in the result. He repelled the plea as I understand not because there was nothing in it at all, but because in his judgment it was not appropriate to raise the defenders' point by way of plea in this action. In that I think he was right. Mr Watson frankly admitted that on the record as it stands it will be open to the defenders to prove all their averments if they can, including article 13 of the statement of facts, and the Lord Ordinary will have before him full material for doing justice to the case, including any point which may be raised in any application that is put before him under the Act of 1917.

LORD GUTHRIE—I agree that this reclaiming note raises nothing but a question of procedure. The respondents do not propose to evade the application of the 1917 Act by maintaining, for instance, that it cannot be carried out without the Court having framed rules under an Act of Sederunt. The question is—when the reclaimers' remedy comes into force, where it comes into force, and how?

The respondents raised an action for payment, and in their reply the reclaimers said —first, no breach of contract; secondly, the contract was induced by misrepresentation; and thirdly, and in any case, they were protected by the 1917 Act. The first two matters have been remitted to probation. The Lord Ordinary thinks the third question does not arise in these proceedings, and he has repelled plea 8. He does not say how the remedy of the 1917 Act is to be carried out—whether by minute to the Inner House or by petition to the Lord Ordinary; but he must, I suppose, have had one or other of these courses in view.

Taking the interlocutor as it stands, without the assurance given to us from the bar, I am not satisfied that the reclaimers can trust to being able to bring out all the facts necessary to raise their case under the 1917 Act, and that leads to the construction of the Act. Differing from your Lordships, it seems to me that while agreeing that the Act is not easy to construe in respect that it is framed not for the United Kingdom but on the lines of English procedure, and uses an expression which is not a technical one in Scotland—namely, "application"—it is, as I read it, expressed so as to include an application by any party to any contract whatsoever. Now Mr Watson's client is a party to this particular contract, and it seems to me that the statute is capable of being read, and should be read, so as to include under "application" an action at his instance, and so as to warrant the other party to the contract invoking its aid either in the way in which that has been done in this case—by averment and relative plea-in-law —or by a separate application.

If the eighth plea is repelled, the question cannot arise strictly in these proceedings, but it will be open to the reclaimers at the end of the day to apply under the 1917 Act. If, however, it is understood that the whole facts which are founded on by the reclaimers are to come out, and if it is open to them after they have come out still to put in their minute or petition, the difference between us becomes really academic.

LORD SALVESEN was absent.

The Court refused the reclaiming note and remitted the case to the Lord Ordinary.

Counsel for the Pursuers (Respondents)—W. T. Watson. Agents — Whigham & MacLeod, S.S.C.

Counsel for the Defenders (Reclaimers)—Moncrieff, K.C.—A. M. Mackay. Agents—Fraser & Davidson, W.S.

VALUATION APPEAL COURT.

Thursday, December 19.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

D. H. & J. NEWALL *v.* ASSESSOR FOR KIRKCUDBRIGHT.

Valuation Cases—Subjects of Valuation—Erection by Tenant—Granite Crusher—Treating Minerals — Lands Valuation (Scotland) Amendment Act 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4 (3).

Section 4 of the Lands Valuation (Scotland) Amendment Act 1895, providing for the valuation of erections or structural improvements made or acquired by a lessee, exempts (3) "coke ovens or other structures in which coal or other minerals are treated, where the rent or lordship stipulated . . . to be paid in respect of such coal or other minerals is . . . calculated upon the coke or other minerals as treated in such ovens or other structures."

The lessees of a granite quarry and of the site of a granite crusher which had been erected by them under the terms of a previous lease were bound to pay to the lessors a certain sum by way of lordship on every ton of granite crushed in the granite crusher.

Held that the granite-crushing plant fell within the meaning of exception 3, in respect that the granite was "treated" in the granite-crusher, and that the lordship was payable on the minerals so treated.

The Lands Valuation (Scotland) Amendment Act 1895 (58 and 59 Vict. cap. 41), sec. 4, enacts—"Section 6 of the Valuation Act 1854 shall be read and construed as if the following proviso were inserted after the words 'as compared with the amount of such valuation,' that is to say—'Provided also that where any lessee of any such lands and heritages holding under a lease or agreement the stipulated duration of which is twenty-one years or under from the date of the entry under the same, and in the case of minerals thirty-one years or under from the date of such entry, has made or acquired erections or structural improvements on the subjects let, and where