because, in the first place, the resolution to impose the tax may, in my opinion, be made at any time, provided it be carried out and levied precisely in terms of the valuation roll when it comes to be made up and completed. I am therefore of opinion that the judgment of the Lord Ordinary is well founded.

Lord Mure—There are two questions before us—first, whether the circumstances of this case are such as to admit of the application of the 89th section of the Act of 1862? and secondly, whether, assuming them to be so, the pursuer has complied with the statutory conditions as to the manner of imposing and levying the assessments in question?

I concur in the result at which your Lordship has arrived. Section 89 deals with two different and distinct questions. There is the case of a property not let continuously for three months, as to which a deduction is to be made; and there is the case of owners who let their lands and premises for periods less than a year. The defender maintains that the latter part of the section does not apply except when the premises are unoccupied for three months continuously. I do not think that is a sound contention. I think that part of the section was introduced for the purpose of enabling the authorities to levy from owners where the premises are let for periods less than a year. I think that is the plain meaning and the plain policy of the section. The public authorities have not the same opportunity of recovering their assessments in such cases from the occupiers as from the owners. The occupiers are a class who move about, and are not, as a rule, people of much substance.

On the second question I entirely agree with what your Lordship has said.

Lord Shand concurred.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—Trayner—Campbell. Agents—Macbrair & Keith, S.S.C.

Counsel for Defender (Reclaimer)—Kinnear—Mackintosh. Agents—Campbell & Smith, S.S.C.

Thursday, February 17.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

AULD *v.* M'BEY AND ANOTHER.

Reparation—Damages—Road—Duty of Omnibus Driver.

Two omnibuses were driving at a moderate pace along a road, the horses of the second being within a few yards of the back of the first. A number of children were running after the first omnibus or hanging on the step behind it. One of them fell in front of the second omnibus and was run over and killed before the horses could be pulled up. In an action for damages at the instance of the child's father, *held* that, apart from any question of contributory negligence, the driver of the second omnibus had failed in his duty of proper precaution, and £60 of damages granted accordingly.

John Auld, labourer, sued William M'Bey, omnibus proprietor, and George Drummond, a driver in his employment, in the Sheriff Court of Aberdeen, for damages in respect of the death of Thomas Auld, his son, a child about six years old, who was alleged to have been killed through the culpable negligence of the defender Drummond.

The circumstances of the accident which caused the child's death were as follows:—Two omnibuses were in use to leave Aberdeen daily for Newburgh at the same hour in the morning, the one belonging to the defender M'Bey, the other to a man named Tough. On the 26th of September 1880, after halting together at an inn on the road, Tough's omnibus started first, a number of children running after it, some hanging on the step behind; M'Bey's omnibus, driven by the other defender Drummond, followed close behind. When they had proceeded about sixty yards along the road the child Auld fell down—whether from the step of the front omnibus or having stumbled on a stone did not clearly appear—and in spite of every effort to pull up the horses, the omnibus driven by Drummond passed over him and killed him on the spot. At the time of the accident the heads of Drummond's horses were not more than six yards or so behind the omnibus in front; it was not proved that he was driving at an excessive speed; some evidence was led as to the omnibusses racing and Drummond trying to pass Tough's omnibus at the time of the accident, but this allegation was not fully established.

The Sheriff-Substitute (Dove Wilson), after proof led, found that the defender had failed to prove that the injury complained of was caused through the negligence of the defender's servant, and therefore assoilzied the defender.

On appeal the Sheriff (Guthrie Smith) recalled that interlocutor, found it proved that the child was killed through the fault of the defenders, and assessed the damages at £60.

He added this note:— . . . "Upon these facts the Sheriff is of opinion that there was contributory negligence on the part of the boy. Allowance must of course be made for children who are necessarily left to run about the streets of a village giving way to their natural instincts; but in hanging on to the 'bus they were certainly engaged in a practice which ought not to be permitted, and if anything had happened to them without the intervention of a third party they would have had themselves to blame. The question is, Were the defenders to blame? and as regards their responsibility these are the rules as enunciated in the Court of last resort which fall to be applied:—

"1. The plaintiff in an action for negligence cannot succeed if it is found by the jury that he himself has been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"2. But there is another proposition equally well established, and it is a qualification on the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet

if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.—*Redlay* v. *L. and N.-W. Railway Co.*, Dec. 1, 1876, H. of L., L.R. 1 App. Ca. 754."

The defenders appealed to the Court of Session.

Authorities—*Redlay* v. *L. and N.-W. Railway Co.*, Dec. 1, 1876, L.R. 1 App. Ca. 754; *Davis* v. *Maur*, 1842, 10 M. and W. 546; *Clark* v. *Petrie*, June 19, 1879, 6 R. 1076; *Grant* v. *Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258; *King* v. *North British Railway Co.*, Oct. 29, 1874, 12 Scot. Law Rep. 53; *Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *Aberdeen Commercial Co.* v. *Jackson*, Oct. 16, 1873, 1 R. 25; *Campbell* v. *Ord and Maddison*, Nov. 5, 1873, 1 R. 149.

At advising—

Lord President.—This case, like every other of the same class, is attended with some difficulty, because of the variety in the evidence given, arising in a great measure from the points of view from which the different witnesses saw the occurrence, and from the accuracy of observation of some witnesses as compared with the inaccuracy of others. I have always found that when the question is as to what happened on a particular occasion the best witnesses are boys and girls. Their eyes are generally open, and they are not thinking of other things, and they are not talking to their neighbours. Everyone who has had experience in the Criminal Courts must know that when the question is as to what occurred at a particular place and time the best evidence is often given by boys and girls. Now, I think that here the evidence of the boys is quite reliable, and amounts to this, that Thomas Auld was not on the omnibus, but was on the road, running after it in order to get on it if he could. Now the question which that state of facts presents is this, What was the duty of the driver of the second omnibus in these circumstances? It is extremely vexatious and provoking for drivers of all kinds that children should get in their way. But I am afraid that it is part of the disposition of boys and girls to get in the way of carriages, and that is just a fact in the history of young people which must be taken into account in dealing with the question of the duty of drivers. Drivers must take account of this disposition as an incident inseparable from their occupation. The question is, whether this driver followed his duty in respect of these children, or whether he failed in his duty? Now, my opinion is that he failed in his duty. The result of the whole evidence is that he was too near the other omnibus. If he had been twenty or thirty yards further back this accident would not or might not have happened. If it had happened, it would have happened in a different way. The boy is said to have stumbled over a stone and fallen. However that may be, he did fall, and it was impossible for the driver to pull up the horses, even with the assistance of the passengers beside him, before the wheels passed over the boy. That proves that he was too near. I do not think that the accident could have happened unless he had been too near.

That is the simple view I take of the case, and I do not adopt the views of the Sheriff as to contributory negligence, for I do not think the case involves a question of contributory negligence at all.

Lord Mure and Lord Rutherfurd Clark concurred.

Lord Deas and Lord Shand were absent.

The Court refused the appeal.

Counsel for Appellants (Defenders) — Keir. Agent—R. C. Gray, S.S.C.

Counsel for Respondent (Pursuer)—Robertson—C. N. Johnston. Agents—Pearson, Robertson, & Finlay, W.S.

Friday, February 18.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MAGISTRATES OF LEITH *v.* LENNON.

Process—Expenses—General Police and Improvement (Scotland) Act 1862, *secs.* 84, 87, 89, 92 *—Notice.*

The magistrates of a burgh sued L. for £34 as the amount of assessments due by her under the General Police and Improvement Act 1862, in respect of subjects belonging to her in the burgh. L. lodged defences, in which she stated that prior to the raising of the action no demand had been made for, or notice given of, the assessments now sued for, and tendered £25 in full of all claims. This tender the pursuers judicially accepted. *Held* (*rev.* Lord Rutherfurd Clark, Ordinary, who decerned against the defender for expenses) that in the circumstances, the pursuers having failed to instruct that they had given any notice to defender, or made any extra-judicial demand, must pay the expenses of the action which they had raised.

The Magistrates and Council of the Burgh of Leith, as coming in room and place of the Commissioners of Police in and for said burgh, sued Mrs Eleanor Boylan or Lennon for £34, 6s. 8d., as the amount of certain assessments alleged to be due by her under the General Police and Improvement (Scotland) Act 1862, in respect of certain premises in Leith belonging to her. A detailed account of said assessments stating the particular items was produced along with the summons.

The pursuers averred—"The defender is thus due to the pursuers the sum of £34, 6s. 8d., conform to said account; and though the defender has been repeatedly desired and required to make payment thereof to the pursuers, yet she refuses or delays to do so, and has thus rendered the present action necessary."

This the defender denied, and averred—"The present summons is the first and only demand that has been made on the defender, and reference is made to the statement of facts for her. No account embracing the sums now sued for was ever served upon the defender. She has been left wholly ignorant of the details of the claim now made against her, and of its grounds.

The third article of the defender's statement of