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 daresay 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 ony 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

by him to the respondent; (2) there was *concursus debiti et crediti* between the complainer and the said cedent prior to the assignation founded on by the respondent; (3) the respondent, as assignee of the said John Fowler, is liable to all pleas competent against his author when the assignation was made; (4) the complainer is not due any sum to the respondent."

The respondent pleaded—"(4) The complainer is barred by the exception of competent and omitted from now pleading compensation in the present proceedings."

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 13th November 1915 sustained the first plea-in-law for the complainer and suspended the charge complained of.

Opinion.—"Miss Fowler, the complainer in this suspension, seeks to suspend a charge at the instance of Mr J. C. Brown as assignee of Mr John Fowler, brother of the complainer, for payment of sums of £44, 4s. 6d. and £1, 9s.

"In 1869 William Fowler, brother of the complainer and Mr John Fowler, conveyed to the said John Fowler his whole estates, heritable and moveable, under burden of certain debts, annuities and conditions mentioned in the disposition. Among the annuities was one of £150 payable to the complainer during her lifetime, beginning at the term of Whitsunday 1870 for the half-year succeeding and thereafter half-yearly.

"The annuity payable to the complainer appears to have fallen early into arrear. In 1892 she raised an action against her brother for payment of the amount she claimed as due to her. This action was settled by John Fowler granting a bond and disposition in security over his heritable property for payment of £2000 and interest at 2½ per cent. per annum, the principal sum being payable at Whitsunday 1907. Of this sum there still remains due to the complainer £1935 of the principal sum. The annuity which was payable independent of the bond has further fallen into arrear. The respondent admits that payment has not recently been made of this annuity, as a heritable creditor has taken possession of the heritable property which constituted the main assets conveyed by William Fowler to his brother John Fowler. It is explained that this heritable creditor is the respondent, who manages Mr John Fowler's heritable properties.

"In 1913 the complainer presented a petition to the Junior Lord Ordinary to have a factor appointed upon John Fowler's heritable properties. Answers were lodged in the name of John Fowler. The prayer of the petition was refused by the Lord Ordinary and the complainer was found liable to John Fowler in the expenses incurred by him in connection with the application. These expenses were taxed at the sum of £44, 4s. 6d., the dues of extract being £1, 9s.

"By assignation dated 24th February and intimated to the complainer 26th February 1915 the said John Fowler assigned these sums to the respondent, who, after receiving liberty to proceed with diligence, charged the complainer on 29th April 1915 to make payment thereof. The complainer maintains that she is entitled to compensate the amount for which she is charged to make payment by an equivalent amount of the much larger sums due to her as she maintains by John Fowler at the date of the assignation.

"The first point taken by the respondent is contained in his fourth plea to the effect that the complainer is barred from pleading compensation as she did not plead it at the time when decree was pronounced. According to the respondent compensation is not pleadable at common law, but only under the Act 1592, cap. 143, which provides that any debt be admitted by way of exception before giving decree but not thereafter in a suspension or reduction of the decree. The complainer founded upon certain cases—*Pollock* v. *Scott*, 1831, 9 S. 432; *Fleeming* v. *Love*, 1839, 1 D. 1097, more fully reported in Faculty Decisions 1097, and *Gordon* v. *Davidson*, 1865, 3 Macph. 938—as showing that compensation could be pleaded in a suspension of a charge for payment of expenses decerned for. I propose to refer in detail only to *Fleeming* v. *Love*.

"In that case A held a decree for a debt against B, who afterwards obtained decree against A for the expenses of a certain process which were of smaller amount than the decree held by A. The decree for expenses was extracted in the name of B alone, and a charge for payment was given in his name alone. A presented a bill of suspension on the ground of compensation; appearance was made for the agent of B in support of the charge, who pleaded that he could not be affected by any plea of compensation as between A and B, and that the charge was truly given for his behoof. The Court held, reversing the judgment of Lord Fullarton, that the agent's appearance was too late, that A had already a *jus quæsitum* in compensating the debt of expenses due to B, and that the letters ought to be suspended. It may be noted that the plea of competent and omitted was put forward by the charger and repelled both by Lord Fullarton and the Inner House. In dealing with this point Lord Fullarton said "The plea of the charger is the more untenable here, as the decree charged on was for a sum of expenses, which from the form of procedure did not admit of any defence on the ground of compensation." The judges in the Inner House do not appear to have dealt in their opinions with this point, but they could only have reached a conclusion adverse to the charger on the footing that this view of Lord Fullarton's was sound. It was argued that this decision was not authoritative, because it does not appear that the Act of 1592 was founded upon. I do not agree. The record in the present case has no reference to the Act, and the plea which I am now asked to sustain is identical with one of the rejected pleas in that case. No counsel was able to refer me to any case in practice where a plea of compensation had been put forward by a party at the time when decree for expenses was given against him. I am satisfied that the invariable practice of the

profession has been to plead compensation against a decree for expenses in a suspension. The next case to the present argued in the procedure roll before me was a suspension of a decree for expenses on the ground, *inter alia*, of compensation. It was not argued that it was incompetent in a suspension to plead compensation against a decree for expenses, and it appeared to be a matter of as great surprise to counsel in that case as to myself that such a plea was maintainable. I consider the decision of *Fleeming* binding upon me as an authority for repelling the fourth plea of the respondent." [*His Lordship then proceeded to deal with another point on which the case is not reported.*]

The respondent reclaimed, and argued—Compensation was not pleadable at common law, but only under the Act of 1592, cap. 143, under which it must be pleaded before decree, and could not be raised afterwards in a suspension—Bell's Prin., sec. 572; Ersk. iii, 4, 12; Stair, i, 18, 6; Kames' Principles of Equity (1828 ed.), vol. i., 395; 2 Bell's Comm. 120 (M'Laren's ed.); Balfour's Practicks, p. 349; *Nicoll* v. *Blair*, 1664, 2 Brown's Sup. 340; *Gordon* v. *Melville*, 1707, Mor. 2642; *Anderson* v. *Shaw*, 1739, Mor. 2646. The statute was express authority on the matter, and left no room for a development of the common law in a contrary sense. Equity was in the reclaimer's favour, because he had been deprived of an opportunity to propone an argument which he otherwise might have done. *Fleeming* v. *Love*, 1839, 1 D. 1097, founded on by the Lord Ordinary, had not been recognised in the books as laying down anything with regard to compensation—Mackenzie's Institutes, iv, 3, 368; Bankton, i, 493; Mackenzie's Observations on the Statutes, 269. Compensation did not operate *ipso jure*—*Cowan* v. *Gowans*, 1878, 5 R. 581, 15 S.L.R. 315—but required to be pleaded and sustained. There was no distinction between a decree for a principal sum and expenses. In *Fleeming* v. *Love* (*cit.*) there was nothing to show that the Court differed from Lord Medwyn's opinion in the Outer House. The Court in that case were really concerned with the appearance in the process of a third party, viz., the agent. *Pollock* v. *Scott*, 1831, 9 S. 432, and *Gordon* v. *Davidson*, 1865, 3 Macph. 930, cited by the Lord Ordinary, were not in point. No doubt the Act had been relaxed to a certain extent, *e.g.*, balancing of accounts in bankruptcy—*Shiells* v. *Ferguson, Davidson, & Company*, 1876, 4 R. 250, 14 S.L.R. 172—and where a suspender was out of the country. In these cases, however, the reason for relaxation was want of opportunity for pleading the statute. In the present case there had been an opportunity to propone the plea of compensation, and it could be pleaded against a finding for expenses—*Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1907 S.C. 442, 44 S.L.R. 364; *Grieve's Trustees* v. *Grieve*, 1907 S.C. 963, 44 S.L.R. 737. There was a further apparent exception in the case of illiquid claims, but this was to be explained not on the principle of compensation but of retention—Bankton, i, 24, 4; Ersk. Inst., iii, 4, 19; *Logan* v. *Couts*, 1678, Mor. 2641; *Paterson* v. *M'Aulay*, 1742, Mor. 2646. It was therefore too late to raise the question in a suspension, and the plea of competent and omitted applied—*Rennie* v. *James*, 1908 S.C. 681, 45 S.L.R. 528. In any event, before any plea of compensation had been pleaded against the reclaimer the case had passed into the region of a judgment debt and decree had been extracted, and compensation could not be pleaded against a judgment debt—*Paolo* v. *Parias*, 1897, 24 R. 1030, 34 S.L.R. 780.

Argued for the complainers—The exact meaning of the Act of 1592 was not vital to a decision of the case. Erskine and Bell took different views of the Act, but it was sufficient for the complainer to say it was doubtful whether the Act introduced the law of compensation or merely regulated it. The presumption, however, was that it existed prior to the Act because it existed in the Roman law on which Scots law was based. But in any event the Act had no bearing on a decree for expenses—*Brownlee* v. *Tennant*, 1855, 17 D. 422, *per* Lord Cowan at p. 424. At the date of the Act it was not the custom to conclude in a summons for expenses. The matter was for the equitable jurisdiction of the Court and its rules and practice—*British Motor Body Company, Limited* v. *Thomas Shaw (Dundee), Limited*, 1914 S.C. 922, 51 S.L.R. 812. A decree for expenses was not a liquid claim till the reclaiming days had expired and the Auditor's report had been approved. A mere finding for expenses was not sufficient. It must be an extracted decree. The statute clearly contemplated that everyone should have an opportunity at least once of stating his intention as regards compensation. It being clear, therefore, that a litigant could not have this opportunity as regards expenses in the original action, he must have it later, and the appropriate occasion was in a suspension. In the present case the decree had been assigned to an assignee, and the cases on agent-disbursee, who was not regarded as a true assignée, had nothing to do with the case. The case of *Gordon* v. *Davidson*, 1865, 3 Macph. 938, showed that expenses could always be compensated except in the exceptional case of agent-disbursee, which was merely an expedient and illogical. The present cases was ruled by *Fleeming* v. *Love* (*cit. sup.*) Lord Fullarton's opinion in that case was authoritative on the question, and the Court could not have reached the conclusion they did if they had not adopted it. The Act in any event had been subject to many common law modifications, *e.g.*, the rule as to instant verification—*Seton*, 1683, Mor. 2566; *Ross* v. *Magistrates of Tayne*, 1711, M. 2568; *Munro* v. *Macdonald's Executors*, 1866, 4 Macph. 687.

At advising—

LORD JUSTICE-CLERK—In this case the two points which were raised before the Lord Ordinary were again argued before us. I agree with the Lord Ordinary as to both. The first is whether the plea of compensation can be given effect to in the circumstances of this case. I shall assume

that the principle on which that plea is founded was introduced into our law by the Statute of 1592.

But our Scots Acts of these and even later times were interpreted by our Courts with a freedom which would not be thought legitimate in the present day. The interpretation of statute law was indeed itself made matter of statutory enactment in 1427 by the Act of the seventh Parliament of James I, c. 107, an Act which was formally repealed by the Statute Law Revision (Scotland) Act 1906, but which while in observance was apparently regarded as authorising very elastic canons of construction. For some time after the Act of 1592 was passed the Courts gave it a strict interpretation as is shown by cases reported in M. 2564, 2565; that interpretation was, however, departed from apparently for the first time in the case of *Seton*, M. 2566, which decision was spoken of by the reporter as "reversing the Act," and he added that "though it be materially just, yet it is a great relaxation of our ancient form." This later decision, however, was subsequently adopted and followed as sound.

So too the competency of the plea of compensation after decree, and in the suspension thereof, at least so far as expenses were concerned, came to be given effect to as is evidenced by the case of *Fleeming* v. *Love*, which the Lord Ordinary founds on. That decision was accepted as one of an established series of cases which had fixed the law—*Miller* v. *Geils*, 10 D. 1384. Moreover, one of the main arguments relied on for vindicating the agent-disburser's rights was founded on the view that compensation was pleadable after decree between the clients so far as expenses were concerned. I am of opinion with the Lord Ordinary, following the case of *Fleeming*, that the first plea-in-law for the complainer is well founded.

LORD DUNDAS—I am of the same opinion. Two questions were argued—one of more or less general, the other of purely special, application. The first question is, I think, concluded by authority. The Lord Ordinary in deciding it in favour of the complainer held himself bound by the case of *Fleeming* v. *Love*. I think that is a decision directly in point and it is binding upon us. It would, no doubt, be within our power to take steps, if we thought fit to do so, to have the case of *Fleeming* v. *Love* reconsidered by a fuller Bench; but for my own part I see no reason to doubt the soundness of the opinions expressed upon this matter by the very learned Judges who decided that case. What I have said appears to me to afford a sufficient ground for the present decision. It is not therefore necessary, and I do not desire, to offer any opinion as to other and wider topics discussed at the debate. . . .

LORD SALVESEN—We had a learned argument in this case with a full citation of authorities, mostly of very ancient date. The respondent's contention may be thus summarised—Prior to 1592 the common law of Scotland did not recognise compensation even of liquid debts. This was first introduced by the Scots Act 12 James VI, cap. 143, which at the same time provided that if compensation were not pleaded by way of exception, and decree passed for a debt, compensation could not afterwards be pleaded as a ground for suspending or reducing the decree. Assuming these propositions to be universally applicable, it followed that as compensation had not been pleaded before the decree for expenses on which the charge in this case proceeds was pronounced, it is incompetent to plead it as a ground of suspension.

The first of the respondent's propositions in law is supported by the authority of some of the institutional writers. When it is traced to its source, however, it appears to rest on a passage in Balfour's Practicks. It is doubted by Mr Bell in his Commentaries, who points out that as the Roman law, from which so much of our common law is derived, fully recognised the doctrine, it seems unlikely that it should have been excluded at any time in our law. The Statute of 1592 does not militate against this view, for the first clause may have been merely declaratory of the common law, and the statute would in that case be directed towards preventing unnecessary expense and delay by requiring compensation to be pleaded in the original action in which a debt was sought to be constituted. The point is, however, academic, for it is the latter clause of the statute with which alone we are concerned.

What, then, is the scope of the old Scots Act? I think it plainly applies only to debts which were liquid in the sense of being capable of instant verification at the time when the decree was pronounced. Further, it assumes that the defender in the original action had an opportunity of pleading compensation before decree passed and failed to take advantage of it. The penalty of his failure is not the extinction of his claim of debt, but merely that he shall not be permitted to impede execution by proponing his counter-claim in a suspension or reduction, because he ought to have put it forward in defence to the original claim. But the Act is not applicable where the claim on which compensation is pleaded in a suspension was not liquid at the time when the decree was granted, but has become so before the charge on it was given or before the suspension is disposed of, or where the defenders in the original action had no opportunity of pleading compensation as a bar to decree.

Both of these exceptions apply to the present case. The proceeding in which the expenses now in question were awarded was a petition for the appointment of a judicial factor. The present complainer was the petitioner, and the judgment was one dismissing the petition and finding the petitioner liable in expenses. Up to that point the contentions of the complainer could not have been put forward. It was, however, suggested that when the respondent moved for approval of the auditor's report and for decree in terms of it the petitioner should have pleaded her claim in respect of the arrears of her annuity, and should have moved the Court to refuse decree on the ground that it

exceeded the sum of expenses incurred to the respondent. This would have been, so far as my experience goes, an unprecedented demand, and one to which, as Lord Ordinary, I should certainly not have acceded. It would have involved a new record on a point which might be entirely unconnected with the subject-matter of the petition and thereby initiate a new litigation.

On principle, therefore, I should have been prepared to decide the question against the reclaimer. But I further agree with the Lord Ordinary that so far as we are concerned it is settled by authority. The only matter dealt with in the opinion of the Inner House in *Fleeming's* case does not arise here, but the exact point was dealt with by Lord Fullarton, and the ultimate decision involved an affirmance of his view as stated in the passage quoted by the Lord Ordinary. . . .

LORD GUTHRIE concurred.

The Court adhered.

Counsel for the Reclaimer—A. O. M. Mackenzie, K.C.—Morton. Agents—Norman Macpherson & Dunlop, S.S.C.

Counsel for the Respondent—M'Lennan, K.C.—W. J. Robertson. Agents—Thomas & William Liddle, W.S.

Saturday, March 11.

SECOND DIVISION.

[Lord Hunter, Ordinary.

CARMICHAEL *v.* HECTOR AND OTHERS.

School—School Board—Membership—Disqualification—"Holding Office of Profit"—Pensioner—Education (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 78), *sec.* 21.

The Education (Scotland) Act 1878, section 21, enacts—"No person holding an office of profit under a school board in any parish or burgh shall be eligible or shall be capable of acting as a member of such school board. . . ." *Held* that the words "holding an office of profit" in above section did not apply to a pensioner of the school board so as to render him ineligible for nomination as a candidate for election to, and for membership of, the school board.

The Education (Scotland) Act 1878 (41 and 42 Vict. cap. 78), section 21, is quoted *supra* in rubric.

John Nelson Carmichael, Margaret Place, Aberdeen, *pursuer*, brought an action against (1) Thomas Hector, clerk and treasurer of Aberdeen School Board, returning officer at the election of the School Board of the burgh of Aberdeen, alleged to have taken place on or about 16th April 1914; (2) Alfred Beaumont, Aberdeen, and others, being the persons alleged to have been elected members of the School Board at the said election; and (3) the School Board of the Burgh of Aberdeen, *defenders*, for declarator "that the pursuer was on 1st April 1914, and presently is, eligible for nomination as a candidate for election to and for membership of the School Board of the burgh of Aberdeen, and (second) this being so found and declared, or whether this be found and declared or not, the defender the said Thomas Hector, as returning officer foresaid, ought and should be decerned and ordained by decree of the Lords of our Council and Session to exhibit and produce before our said Lords a pretended decision made and intimated on or about 1st April 1914 by the said Thomas Hector, as returning officer foresaid, whereby he declared to be invalid a nomination paper or papers lodged in his hands on or about the said 1st April 1914 nominating the pursuer as candidate at the election of the said Aberdeen School Board, and the said pretended decision ought and should be reduced by decree of our said Lords, and the pursuer reponed and restored thereagainst *in integrum*."

Defences were lodged for Thomas Hector and the School Board of Aberdeen.

The pursuer pleaded—"(1) The pursuer having, on 1st April 1914, been and being now, eligible for election as a member of the School Board of the burgh of Aberdeen, is entitled to decree in terms of the declaratory conclusions of the summons. (2) The pretended decision of the returning officer declaring the pursuer's nomination invalid, being illegal and improper, should be reduced as craved."

The defenders pleaded—"(4) The pursuer being a person 'holding an office of profit' under the School Board, within the meaning of the Education (Scotland) Act 1878, section 21, and the Order in Council of the Scotch Education Department of 25th November 1913, section 8, was ineligible for nomination as a member of the Board, and the defenders are therefore entitled to absolvitor."

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 4th December 1915 sustained the first plea-in-law for the pursuer and decerned against the compearing defenders in terms of the declaratory conclusions of the summons.

Opinion.—"The pursuer in this case, who was formerly a manual instructor under the Aberdeen School Board from December 1895 until March 1911, has brought an action to have it found and declared that he is eligible for nomination as a candidate for election to and for membership of the School Board of the burgh of Aberdeen. There is also a conclusion for reduction of a letter by the Clerk of the School Board acting as returning officer, intimating that in connection with an election for the School Board in April 1914 he held the pursuer's nomination as a candidate for a seat on the Board to be invalid. The defenders in the action are the Clerk of the School Board and the members of the School Board.

"The only question that was raised in the case is whether, as put by the Clerk in his letter, in respect that as a former manual instructor in the Board's service he draws a