Wednesday, March 8.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Dumbarton.

A. E. ABRAHAMS, LIMITED *v.* CAMPBELL.

(*Ante*, November 30, 1910, *supra*, p. 191, and December 23, 1910, *supra*, p. 293.)

Expenses—Sheriff—Higher or Lower Scale—Act of Sederunt Regulating Fees of Agents and Others in the Sheriff Court of 10th April 1908.

A Sheriff found the pursuers in an action liable to the defender in his expenses, and remitted to the Auditor to tax the account and to report. The Auditor taxed the account on the lower scale. On an appeal on the merits, the Court found the pursuers and appellants liable in the expenses of the appeal, and, it not having been pointed out that the Sheriff Court account of expenses had already been taxed, remitted the account of expenses of the appeal along with the account of expenses found due by the Sheriff to the Auditor to tax and to report. The Auditor taxed the Sheriff Court account on the higher scale. On objection being taken to this by the pursuers the Court *sustained* the objection, *holding* that the proposed alteration of the scale of taxation in the Sheriff Court had not been timeously raised, and *allowed* a deduction of the difference between the two scales.

(Reported on the competency of the appeal November 30, 1910, *supra*, p. 191, and on the merits December 23, 1910, *supra*, p. 293.)

The Act of Sederunt regulating the fees of agents and others in the Sheriff Court, dated 10th April 1908, provides, section I—"In the ordinary Sheriff Court, except as after stated, there shall be two scales of taxation, viz., *first*, for causes where the amount of principal concluded for does not exceed £50, and *second*, for causes exceeding that amount. In all cases the Sheriff may appoint that expenses shall be subject to modification." Section II—"(1) The scale of taxation shall in the ordinary case be determined by the principal sum concluded for, but in all cases it shall be competent to the Sheriff to direct that the expenses shall be taxed according to the scale applicable to the amount decerned for. (2) In cases where the principal sum concluded for does not exceed £50, it shall be competent to the Sheriff to direct taxation on the higher scale if he shall be of opinion that such sum does not truly represent the nature and importance of the cause. . . ."

A. E. Abrahams, Limited, advertising contractors, raised an action in the Sheriff Court at Dumbarton against William Campbell junior, furniture dealer, Dumbarton, for £43, 16s. (subsequently restricted by minute to £39, 18s.) alleged to be due under a contract for advertising.

On 22nd October 1910 the Sheriff (LEES), after various findings in fact, found in the circumstances as matter of law "that the pursuers are not *in titulo* to demand implement by the defender of a contract which they have ceased to fulfil, but only reasonable compensation for the amount of advertising display they have obtained for defender's advertisement, and that the sum of £18 would be such reasonable remuneration: Finds the pursuers liable to the defender in his expenses of the cause and of the appeal, and before pronouncing further allows an account thereof to be given in, and remits to the Auditor to tax and to report. . . ."

The pursuers appealed to the Court of Session, and on December 23, 1910, the Court pronounced this interlocutor—(after various findings in fact): "Find in law that the pursuers are not *in titulo* to demand implement of the said contract by the defenders, but further, inasmuch as the Sheriff has found £18 due by the defenders for advertising which the pursuers supplied to them, though not under said contract, and the defender acquiesces in this finding, decern against the defenders for the sum of £18: Find the pursuers and appellants liable in the expenses of the appeal, and remit the account thereof along with the account of expenses found due by the Sheriff to the Auditor to tax and to report."

On 8th March 1911, when the case appeared in Single Bills for approval of the Auditor's report, which, *inter alia*, taxed the defender's expenses in the Sheriff Court on the higher scale, counsel for the pursuer moved to deduct from the expenses allowed the sum of £6, 17s. 4d., being the difference between the lower scale as allowed by the Auditor of the Sheriff Court and the higher scale as allowed by the Auditor of the Court of Session, and argued—The defender, if he wished expenses on the higher scale, should have asked for them from the Sheriff. It would be an unfortunate practice to introduce that expenses already taxed in the Sheriff Court on the one scale should be retaxed in the Court of Session on the other. In any case, if the matter was to have been re-opened it should have been brought to the notice of the Court at advising.

Argued for the defender—Contrary to his contention, it had been held that this was not a summary cause (48 S.L.R. 191), and accordingly the defender was entitled to expenses on the higher scale. In the Sheriff Court, however, it would have been inconsistent for the defender to have asked for expenses on the higher scale, as his position then was that it was a summary cause.

LORD KINNEAR—I think that the objection must receive effect. The interlocutor of this Court remitted to the Auditor to tax the account of expenses in the Sheriff Court. That was a mere ministerial duty laid upon the Auditor, and there was nothing in the interlocutor to decide what was really not a question before us, namely,

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