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

facts was as follows:—"The defender believes that part of the sum sued for may be due. She does not dispute liability for the assessment upon houses when the rents are under £4, and has paid that assessment without objection for the last ten years, and would have done so last year had she been asked for it. She had no notice that she was to be charged for the assessment upon weekly tenants. Had she got notice to this effect she might have recovered it from the tenants, but in so far as she is concerned it is now irrecoverable. The pursuers may have recovered it from the tenants, or may still do so. No proprietor in Leith is assessed upon rents paid weekly, nor was it ever proposed to assess the defender until this action was raised. Under reservation of all her pleas, she hereby tenders £25 as in full of the assessments sued for, leaving the question of expenses to the determination of the Court. She is ready to consign this sum if desired."

The defender pleaded—"The defender being willing to pay the assessments truly due by her, on demand being made for them, and on an account rendered showing details, the present action was premature and unnecessary, and ought to be dismissed with expenses. The defender ought to be found entitled to expenses, in respect that (1) the sum tendered is more than is really due, and (2) that no litigation would have been required had the pursuers rendered an account and afforded reasonable information regarding their claim."

The record was closed on 19th October 1880, and on 21st October a minute for the pursuers was lodged by which they accepted the defender's tender of £25.

On 29th October the Lord Ordinary (RUTHERFURD CLARK), in respect of the tender and of the minute, decerned against the defender for £25, and found her liable in expenses.

There was, before this interlocutor was pronounced, laid before his Lordship certain correspondence that had passed between the pursuer Clunes and the defender's son, the tenor of which is adverted to in the opinion of the Lord President.

The defender reclaimed against the finding as to expenses.

At advising—

LORD PRESIDENT—This is merely a question of expenses, but is somewhat more important than such questions generally are, for it affects in some degree the procedure under section 84, and the other sections of the General Police and Improvement Act of 1862. We have therefore taken time to look into it and to ascertain which of the parties really is in fault. The action concludes for payment of £34, 6s. 8d. as the amount of certain assessments said to be due by the defender in respect of properties belonging to her which are let for periods shorter than a year, and of certain other properties which are let at rents under £4 per annum. Now, in the case of property where the rent is under £4, the owner alone is assessable; where the subjects are let for periods shorter than a year the collector has the option of assessing the owner or occupier. The aggregate sum here sued for is the amount due, or said to be due, by the defender in respect of a number of different properties in one or other of these situations. When defences to this summons were lodged the defender alleged, in answer to the pursuer's general averment of resting-owing, that "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." And in her statement of facts there was the following averment:—"The defender believes that part of the sum now sued for may be due. She does not dispute liability for the assessment upon houses when the rents are under £4, and has paid that assessment without objection for the last ten years, and would have done so last year had she been asked for it. She had no notice that she was to be charged for the assessment upon weekly tenants. Had she got notice to this effect she might have recovered it from the tenants, but in so far as she is concerned it is now irrecoverable. The pursuers may have recovered it from the tenants, or may still do so. No proprietor in Leith is assessed upon rents paid weekly, nor was it ever proposed to assess the defender until this action was raised. Under reservation of all her pleas she hereby tenders £25 as in full of the assessments sued for, leaving the question of expenses to the determination of the Court. She is ready to consign this sum if desired." Now, this tender was accepted by the pursuers; and therefore, so far as the main conclusion of the summons was concerned, the action was at an end. But the question of expenses remained for the determination of the Court; and that must obviously depend on whether or not this action was raised after due and proper notice to the defender that she was due to the pursuers the sum sued for. In the circumstances I think it was the plain duty of the pursuers, before closing their record, to meet the defender's very pointed allegation of want of notice. But they have offered no proof that notice was given; we have only some letters, which do not amount in my opinion to any notice at all. The correspondence begins by the collector asking Mrs Lennon to make a return of her actual rents. There is no authority in the statute for such a demand. The Commissioners of Police are to take the valuation roll, and from that roll they are directed (section 91) to make up a roll or book of the assessments; and on that roll or book the charge on each taxpayer is to be made. There is no room in the statute for a requisition, such as here seems to have been made on Mrs Lennon, to make a return of her actual rents. She declined to do so, and the letters which follow are all about that; there is not a word as to the amount of the assessment. As the case stands, I must take it for granted that there never was any demand made upon her for any specified sum as the amount alleged to be due by her to the pursuers by way of assessment. That being so, is the present claim justified by the Act of Parliament? We were told in the course of the pursuers' argument that the Act has no provision requiring any notice of the amount of these assessments to be served on or left with the owner or occupier. But I cannot assent to that view, for I think the 92d section clearly expresses the contrary. Where

any person refuses to pay any assessment, it is enacted that "the collector may make an attestation in writing setting forth that the said person has failed to pay such assessment, or any portion thereof, notwithstanding the same has been demanded from him by the said collector by a printed notice delivered to or left for him on the premises in respect of which such assessment is made; and such attestation being made, it shall be lawful for the collector to make application to the Sheriff, or to any one of the magistrates of police or other magistrates of the burgh, who upon such application, and production therewith of such attestation, shall grant summary warrant;" and so forth. Now, no doubt the printed notice there referred to is mentioned only in reference to the application for a summary warrant; but I think it is assumed in that enactment that a notice has been served before any steps are taken for recovering the assessment. It is said, however, that the after part of the clause, which provides that "nothing herein contained shall prejudice the right of the collector at any time after the said assessment shall be payable to prosecute . . . . by any other legal form of proceedings," makes no provision for service of such a notice. But it would be an extraordinary contention to hold that it is required in one instance and not in the other. I think it is all the other way. Every action for recovery of a debt is necessarily preceded by a demand. No man raises an action for payment of an account which he has not rendered. This is so in every case of the kind, and the summons bears, as part of the final averment, that the pursuer has frequently desired and required payment of his debt in vain. And this action having been brought into Court without such previous demand is the cause of this litigation, for I think we are bound to assume that the pursuers' demand for £34, 6s. 8d. would have been met extra-judicially, as it has been met judicially, by an offer of £25, and that the collector would have accepted that offer, as he has now done. I am therefore of opinion that the whole expense of raising this action has been caused by the failure of the collector to demand payment of this sum of £34, 6s. 8d. before bringing his summons into Court.

Lord Mure concurred.

Lord Shand—The record in this action was closed on 19th October 1880, and on the 21st a minute accepting defender's tender was put in by the pursuers. At that time, therefore, the parties certainly had no further litigation in view, and the whole subsequent dispute has been about expenses. In addition to the passages from the record referred to by your Lordship, I find the defender pleads—"The defender being willing to pay the assessments truly due by her, on demand being made for them, and on an account rendered showing details, the present action was premature and unnecessary, and ought to be dismissed with expenses. The defender ought to be found entitled to expenses, in respect that (1) the sum tendered is more than is really due, and (2) that no litigation would have been required had the pursuers rendered an account and afforded reasonable information regarding their claim." Now, agreeing with your Lordship, I cannot doubt that the question of expenses having been thus raised, and the action instituted without an extra-judicial demand for payment, the pursuers ought to have met the defender's allegation of want of notice in some way, and that it is not met by their general statement that "the defender has been repeatedly desired and required to make payment." And though this ought to have been done upon record, yet I think the pursuers were not precluded from stating anything of the sort at the discussion. But what has happened here? The defender says she had no notice, and that if she had she would have paid what was right. The pursuers' answer was to have produced their notice, and we asked about the matter, but no such notice has been laid before the Court. The argument for the pursuers on this matter of expenses was rested first on their substantial success. But I think that has no bearing on the matter. If a creditor sues me, and I say, "There is your money, but you gave me no notice," is that substantial success on his part? He would have got his money without raising a summons. The pursuers' next point was that certain letters which were produced were equivalent to notice. But I think they had nothing to do with this claim, and in no way amounted to notice. I am clearly of opinion that when a debt of money is demanded, and the defender is not first told how much is asked of him, and when it is to be paid, but a summons is raised at once, and the pursuers then ask expenses, the defender is entitled to expenses, and not the pursuer.

The Court recalled the Lord Ordinary's interlocutor in so far as it found the defender liable in expenses, and in place thereof found the pursuers liable in expenses. *Quoad ultra* adhered, with additional expenses to the defender.

Counsel for Pursuers (Respondents)—Trayner—Harper. Agents—J. Campbell Irons & Co., S.S.C.

Counsel for Defender (Reclaimer)—J. C. Smith. Agent—Daniel Turner, S.L.

Friday, February 18.

SECOND DIVISION.

[Sheriff of Perthshire.

LOWSON *v.* ROSS.

Landlord and Tenant—Removing—Accessory held on Lease with Different Ish from Principal.

A tenant held from the same landlord on separate leases a country house, the lease of which expired at Whitsunday 1881, and an adjoining cottage, used as a coachman's house and laundry, the lease of which expired at Martinmas 1880. In an action to remove the tenant from the cottage, *held*, on the terms of a correspondence between the parties, that an offer accepted by the tenant, and bearing to refer to the dwelling-house only, to "extend the existing lease for one year—say to Whitsunday 1882—the tenure to be in every respect the same as previously," referred to the whole subjects as then possessed, and not to the dwelling-