

the latter portion of that section. In the latter part it is, no doubt, true that the reference is to "the days and hours aforesaid," but that, in the case of spirits, must in my opinion be read as the previous part falls to be read, namely, to the effect of excluding Saturdays and the hours on other days (other than Sundays) from 6 p.m. to 8 p.m.

I therefore agree that both questions should be answered in the affirmative.

LORD JUSTICE-CLERK—I have had an opportunity of reading the opinion of Lord Dundas, and I concur in the result at which he arrives.

The Court answered both questions of law in the affirmative and sustained the appeal.

Counsel for the Appellant—Solicitor-General (Morison, K.C.)—M. P. Fraser. Agent—Sir William S. Haldane, W.S., Crown Agent.

Counsel for the Respondent—Constable, K.C.—T. G. Robertson. Agents—J. W. Douglas Gardiner & Mill, S.S.C.

COURT OF SESSION.

Friday, February 25

SECOND DIVISION.

[Jury Trial.]

WILSON v. DICK'S CO-OPERATIVE INSTITUTIONS, LIMITED.

Process—Jury Trial—Bill of Exceptions—Form of Bill—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 35.

Exceptions to the charge of the presiding judge at a jury trial *disallowed*, in respect that the bill of exceptions was not properly framed in omitting to set out in detail not only that exception was taken to the negative statement of the judge but also the evidence which the pursuer asked the judge to direct the jury to consider, and also in respect that the whole of the notes of evidence were printed as an appendix to the bill instead of relevant excerpts therefrom being embodied in the bill of exceptions itself.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), section 35, enacts—"The bill of exceptions (which may be subsequently prepared, and of which notice shall be given as in the case of a motion for a new trial), shall consist of a distinct statement of the exception or exceptions so noted, with such a statement of the circumstances in which the exception or exceptions were taken (including, if necessary, a statement of the purport of the evidence or extracts therefrom so far as bearing upon such exception or exceptions, but without any argument), as, along with the record in the cause, may enable the Court to judge of such exception or exceptions; and unless the

party excepting shall choose, or the judge at the trial, or the Court at the discussion of the bill, shall so direct, it shall be unnecessary to print or submit to the Court the notes of evidence or the documentary evidence adduced at the trial; and when such notes and documents are submitted to the Court they shall form no part of the bill of exceptions; and in discussing a bill of exceptions it shall be competent for either party to refer to the record and to every document produced and put in evidence at the trial, and the notes of evidence at the trial may be produced and founded on at any time."

William Ferrier Wilson, residing at Townhill Road, Dunfermline, *pursuer*, presented a bill of exceptions against a ruling of Lord Hunter in a trial by jury of an action of damages for personal injuries at his instance against Dick's Co-operative Institutions, Limited, East Port, Dunfermline, *defenders*.

The issue was as follows—"Whether on or about 19th April 1915, and at or about a point in the main road from Inverkeithing to Aberdour where it is joined by a road leading from Dalgety Church, the pursuer and his motor bicycle were run into and injured through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The bill of exceptions stated, *inter alia*—"And upon the trial of the said issue evidence was led for the pursuer and for the defenders, whereof sufficient excerpts for the purposes of this bill are set forth in the Schedule hereto appended (Appendix I). . . . After the evidence for the defenders was closed, counsel for the parties addressed the jury, and his Lordship proceeded to charge the jury. At the end of the charge counsel for the pursuer intimated that he excepted to that part of his Lordship's charge in which he charged the jury that there was no evidence on which they could find special damage to the pursuer's business. The jury, having retired, returned at the end of three hours and brought in a verdict for the pursuer by a majority, and assessed the damages at £100."

Appendix I contained the whole of the notes of evidence.

At the hearing counsel for the defenders argued that the bill of exceptions was not in proper form and should be refused, and cited—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 35; *Baird v. Reilly*, 1856, 18 D. 734; *Connelly v. Clyde Navigation Trustees*, 1902, 5 F. 8, 40 S.L.R. 14; *Wood v. North British Railway Company*, 1899, 2 F. 1, 36 S.L.R. 407; Mackay's Manual of Practice, p. 363.

Counsel for the pursuer moved for a new trial and maintained that the bill of exceptions was in proper form.

LORD JUSTICE-CLERK—I think there are several answers to this bill of exceptions so far as it deals with the judge's charge. I do not think it is properly framed. All we are told is that at the end of the charge counsel for the pursuer intimated that he excepted to that part of his Lordship's charge in which he charged the jury that there was no evi-

dence on which they could find special damage to the pursuer's business. The bill ought to have set out in detail not only that exception was taken to that statement, but also that the Lord Ordinary was asked to direct the jury affirmatively that in respect of the evidence adduced—and the particular evidence founded on—should have been set out or referred to—they should consider the question of evidence as to special damage. If the judge thought there was no evidence at all he was, of course, quite right in giving the direction he did. Without having a specific statement on the face of the bill of exceptions itself, however, as to the evidence which the pursuer asked the judge to direct the jury to consider, I think it is impossible for us on a bill of exceptions to say that there was any error on the part of the judge in directing the jury as he did. Though not cited to us, I desire to refer also to Scott and Brand's Court of Session Act 1868, sec. 35, and notes thereto. It is said in the bill that sufficient excerpts of the evidence for the purposes of this bill are set forth in the schedule hereto appended. No such excerpts are appended. But the evidence as a whole was printed. The case of *Baird*, 18 D. 734, to which we were referred, and especially the opinions of the Lord President and Lord Deas, support the view that so far as this part of the bill is concerned it is not in proper form. Further, it was stated in the course of the argument that the Judge explained in his charge what "special" damage was, and no exception was taken to his charge in this respect, and the terms of the charge on the point are not before us. [*His Lordship then dealt with the other objections to the bill of exceptions.*]

LORD DUNDAS—I agree. I think that the proper procedure is stated by Mr Mackay in his Manual at page 364, where he says—"The bill of exceptions must state both the direction complained of and the law which the exception maintains should have been stated;" and the case of *Baird*, 18 D. 734, seems to bear that out. I may add that I think this bill of exceptions is out of shape in another respect. In the bill itself we are told that "sufficient excerpts" of the evidence "for the purposes of this bill are set forth in the schedule hereto appended (appendix I)," but I find that appendix contains the whole of the evidence adduced at the trial. That is not right. I think the correct procedure was that the bill itself should contain such passages of the evidence as were necessary to establish the points which it was desired to raise, and that no more of the evidence ought to have been printed.

LORD SALVESEN—[*After dealing with the other objections to the bill of exceptions*]—With reference to what Lord Dundas has said, I think it is an unheard-of thing in a bill of exceptions for the person excepting to print the whole of the notes of evidence taken at the trial. It is plainly contemplated by the Court of Session Act that a bill of exceptions shall be complete in itself, and that upon the facts and statements made in that bill the Court shall be in a

position to dispose of it. I have never known of notes of evidence being printed as an appendix to a bill of exceptions. I dare say confusion has arisen from the fact that sometimes we have both a bill of exceptions and a rule to show cause, for the latter of which it is necessary to print the notes of evidence, and then the two matters are generally heard together. But here there is no objection to the verdict except the bill of exceptions, and everything that is necessary for the discussion of that bill should be contained within it.

LORD GUTHRIE and LORD HUNTER concurred.

The Court refused the bill.

Counsel for the Pursuer—Sandeman, K.C.—Duffes. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Watt, K.C.—M'Laren. Agent—John Robertson, Solicitor.

Tuesday, March 7.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

FOWLER v. BROWN.

Compensation—Expenses—Process—Competent and Omitted—Suspension—Charge for Expenses—Compensation after Decree—Act of 1592, cap. 143.

It is competent to plead compensation in a suspension of a charge for expenses notwithstanding that it has not been pleaded before the decree for expenses has been pronounced.

Fleeming v. Love, 1839, 1 D. 1097, 14 Fac. 1097, followed.

The Act of 1592, cap. 143, enacts—"That any debt *de liquido ad liquidum* instantly verified be writ or aith of the party before the giving of the decreete, be admitted be all judges within this realme, be way of exception, bot not after the giving thereof in the suspension, or in reduction of the same decreete."

Miss Mary Fowler, residing at Mount Clare, Rothesay, complainer, brought a note of suspension and interdict against James Campbell Brown, house factor, Glasgow, as assignee of John Fowler, Argyle Street, Glasgow, conform to assignation by the said John Fowler, dated 24th and intimated 25th February 1915, respondent, in which she craved the Court to suspend a charge at the instance of the respondent for payment of £44, 4s. 6d., being the taxed amount of an account of expenses incurred by John Fowler, his author, in a petition at the instance of the complainer and another, and that in respect that the respondent was owing to the complainer a liquid sum of a larger amount than that claimed.

The complainer pleaded—"1. The complainer is entitled to have the said charge suspended in respect that (1) the cedent John Fowler was and is liable to her in liquid sums of far larger amount than the sums assigned