definition there given of what negligence is. Well, the definition given there is a very good one, and was strictly in point in the case. The case itself has to do with the duty of a water-works company to make their pipes sufficiently strong to resist frost, and the dictum is given *secundum subjectam materiem.* But the Lord Ordinary quotes it as if negligence *per se* was sufficient to make liability. Negligence *per se* will not make liability unless there is first of all a duty which there has been failure to perform through that neglect. I also deprecate very much that the Lord Ordinary should say afterwards that he thinks "a reasonably prudent man would in the circumstances set forth in the record have adjusted the chain himself and warned the boy to keep away." Nobody can tell how the circumstances set forth in the record are going to come out, and how they come out, it seems to me, will make the whole difference.

LORD KINNEAR—I agree with your Lordship. I have nothing to add except that in particular I agree with what your Lordship has said as to the Lord Ordinary's observation about negligence, and I think it is extremely important that that should be said, because we constantly find in discussion of this kind that the primary necessity for resting the charge of negligence upon some relation of duty is forgotten. There can be no question as to the authority of the passage which the Lord Ordinary quotes from Baron Alderson, and which is so frequently cited. But the learned Judge was giving the standard or measure of negligence, assuming it to be an actionable wrong, and was not defining the conditions on which an action for negligence will lie. The law is well stated by Sir Frederick Pollock, where, after stating the general rule in the words of Baron Alderson, he goes on to say (Pollock on Torts, 6th ed., p. 420)—"It was not necessary for him to state, but we have always to remember, that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care." I agree that the first condition of relevancy is that the pursuer should aver a duty on the part of the defender "of taking care" for the safety of the boy whose death resulted from the accident.

As to the averments, I agree with what your Lordship has said, and have nothing to add.

LORD JOHNSTON and LORD MACKENZIE concurred.

The Court adhered.

Counsel for the Pursuer and Respondent — Morison, K.C. — Hamilton. Agents — Sharpe & Young, W.S.

Counsel for the Defender and Reclaimer— J. C. Watt, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Tuesday, December 20.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

CATHCART *v.* CHALMERS.

Lease — Outgoing — Compensation for Improvements—Contracting Out—Substitution of Conventional for Statutory Compensation — Time for Making Claim — Illegal Condition — Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 36.

The Agricultural Holdings (Scotland) Act 1883, sec. 36, provides—"Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void."

The lease of a farm prescribed compensation for improvements to be paid in lieu of the compensation provided by the Agricultural Holdings Act 1900, sec. 1, and relative schedule (which superseded sec. 1 and relative schedule of the Agricultural Holdings (Scotland) Act 1883). The lease also contained a proviso that no claim for compensation should be made by the tenant later than one month prior to the determination of the tenancy. The tenant having given notice in terms of the lease of his intention to terminate the tenancy, quitted the farm accordingly. He made claims for compensation prior to the determination of the tenancy (which but for the proviso would have been timeously made) but less than one month prior thereto. The landlord intimated to the tenant that the claims were excluded by the lease in respect that they were not timeous. Thereafter on the application of the tenant the Board of Agriculture and Fisheries appointed an arbiter for the purpose of dealing with the claims. A note of suspension and interdict having been presented by the landlord to prevent the arbitration being proceeded with, the Court—*rev.* the decision of the Lord Ordinary (Guthrie)—*refused* the interdict, holding that the stipulation contained in the lease as to the time of making the claim was void in respect that it was an agreement by the tenant by virtue of which he was deprived of his right to claim compensation.

The Agricultural Holdings Act 1900 (63 and 64 Vict. cap. 50) enacts—Section 1—"(1) Where a tenant has made on his holding any improvement comprised in the First Schedule to this Act, he shall, subject as in the [Agricultural Holdings (Scotland) Act] 1883 (in this Act referred to as the principal Act), and in this Act mentioned, be entitled

at the determination 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. . . ." Section 2—"(2) Any claim by a tenant for compensation under the principal Act or this Act in respect of any improvement comprised in the First Schedule to this Act shall not be made after the determination of the tenancy."

The Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62) enacts—Section 5—". . . Where, in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and not under this Act." Section 36 is quoted *supra in rubric.*

Sir Reginald Archibald Edward Cathcart, Baronet, presented a note of suspension and interdict against Alexander Hyslop Chalmers and J. Montgomerie Pearson in order to prevent them proceeding with an arbitration under the Agricultural Holdings (Scotland) Acts. The respondent Chalmers had been tenant of a farm which had been let to him by the complainer on lease. The lease, dated 2nd and 14th March 1903, incorporated the estate regulations, which included, *inter alia*, an article prescribing the compensation for improvements to be paid to the tenant in lieu of that which he might otherwise have claimed in respect of improvements specified in Part III of the First Schedule annexed to the Agricultural Holdings Act 1900. The article also contained the following proviso—"Provided always that no claim for compensation under the said Acts or under these conditions shall be made by the tenant later than one month prior to the determination of the tenancy."

The tenant having given notice in terms of the lease of his intention to terminate the tenancy vacated the farm on 28th November 1908 accordingly. On 9th November the tenant posted a claim for compensation to the landlord, who received it on 10th November. This was followed by an amended claim posted on 26th and received on 27th November. The landlord intimated to the tenant that the claims had not been made timeously and were therefore barred. The tenant treated this as a refusal to agree to the nomination of an arbiter and applied to the Board of Agriculture and Fisheries for the appointment of an arbiter under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) to deal with the said claims. The Board appointed the respondent Pearson to be arbiter, whereupon the landlord brought a suspension and interdict to prevent the tenant proceeding with his claim and the arbiter from entertaining it. Answers were lodged by the respondent Chalmers only.

The complainer pleaded—"(1) The pretended claims of the respondent Alexander Hyslop Chalmers against the complainer not having been timeously made, and being excluded by the terms of the lease referred to in the statement of facts for the complainer, and therefore not a competent subject for arbitration, the complainer is entitled to interdict as craved. (2) The agreement as to compensation incorporated in the lease having been validly entered into under section 5 of the Agricultural Holdings (Scotland) Act 1883, the respondent's claims for compensation can only be prosecuted in accordance with the provisions thereof."

The respondent pleaded, *inter alia*—"(2) The lease founded on being a contract or agreement made by a tenant, by virtue of which he is deprived of his right to claim compensation under the Agricultural Holdings Acts, is, so far as it deprives him of such right, void by the Agricultural Holdings (Scotland) Act 1883, sec. 36, and the Agricultural Holdings (Scotland) Act 1908, sec. 5, and the prayer of the note should accordingly be refused."

On 13th January 1910 the Lord Ordinary (GUTHRIE) granted interdict as craved.

Opinion.—"I think the complainer here is entitled to interdict. The case for the respondent was argued under two separate views—the one being based on section 5 of the 1883 Act, and the other being based on section 36 of the 1883 Act, taken along with section 2 of the 1900 Act. The argument based on section 5 of the 1883 Act depended on the view that the right to compensation existed, even although there might be a clause such as the clause contained in section 17 of the articles, regulations, and conditions incorporated in this lease, under which no claim for compensation, under the said Acts or under these conditions, shall be made by the tenant later than one month prior to the termination of the tenancy. It was maintained that it would be competent, under section 5 of the 1883 Act, to void the effect of that clause by showing the arbiter that that was not a fair and reasonable condition. It seems to me clear that section 5 does not apply in the circumstances. It applies to an agreement substituted instead of the Act in relation to compensation for any improvement specified in the third part of the schedule annexed to the Act, and it has no application to the clause relating to notice which we are dealing with in this case.

"The other argument, under section 36 of the 1883 Act and section 2 of the 1900 Act, raises a different question. It is said that under section 1 of the 1883 Act there is a right absolutely expressed to the tenant to get compensation for improvements, the class of improvements being specified in the schedule, instead of which there is provision that you may have a substituted agreement. It is said in regard to notice that the only restriction on the tenant is that no claim by him shall be

good if made after the termination of the tenancy—that is to say, he shall be entitled to claim at any time before the termination of the tenancy. In the absence of agreement that argument is sound. But the question is whether by agreement the provision which is contained in the 1900 Act cannot be varied. It is said it cannot be varied because that would bring the agreement within the scope of the 36th section of the 1883 Act, and you would then have the case where a tenant is deprived of his right to claim compensation under the Act in respect of any improvement. It appears to me that that view is not sound. Section 36 contemplates an agreement which, at the time it was made, on the face of it, necessarily deprives the tenant of the right to claim compensation. That cannot apply here, where the tenant's difficulty has arisen through his own failure to implement an obligation, which, on the face of it, does not deprive him of the right to claim compensation, but only stipulates that he will make his claim within a certain period. There is, to a certain extent, a limitation of the right to contract out, in so far as it is provided, under section 5 of the 1883 Act, that if you contract out of the details contained in the third part of the schedule, and substitute other details, these will not receive effect unless they are fair and reasonable. If they are not, then the provisions of the Act will still apply. But there is no prohibition against contracting out in relation to a totally different matter, namely, the question about when the notice shall be given.

"There was a point made by Mr Cooper in relation to certain claims contained in the claim in the present case which are not specified in article 17 of the Conditions, which it is said can still be made. The clause is read as if it ran—'providing always that no claim for compensation under these Conditions shall be made later than one month prior to the determination of the lease.' But this clause is not so limited, because it also covers claims for compensation made under the Acts. Now if these claims are not made under the Conditions, they must be made under the Acts. But the clause equally limits the time when notice can be given of claims made under the Acts. Therefore I think the complainer is entitled to interdict as craved, with expenses."

The respondent reclaimed, and argued—The view of the Legislature as embodied in the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62) and the Agricultural Holdings Act 1900 (63 and 64 Vict. cap. 50) was that landlords and tenants did not contract on equal terms, and the intention of those Acts was to prevent landlords using the commanding position they would have in bargaining if tenants were not protected. Protection was given to tenants by restricting in their favour complete freedom of contract. To that end the Agricultural Holdings Act 1900, section 1, provided that tenants should have an absolute right to compensation subject only to the conditions contained in the Agricultural Holdings (Scotland) Acts. The tenants must get compensation in every case—*Mears* v *Callendar*, [1901] 2 Ch. 388; *Bell* v. *Graham*, 1908 S.C. 1060, 45 S.L.R. 770, *per* Lord Ardwall. The scale of compensation might no doubt be varied provided the scale substituted were "fair and reasonable," but any agreement, whether absolute or conditional, the operation of which in result deprived the tenant of compensation, was struck at by the Agricultural Holdings (Scotland) Act 1883, section 36. That section contemplated the result of an agreement and not the form. The proviso as to the time of making the claim did not merely regulate the procedure to be followed. It subjected the right to compensation to risks which it did not run under the statutes. Apart from agreement the tenant had the right to claim compensation at any time before the determination of the tenancy. By agreement an earlier date had been substituted, and he was thereby deprived of his right to claim during a period which would have remained available to him but for this innovation. By section 36, the agreement so far as it deprived the tenant of this right was void. Section 5 of the Act did not allow either absolute or conditional contracting out. It merely permitted the substitution of a different scale of compensation for that provided by statute. The only agreements saved by the section were such as "secured" fair and reasonable compensation to the tenant. The result of the agreement in this case was however to deprive the tenant of compensation.

Argued for the complainer—The *onus* was on the respondent to show that there was something in the Acts which enabled him to get rid of the stipulation as to the time of making the claim. All the provisions of the Agricultural Holdings Act 1900 were not so sacred that they could not be varied by agreement. It was only where it was said that the tenant could not be deprived of a certain particular that freedom of contract was excluded. There was nothing in section 2 (2) of the Act to prevent parties contracting out of that section. In applying the Agricultural Holdings (Scotland) Act 1883, section 36, the agreement must be taken as a whole—*Hamilton-Ogilvy* v. *Elliot*, November 3, 1904, 7 F. 1115, 42 S.L.R. 41. So taken the agreement in this case did not deprive the tenant of compensation, but on the contrary made elaborate provision for giving him compensation. Section 36 was intended to prevent the tenant surrendering his right to compensation absolutely or for something illusory, and did not prevent him rejecting his right under the statute in favour of an agreement which provided compensation for him. Here the tenant was deprived of his right to claim compensation not by the agreement but by his failure to make his claim timeously. In any event the agreement satisfied the provisions of the Agricultural Holdings (Scot-

land) Act 1883, section 5, in respect that it "secured" to the tenant "fair and reasonable compensation," and the right to claim statutory compensation was therefore ousted. It was for the tenant to show that the substituted agreement did not give him fair and reasonable compensation, and there was no averment that it did not. An agreement stipulating that claims for compensation should be made one month earlier than the statutory date was fair and reasonable. This, moreover, was a question for the Court—*Bell* v. *Graham, cit.* The complainer having relevantly averred that it was "fair and reasonable," the Court would consider that question, and if they were of opinion that this view was well founded they would stop the arbitration proceedings by granting interdict—*Hunter* v. *Barron's Trustees*, May 13, 1886, 13 R. 883, 23 S.L.R. 615; *Sinclair* v. *Clyne's Trustees*, December 17, 1887, 15 R. 185, 25 S.L.R. 172.

At advising—

LORD SALVESEN—In this case the Lord Ordinary has interdicted the respondent from proceeding with a claim under the Agricultural Holdings Act; and has also interdicted the arbiter appointed by the Board of Agriculture and Fisheries on his application from entertaining his claim. The ground of decision is that by the terms of his lease with the complainer the respondent agreed to give notice of his claim one month before the termination of his tenancy, which he has admittedly failed to do. If the matter depended entirely upon contract, there would be no doubt of the soundness of the judgment under review; but the respondent relies upon section 36 of the Agricultural Holdings (Scotland) Act 1883, which provides that—[*quotes, v. supra in rubric*]. He argued that the effect of the clause in the lease stipulating for a month's notice of the claim had, in the circumstances, deprived him of the right which he would otherwise have had; and that this clause is struck at by the section quoted. In my opinion the respondent is right. Under the Act of 1883 and Amending Act of 1900 the tenant is given an absolute right to compensation on quitting his holding on the determination of a tenancy, provided that before such termination he gives notice of his claim. The Lord Ordinary holds that the forfeiture of this right has arisen through the tenant's own failure to implement an obligation which on the face of it does not deprive him of the right to claim compensation, but only stipulates that he will make his claim within a certain period. I cannot assent to this view. His failure to lodge a claim within a month of the determination of his tenancy would not have affected his right under the Act at all but for the agreement which he entered into with his landlord. That agreement, on the face of it, deprives the tenant of the benefit which the Acts conferred upon him of making a claim for compensation at any time before the determination of his tenancy. It cannot be said that it was unreasonable for the landlord to stipulate for a month's notice, or for the tenant to agree to such a stipulation; but if the agreement results in the tenant being entirely deprived of his right to claim compensation, which he would not be but for the agreement, it is, in my opinion, void under the Act. The contemplation of the Act is that the tenant shall have a right to claim compensation if he gives notice before his tenancy expires; and any agreement by which that right is taken away is an agreement which I think clearly deprives him of such right. If the Lord Ordinary's view were sound any number of stipulations might be made, a failure to comply with any one of which would result in the tenant being deprived of his claim—for in such a case it could always be said that his difficulty arose through his own failure to implement obligations which on the face of them had not deprived him of his right to claim compensation.

In my opinion this is sufficient for the decision of the case, for the respondent's position is not altered or affected by section 5 of the 1883 Act, under which—[*quotes, v. sup.*] Now in this case it is common ground that the tenant cannot claim under the terms of his lease, for he has failed to give the stipulated notice of his claim. He is thus not secured in compensation, and unless he has a right to claim under the provisions of the Act itself his claim for compensation is gone. This section plainly contemplates a claim being possible under the agreement at the time when the arbitration is commenced, and such a claim will exclude the claim under the Act if the arbiter is of opinion that, having regard to the circumstances existing at the time it was made, the agreed-on compensation was fair and reasonable. But the arbiter here has no power to award compensation in terms of the agreement, although it may be that he is entitled to look at it in estimating the amount to be awarded under the Act—a matter on which I express no opinion. I have therefore come to the conclusion that the interlocutor of the Lord Ordinary must be recalled, and that the prayer of the note should be refused.

LORD ARDWALL—I agree with the opinion just delivered by Lord Salvesen. I wish, however, to say that I hold that opinion as applying only to the condition which we have under consideration in this case. For I can figure certain conditions which would not be void as involving illegal deprivation of the benefits of the Act.

LORD DUNDAS—I am of the same opinion. The argument in this case was (quite properly) conducted by reference to various sections of the Agricultural Holdings Acts of 1883 and 1900 respectively, because though both these statutes have now been entirely repealed by the Act 8 Edw. VII, c. 64, the repeal did not take effect until 1st January 1909, a date subsequent by a few weeks to the termination of the ten-

ancy here under consideration. The point involved is exceedingly short and sharp though not without difficulty. I think the Lord Ordinary's interlocutor is wrong and must be recalled. The substitution of a scale of compensation by the agreement of parties for that upon which the tenant would be entitled to be compensated under the Act is quite legal, provided that the substituted compensation is fair and reasonable, which for present purposes I assume it to be in this case. There is no averment to the contrary in the pleadings, and the presumption is very strong to that effect. But the agreement between the parties went further than a mere scheme of substituted compensation, for it adjected a provision that "no claim for compensation under the said Acts or under these conditions shall be made by the tenant later than one month prior to the determination of the tenancy." This provision is certainly a variation of and an encroachment upon the tenant's statutory right to delay making his claim until the last hour of his tenancy. It was said for the landlord that the provision in itself in no way deprives the tenant of his right to compensation, and that it is not by virtue of the agreement, but only in consequence of his own failure to observe the terms of the condition, that mischief has arisen or could arise. But the point seems to me to lie deeper down; and 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.

LORD JUSTICE-CLERK — I concur with your Lordships.

The Court recalled the interlocutor of Lord Guthrie dated 13th January 1910, repelled the reasons of suspension, and refused the interdict.

Counsel for the Complainer—Johnston, K.C. — A. R. Brown. Agents — Skene, Edwards, & Garson, W.S.

Counsel for the Respondent — Morison, K.C.—Jamieson. Agent — James Purves, S.S.C.

Wednesday, December 21.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* AYR MAGISTRATES AND OTHERS.

(*Vide Glasgow and South-Western Railway Co.* v. *Hutchison*, 1908 S.C. 587, 45 S.L.R. 444; and *Glasgow and South-Western Railway Co.* v. *Magistrates of Ayr*, 1909 S.C. 41, 46 S.L.R. 57.)

Burgh — Police—Street — Private Street — Railway—Road Forming "Part of Any Railway"—Railway Lines Forming Obstruction in Street—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 4 (31)—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, c.* 33), *sec.* 103 (5) *and* (6).

The Burgh Police (Scotland) Act 1892, sec. 4 (31), enacts—"'Street' shall include any road, highway, bridge, quay, lane, . . . thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

A railway company brought an action against the magistrates of a burgh, in which they sought declarator (1) that a certain strip of ground in the burgh known as Oswald Road, which they had in 1889 acquired for "extraordinary purposes," and over which there was a public right-of-way, formed part of a railway within the meaning of section 4 (31) of the Burgh Police (Scotland) Act 1892, and was not a "private street," and (2) that the pursuers were entitled to use it for the purposes of their railway as they might think proper. They also craved interdict against the magistrates proceeding with a resolution to cause the road to be freed from obstructions (*i.e.*, a double line of rails which the company had in 1908 laid down upon it) and to be properly levelled.

Held that Oswald Road was not part of a railway at the date of the passing of the Burgh Police (Scotland) Act 1892; that it then became by force of the definition contained in that Act a "private street"; and that the railway company could not thereafter transform it into a railway by laying rails upon it so as to bring it within the exception contained in the Act.

Held further that the rails formed an "obstruction" within the meaning of section 104 (2) (*d*) of the Burgh Police (Scotland) Act 1903, and that the magistrates were entitled to have them removed.

Stewart v. *Greenock Harbour Trustees*, June 8, 1864, 2 Macph. 1155, *followed.*