whether those expenses were to be taxed on the lower or the higher scale. By a slip which was very pardonable counsel did not call our attention to the fact that the account in the Sheriff Court had already been taxed on the scale allowed for Sheriff Court expenses, and the question we now have to decide is whether the Auditor, being directed by us to tax the account, has properly substituted the other scale. If the question is raised, it is for the Sheriff to decide whether or not the costs in an action before him shall be taxed on the higher scale. I do not know whether he was moved and refused to allow the higher rate, or whether no motion was made to depart from the ordinary rule. But, at all events, the Auditor of the Sheriff Court had no authority to tax the account otherwise than as an ordinary account of Sheriff Court expenses, and he accordingly applied the ordinary Sheriff Court scale. I do not think we can be asked to permit an alteration of that taxation now, and therefore I am of opinion that the Auditor's report must be subjected to the reduction sought by the pursuer.

LORD JOHNSTON and LORD MACKENZIE concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor—

"The Lords having considered the report of the Auditor of the Sheriff Court on the account . . . taxing the defender's expenses in that Court on the lower scale, and having also considered the report of the Auditor of the Court of Session on the account . . . taxing, *inter alia*, the same on the higher scale, and having heard counsel for the parties, decern against the pursuers and appellants for payment to the defender and respondent of the sum of £38, 19s. 8d. sterling, being the taxed amount of expenses in the latter report (£63, 17s.), under deduction of (1) £6, 17s. 4d., being the difference between the two scales of taxation above mentioned, and (2) £18, being the sum which by interlocutor of 23rd December 1910 the defender was ordained to pay to the pursuers."

Counsel for the Pursuers and Appellants —Wilton. Agents—Henderson & M'Kenzie, S.S.C.

Counsel for the Defender and Respondent —Fenton. Agents—Simpson & Marwick, W.S.

HOUSE OF LORDS.

Tuesday, March 21.

(Before the Lord Chancellor (Loreburn), Lord Kinnear, Lord Atkinson, and Lord Shaw.)

CATHCART *v.* CHALMERS AND ANOTHER.

(In the Court of Session, December 20, 1910, 48 S.L.R. 207.)

Lease—Outgoing—Compensation for Improvements—Contracting Out—Conventional Scale—Void Condition—Stipulation for Early Notice of Claim—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62) *and* 1900 (63 *and* 64 *Vict. cap.* 50).

"The statutes sanction a pactional substitution of compensation in terms of agreement for compensation in terms of the Acts; but not the adjection of a collateral stipulation which might (at least indirectly) operate to deprive the tenant of his right to obtain compensation at all."

A stipulation, therefore, adjected to a conventional scale of compensation in an agricultural lease, that any claim for compensation must be made a month before the determination of the tenancy, whereas the statutes allow it up to the determination, *is void.*

This case is reported *ante ut supra*, where will be found quoted the sections of the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), and 1900 (63 and 64 Vict. cap. 50).

Sir Reginald Archibald Edward Cathcart, Bart., the complainer (reclaimer), appealed to the House of Lords.

At the conclusion of the appellant's argument—

LORD CHANCELLOR—In this case I think the appeal, which has been very fairly and very ably argued by both the learned counsel for the appellant, must fail. To my mind, without entering into the facts (which are agreed), the substantial meaning of the Act of Parliament is this (I am paraphrasing the language)—You shall not by private contract deprive a tenant of his right to claim compensation under this Act, or, if you do, then your contract, so far as it deprives him of such right, shall be void. But there is an exception, namely, that you may by a private contract substitute a different scale of compensation for the scale of compensation provided by the Act. That is, I think, the true effect of the exception. Beyond that you may do nothing which deprives him of his right to claim compensation under this Act.

Now in this case the lease has substituted a different scale I believe—whether it has or not is not very material, because no one complains of the scale; it is common ground, I think, in this case that the scale is a fair one. The question is, can you add in that lease a condition as to the time

within which the tenant is to claim or is to give notice of his claim? That depends upon whether the condition requiring him to give notice within a month is or is not something which deprives him of his right to claim compensation under this Act. I think it certainly does deprive him of his right, and for this reason; it says, You cannot give notice during the whole month prior to the end of the lease, whereas the Act allows notice to be given during the whole of that month. It deprives him therefore of one month within which he would be otherwise entitled to give the notice of his claim to compensation; and therefore it deprives him of the right to claim compensation under the Act.

LORD KINNEAR—I entirely agree with my noble and learned friend on the woolsack, and I only add that I think the last sentence of Lord Dundas's opinion expresses exactly the view which I take of this case.

LORD ATKINSON—I concur. I do not think it is necessary to determine whether it is ever proper to introduce any condition whatsoever into an agreement under section 5 of the Act. The vice of this condition, in my opinion, is that it does deprive the tenant of a right which the Act has secured to him, namely, that he should be able to assert his claim up to the last moment of his tenancy.

LORD SHAW—I do not find this case to be difficult, but I do not conceal from myself that it is important. The position of the parties to it depends upon section 1, sub-section (1), of the Agricultural Holdings Act of 1900. That section provides in simple language that the outgoing tenant shall "be entitled at the termination of a tenancy on quitting his holding to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant." That seems to represent the plain equity of the situation. The position taken up as a litigant by the tenant in this case is a quotation of that Act of Parliament, and he pleads that the right so conferred upon him should not be taken away. Before the determination of the tenancy and before quitting the holding he made his claim for compensation for unexhausted manures, &c., and desired arbitration upon it. This proceeding, however, was arrested by the landlord (the appellant) presenting a petition for interdict. The landlord maintains that by the lease the tenant had bound himself to another scheme of compensation requiring that the claim be lodged one month before the end of the lease. As the claim was lodged only nineteen days and not one month before that event, the appellant maintains that all right to compensation is lost.

The history of the legislation on this subject shows that Parliament was confronted with the problem of contracting out. It was permitted, but only under the clearest conditions. Contracting out is dealt with by sections 5 and 36 of the Act of 1883. Substantially what has been enacted is a series of provisions to prevent the confiscation by the landlord of the value of an outgoing tenant's improvements, and securing that in all private agreements there shall be a substituted compensation.

I have read the eleven or twelve pages of the print containing the lengthy and involved document called "Articles, Regulations, and Conditions" stipulated and agreed upon under which the various farms on the estates belonging to the appellant "are to be let." This document was adopted *en bloc* in the lease. I can conceive—it requires no effort of the imagination to conceive—that a tenant attempting to master that paper might be bewildered, but it would never cross his mind that there lurked within it something which cut down or cut away his statutory rights. Such a document appears to me to fit those necessities for protection which the Act of 1883 specially provided. With regard to that Act, and especially section 36, I cannot hold that it means anything less by way of protection than these two things—First, that the compensation to be substituted for the statutory compensation shall be secured to the tenant, and secondly that it shall be compensation on a fair and reasonable scale. Were the appellant's argument correct both of these things would disappear.

Like my noble and learned friend who has preceded me, I think that the true view of this case is clearly summed up in the last few sentences of the judgment of Lord Dundas. They are these—"The question is as to the legality, or the reverse, of such a provision as we have here. I think it is an illegal provision. The statutes sanction a pactional substitution of compensation in terms of agreement for compensation in terms of the Acts; but not as I consider the adjection of a collateral stipulation such as this, which might (at least indirectly) operate to deprive the tenant of his right to obtain any compensation at all." I respectfully desire to adopt that language as part of my opinion.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant (Complainer)—C. N. Johnston, K.C,—A. R. Brown. Agents—Skene, Edwards, & Garson, W.S., Edinburgh—Martin & Company, Westminster.

Counsel for the Respondents — Lord Advocate Ure, K.C.—F. Watt. Agents—Rankin & Aitken, Stranraer—James Purves, S.S.C., Edinburgh — Godden, Son, & Holme, London.