against the pursuer for a certain sum. The whole extract from the record published by the defenders being true, and being a record of what took place in a public Court, I think the pursuer has no ground for his present claim.

LORD MONCREIFF—I am of the same opinion. I do not think it is necessary to consider whether technically this is a decree in absence or a decree *in foro*. In the "black list" complained of I think the defenders have sufficiently made it plain that they did not enter that decree as a decree in absence in the ordinary sense of the word. They have a long list of decrees in absence, and they have a separate list in which they enter decrees in which appearance has been made at earlier stages of the case, but not when the decree was pronounced. But the true complaint here for the pursuer is that the entry in the list is not a true excerpt of the entry in the register. Now, if anything had been omitted which would have aided the pursuer there would have been a good deal to be said for it. But I do not think he is prejudiced in the least by the omission made here. In the first place, if the entry itself, the true entry in the register, had been inserted in full, it *ex facie* would have disclosed a decree in absence, and nothing else. There was no entry of any appearance having been made on behalf of the defender at an earlier diet. On the contrary, what appears is that the pursuers were present and the defender absent, and finally that decree for £2, 0s. 10d. was given. But it has been said that if the amount sued for had been inserted it would have shown that, as decree was only given for £2, 0s. 10d., appearance must have been made and objection taken at an earlier stage. I do not think that that is a necessary inference, because the pursuer might have restricted his claim or the Sheriff might have suggested its restriction. On the whole matter I think there is really no relevant substance in the pursuer's averments.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent —Orr—J. C. Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers —Salvesen, K.C.—T. B. Morison. Agent—George F. Welsh, Solicitor.

Thursday, October 16.

FIRST DIVISION.

[Jury Trial.

CONNELLY *v.* TRUSTEES OF THE CLYDE NAVIGATION.

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

Section 35 of the Court of Session Act 1868 provides that "The bill of exceptions . . . 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. . . ."

The pursuer in an action in which the jury returned a verdict for the defenders presented a bill of exceptions, which contained no statement of the circumstances in which the exception was taken beyond the statement that the Judge had given a certain direction for which he was requested by the pursuer to substitute another. There was no statement of the purport of the evidence.

The Court (1) *refused* the bill of exceptions, and (2) refused to grant leave to amend by printing the notes of the evidence.

An action was raised by John Connelly, labourer, Glasgow, against the Trustees of the Clyde Navigation for payment of the sum of £300 as damages in respect of injuries sustained by him in an accident, which the pursuer alleged occurred through the fault of the defenders' employee.

The pursuer at the time of the accident was working in the hold of a vessel which was discharging iron ore by means of a steam crane and four buckets belonging to the defenders. One of the empty buckets fell upon him and caused the injuries in respect of which the present action was raised.

The pursuer averred that the accident occurred through the fault of the craneman, an employee of the defenders.

The defenders averred that "the accident was caused or materially contributed to through the fault of the pursuer's fellow-servants or by himself." They further averred that they hired out to the stevedore the crane and a man to work it, and that the craneman was "bound to obey the orders given to him by the stevedore, his foremen, and men, and *pro hac vice* the craneman was the servant of the stevedore."

The case was tried on 17th March 1902 before the Lord President and a jury on

the following issue:— "Whether on or about 14th August 1901, and aboard the s.s. 'Kathleen,' at or near the General Terminus Quay, South Side, Glasgow, the pursuer was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The jury returned a verdict in favour of the defenders.

The pursuer presented a bill of exceptions, which contained the following statements:—"And upon the trial of the said issue the counsel for the parties adduced evidence to maintain and prove their respective contentions. After evidence for both parties had been closed and their respective counsel had addressed the jury, the Lord President charged the said jury, and in the course of his address, *inter alia*, directed them as follows, viz.:—'That if the jury are satisfied upon the evidence that the stevedore or his men had such a kind or degree of control over the craneman as to make him a servant of the stevedore in the unloading of the 'Kathleen,' the defenders are not liable for fault or negligence on the part of the craneman while so employed.' The pursuer's counsel thereupon asked the Lord President to deliver to the jury, in place of the said direction, the direction following, viz.:—'That if the jury are of opinion that the pursuer's injuries were due to the fault of Hall (the craneman), and that Hall was in the employment of the defenders, having been selected, engaged, and paid, and being liable to be dismissed by them, the pursuer is entitled to a verdict in his favour.' Which direction his Lordship refused to give. Whereupon counsel for the pursuer excepted. And the jury did thereafter deliver their verdict in favour of the defenders, and it was recorded accordingly."

Counsel for the defenders argued that the form of the bill of exceptions was not in accordance with the provisions of section 35 of the Court of Session Act of 1868, inasmuch as it did not contain a statement of the circumstances with reference to which the direction was given, and of the purport of the evidence so far as bearing thereon.

Counsel for the pursuer argued that the bill of exceptions if read along with the record contained sufficient information to enable the Court to pronounce on the validity of the exception, and alternatively moved the Court for leave to amend the bill of exceptions by printing the notes of evidence.

LORD ADAM—In this case the pursuer in his bill of exceptions has set forth that the trial took place on a certain date, and has also set forth the verdict that was returned. It is set forth that the parties adduced evidence to prove their respective averments, and then that "after evidence for both parties had been closed, and their respective counsel had addressed the jury, the Lord President charged the said jury." A portion of the charge is set forth, and then this follows:—"The pursuer's counsel thereupon asked the Lord President to deliver to the jury, in place of the said direction, the direction following" (and then is set forth the direction which he desired); and that his Lordship refused to give this direction, and thereupon it is stated that counsel excepted to this ruling.

Now the form of a bill of exceptions is now regulated by the 35th clause of the Court of Session Act of 1868, which put an end to the old form. Section 35 says:—[*His Lordship read the section.*] Now it is quite obvious that this Bill is not in form, because it does not set forth on the face of it the circumstances in which the exception was taken so far as bearing on the exception, so that we cannot, according to my opinion, form the slightest idea as to the circumstances under which the direction was asked and refused. It appears to me that there should have been such a statement of the circumstances in which the direction was asked and refused and the charge actually given objected to. But there is none such, and I cannot on reading this bill of exceptions decide whether or no the statutory rule which we have before us is complied with.

It appears to me that, reading it as stated to the jury by the Lord President, the charge is perfectly unexceptionable. The charge which his Lordship gave to the jury was—"That, if the jury are satisfied upon the evidence that the stevedore or his men had such a kind or degree of control over the craneman as to make him a servant of the stevedore in the unloading of the 'Kathleen,' the defenders are not liable for fault or negligence on the part of the craneman while so employed." The jury have by their verdict found for the defenders, and they found therefore that the stevedore had such control over this man as to make him his servant. That appears to me from all that we see to be entirely unexceptionable. It may be that it does not disclose the whole nature of the case, but then it is not said that the charge was wrong—there is no exception to the charge. All that is said is that in place of this direction another direction should have been given, namely, "That if the jury are of opinion that the pursuer's injuries were due to the fault of Hall, and that Hall was in the employment of the defenders, having been selected, engaged, and paid, and being liable to be dismissed by them, the pursuer is entitled to a verdict in his favour." Now it appears to me that that is a direction which in certain circumstances would be good, but it is not a direction which would necessarily be right in all circumstances, or which could properly be made the subject of a bill of exceptions such as this, which does not set forth the circumstances.

There has been a motion made by Mr Watt that the notes of the evidence should be printed. I am averse to that course being followed. I think we cannot amend this bill of exceptions by allowing a print of the notes to be put in now, and I am of opinion that we should hold that the bill is incompetent in point of form.

LORD M'LAREN—There may be cases where a very general statement of circumstances will suffice to enable the Court to judge of an exception. Take the case which I suggested in the course of the discussion, of an exception to the Judge's ruling admitting or rejecting evidence. All that is necessary to raise the question—at least in many cases all that would be necessary—would be to set out the interrogatory that was addressed to the witness and objected to. In such a case no statement of the purport of evidence would be needed to enable the Court to judge whether the evidence was rightly admitted or rightly rejected. There may even be points arising on the Judge's charge which do not depend on the evidence. For example, whether it is competent in an issue to make a joint award of damages, or whether the jury must find separate awards. No statement of evidence would be needed for a question of that kind, but I must say that in the majority of cases of exception to a judge's charge the direction excepted to is given with reference to a particular state of facts, and its validity cannot be judged apart from a statement of the facts with reference to which it is given. That appears to me to be eminently the case with reference to the direction of the Lord President which is said to be—I am not sure whether it is—excepted to. In any case, it is a direction that if the jury should come to a certain conclusion on the facts, then the defenders would not be liable. It seems to me perfectly impossible to judge of the soundness or suitability of such a direction without having the facts before us, either by way of excerpts from the evidence, or by a fair statement of its purport. I am very far from suggesting that such a statement would affect our judgment in this case, because from the explanations given to us in the opening statement, I have every reason to think that the direction given is such as we would have affirmed if all the facts had been before us. Then the direction which it is said ought to have been given appears to me also to depend on facts, because in a certain state of the facts it might have been a very misleading direction. It is conceivable that the facts might have been such as to justify such a direction being given, although I have very great doubts whether this could be said in regard to the present case. I think that the framer of this bill of exceptions has erred by endeavouring to improve upon the Court of Session Act. The Act simplifies the form of a bill of exceptions, but he has simplified the bill to such a degree that it is impossible for us to deal with it. I am of opinion that we must disallow the bill.

LORD KINNEAR—I agree. I should be very reluctant to refuse the motion that the notes of the evidence should be printed and brought before the Court if there were any reason to believe that a consideration of the evidence would alter the conclusion at which your Lordships have arrived, but unless there be very strong reasons for expecting that it would have that effect, I think it would be an extreme hardship to the pursuer to put upon him the expense of printing, with no advantage to the consideration of the case or the decision. I think the evidence would make no difference, for the reason which Lord Adam stated in the course of the discussion. The direction objected to put before the jury the question whether the defenders on the one hand or the stevedore on the other had such a kind or degree of control over the craneman, who is said to have been in fault, as to make him the servant of the one or the other, and the jury by a verdict which is not gainsaid have answered that question by determining that he is the servant of the stevedore, and therefore we should have to read the evidence, if we had it, in view of the fact established by a verdict to which the pursuer does not object that the man was the servant of the stevedore and not a servant of the Clyde Navigation Trustees; and therefore it does not appear to me that we should take any advantage from the production of the evidence. But I agree with your Lordships that without some statement of the purport of the evidence—some statement of the facts which the party alleges to have been established—it is quite impossible to sustain either the implied exception—for there is no positive exception—to the direction actually given by his Lordship in the chair, or to set aside the refusal to give the direction asked. The direction simply is, that if the jury thought the stevedore or his men had such a kind or degree of control over the craneman as to make him a servant of the stevedore in the unloading of the vessel, then the defenders are not liable. Now I agree with what was said by Lord Adam—that that taken by itself is perfectly unexceptionable. It was said by Mr Hamilton that it might be misleading, inasmuch as it is inadequate—not a full statement of the conditions of the question which the jury had to determine. That might very well be, but that is not an exception with which we are concerned. The bill does not except to any other part of the charge, and we must assume, what of course we know, that the statement which the pursuer objects to was not the only statement made by the Lord President to the jury. We must assume that his Lordship explained everything to them which would enable them to understand the case, and explained it in accordance with the law, except in so far as a particular exception is taken to what he said. Now there is no exception to his statement as being in error. The only exception, if it be one—and I agree with the remark of Lord M'Laren that it is doubtful whether it is an exception or not—the only exception is that he should not have said that but something else in its place. Now I am of opinion that if his Lordship had said what he was asked to say instead of what he did say it would have been a wrong direction, for the only meaning put on it, and I think put by Mr Hamilton himself, was that his Lordship was to direct the jury that in

considering who was responsible for this man's neglect they were not to consider who had control over the work, but only who selected, engaged, and paid the man. Whatever the circumstances of the case may have been, the question of control is always an ingredient in considering who is responsible for a wrong done in the course of a work. I should be disposed to think that the true view of the law is that the person who is responsible is the man who does the wrong, or the first person in the ascending line of employers who had control of the work and in whose service the work is done. But at all events I should think that in ordinary circumstances the jury were entitled to consider not only the elements of employment specified in this direction asked but also the element mentioned in the direction given in the Lord President's charge. I quite agree with what has been said to the effect that there might be circumstances in which there was a question between mere control on the one hand and the terms of employment on the other hand, and it might be important that the jury in cases of that kind should be told and should consider the matter. On the other hand, in other cases it is more important to decide who controlled the work; but we have nothing in this bill to say whether this case is of the one kind or of the other. We can only be asked to sustain the exception if we consider it an absolute principle of law that the question of liability for the negligence of a servant never can depend on whether the person proposed to be made answerable had any control over the work or not, but must depend solely on whether that person has selected, engaged, paid, and is legally entitled to dismiss a wrongdoer. I have made these observations because I should have been sorry to throw out this bill of exceptions upon a merely technical point, however formidable that may be. But I think the objection to the bill is not technical—it goes to the whole substance of it—and we must consider it according to the terms in which it is set out. The whole point is that it sets out no tenable objection to what his Lordship directed the jury, and asks us to hold that the jury should have been directed in a manner that would have been wrong.

The LORD PRESIDENT—I concur.

The Court refused the motion for leave to print the notes of evidence, refused the bill of exceptions, and of consent applied the verdict, assoilzied the defenders, and found them entitled to expenses.

Counsel for the Pursuer—Campbell, K.C. —Hamilton. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders—Ure, K.C.—Guy. Agents — Webster, Will, & Co., S.S.C.

Thursday, October 16.

FIRST DIVISION.

[Jury Trial.

GLASS *v.* PAISLEY RACE COMMITTEE.

Reparation—Injuries through Collapse of Stand—Liability of Lessors of Ground—Sub-Lease.

An action of damages was raised against a race committee for injuries sustained by the pursuer through the collapse of a stand which had been erected in a park leased by the defenders, but on ground sub-let by them to a person for the purpose of erecting the stand. The case was tried before a jury, and the defenders asked the presiding Judge to direct the jury (1) that by letting ground to a tenant for the erection of a stand they were not liable for the fault of the tenant or his contractor in designing or erecting it; and (2) that if the jury thought the fault due to the defective design or construction of the stand, and that the defenders did not design or construct it either by themselves or by others acting under their orders, or make any charge to or have any contract with the pursuer for admission thereto, then the jury must find for the defenders.

The presiding Judge refused to give these directions, and the defenders presented a bill of exceptions.

The Court *refused* the bill of exceptions on the ground that the directions asked were rightly refused.

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

A bill of exceptions narrated the issue and the directions, but contained no statement of the circumstances of the cause or purport of the evidence; but the notes of the evidence were printed by the party presenting the bill.

Opinions (*per* LORD ADAM and LORD M'LAREN)—That the bill was not in conformity with the provisions of section 35 of the Court of Session Act 1868 (quoted *ante*, p. 14).

The Paisley Race Committee, who were in charge of races held on 8th and 9th August 1901, leased from the Town Council for the purposes of the race meeting a park known as St James' Park, Paisley, which formed part of the common good of Paisley. In the park there was a permanent stand belonging to the burgh. The Committee let to Alexander Wood, restaurateur, Paisley, part of the field for the purpose of erecting a stand upon it. A fee of 6d. was charged by the Committee to the public for admission to the field. Mr Wood erected a stand on the ground sub-let to him, and sub-let the stand to Mr Bridges, a bookmaker, who charged an admission fee of 2s. 6d.

During the races, on 8th August 1901, this stand collapsed, and the occupants were precipitated to the ground.