

defenders have maintained their right to a general lien on three grounds.

They have argued—“(1) That in reference to the transactions referred to in the case they were the factors of the bankrupt, that his goods came into their possession as factors, and that therefore they were entitled to factor's lien. (2) Their next ground was that of general usage of trade. (3) Lastly, they said the course of dealing between the parties was that there should be a right of retention of any horse or horses for the general balance which might be due at the time.”

As to the first ground, I am still of opinion that the facts of the case do not warrant the view that the horses came into the defenders' possession as factors for sale. They have stables, and keep horses. They call themselves in one of their pleas not only auctioneers but livery stable-keepers. If the horses were held by them in that capacity they are not factors. The second finding of this interlocutor is, that the horses were put into the defenders' stables to be kept there till it should be seen whether they should be sold by Neilleay, or whether Neilleay should give positive instructions that they be sold by the defenders. I think that is the result of the evidence. I know what Scott, the partner of the defenders' firm who was examined, and Neilleay say on this matter, but the documents seem to me to show that some horses were for positive and some for possible sale. That distinction appears on the face of these documents. The horses were sold by the defenders only if sales were not accomplished in the interim by Neilleay. On 22d May five horses, including those in question, were put into the defenders' stables. Three were sold by them, not by Neilleay, and two stood unsold for weeks. What does that signify? Weekly and bi-weekly sales come and go, and these horses are not sold, because Neilleay had not made up his mind to give instructions for their positive sale, and until he did so the horses were kept at livery. If that be so, we do not require to consider whether an auctioneer is a factor or not. For my part, I would not commit myself to the opinion that an auctioneer is in all circumstances a factor, any more than I would say that in no circumstances can an auctioneer be called a factor. I am not sorry that it is unnecessary to give a definite opinion on that point. It is enough, I think, to hold that the defenders did not receive or hold the goods for sale in the sense that they must sell them.

On the second point it was hardly even contended that the usage of trade gives any such general lien as is claimed, and so there only remains the question

Third, Whether by the course of dealing between those parties there was conferred on the defenders a general right of retention?

Now, that which influences me in setting aside the account which Scott and Neilleay give of the course of dealing is that their depositions appear to me to be inconsistent with the documentary evidence in this case. That evidence, I think, discountenances the idea of such a course of dealing as is contended for. Sometimes a document recognises that a sum has been received by Neilleay on the security of a particular horse, and at another time it is not so at all. The fact of such special arrangements shows me that it could not be part of the contract of the parties that not

only might an advance on a particular horse be matter of claim, but that any general balance should also be claimable. And so I think that the third ground of the defenders' contention is also untenable.

The Court recalled the Lord Ordinary's interlocutor and assoilized the defenders.

Counsel for Pursuer—Campbell Smith—J. M. Gibson. Agent—W. Officer, S.S.C.

Counsel for Defenders—Kinnear—Jameson. Agents—Dove & Lockhart, S.S.C.

Wednesday, February 16.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

### PAISLEY v. MARSHALL.

*The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), secs. 84 and 89—Assessment—Owner or Occupier.*

*Held* that the owner of premises in a burgh which were let during the whole year on successive contracts of tenancy for periods less than a year, these contracts being in some cases from time to time renewed with the same parties, and none of the premises having been unlet or unoccupied for three months consecutively, was liable under section 89 in assessments made under the Act, though not himself occupier of any of the premises.

*The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), sec. 84—Assessment—Valuation Roll.*

Section 84 provides that once in each year the commissioners shall, for the year then current, “assess all occupiers of lands or premises within the burgh according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland.” *Held* that an assessment was properly imposed on 8th September 1879, though the valuation roll for 1879–80 was not made up and completed till 30th September.

Gavin Paisley, collector and treasurer in and for the burgh of Partick under the General Police and Improvement (Scotland) Act 1862, sued John Marshall, portioner, for £30, 13s. 6d., as the amount of assessments due by him in respect of certain premises belonging to him in Partick, under the said Act, and under the Public Health (Scotland) Act 1867, which provides, section 95, that the public health assessment shall in burghs like Partick be levied in like manner and under like powers as the said police assessments.

The said Act of 1862 provides (section 84) that “Once in each year the commissioners . . . shall assess all occupiers of lands or premises within the burgh, according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the police purposes of this Act, in so far as the same may have been adopted, and for the purposes to which the police assessment authorised by any

Act in force in such burgh at the time of such adoption might have been applied, and shall fix a day on which the same shall be payable, and the rate of assessment and day so fixed by the commissioners shall be published by hand-bills posted in the burgh, and by advertisement in any newspaper circulating therein (if any be), or otherwise in some newspaper circulating in the county in which the burgh is situated; provided always that such assessment shall be imposed as from the fifteenth day of May in any one year to the fifteenth day of May in the following year, and shall not in any year exceed a rate equal to two shillings and sixpence in the pound of the gross yearly value of such lands or premises where the enactments of this Act with respect to water have been adopted." . . . .

Section 89 provides—"The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent, or hire lands or premises for less than a year, shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient."

The pursuer averred—"The premises of which the defender is owner are situated at Nos. 152, 142, 138, 130 Castlebank Street, 13 Graham Street, 61, 65, and 62 Merkland Street, 2 Marshall Place, and 52 Merkland Street, all within the bounds of the burgh of Partick. These premises were all, during the year ending 15th May 1880, from time to time let by the defender as owner for rent or hire, on monthly or other tenancies, for periods of less than one year. All the said premises were occupied during the said year by monthly tenants, or other tenants for periods less than a year; and none of the said premises stood unlet or unoccupied for three months consecutively during the said year. The rents for the said premises are each £4 and upwards per annum, conform to statement herewith produced, showing the rents and occupiers of all the said premises as appearing on the valuation roll for the said year."

The defender's answer was as follows:—"Admitted, under reference to the statement produced, and subject to the explanation that the great proportion of the defender's tenants occupied their houses for the whole year in question consecutively, although holding under contracts of tenancy for periods short of a year. Explained further, that at the date of laying on the assessments sued for, none of the premises had been vacant for a period of three months or upwards during the year to which the assessments applied. The defender produces and refers to a detailed statement showing the periods of occupation of the different tenants during the year."

On 8th September 1879, and for the service of the year 15th May 1879 to 15th May 1880, the Commissioners of the burgh of Partick resolved to lay an assessment of  $\frac{1}{2}$ d. per £ of police assessment and 4d. per £ of public health assessment on all occupiers of lands or premises within the burgh. In imposing these assessments they de-

clared that the owners of all premises let for less than a year should themselves, as well as the occupiers, be responsible for these assessments and rates applicable to such premises, and that the same should be recovered from such owners in the event of the occupiers failing to pay the same within two months after they fell due. They further fixed a day (3d November) on which said assessments should be payable, and gave the statutory notices by hand-bills and newspaper advertisements; and sent special notices, pursuant to secs. 106 and 107 of the said Act, to all owners as well as occupiers assessed.

The pursuer averred—"All the occupiers, according to the said valuation roll, of the premises of which defender is owner as aforesaid, received special notices of the amount of their respective rates for the said police and public health assessments, of the time for appeals, payment, and other matters. A first notice was issued to them on or about 6th October 1879, a second on or about 2d December 1879, and a third and final notice on or about the month of February 1880, all in the terms set forth in the printed forms herewith produced. Notwithstanding these notices, and of the simultaneous notices to the defender after mentioned, these occupiers of the said premises have all failed to pay the said police and public health assessments, which amount together to the sum of £30, 13s. 6d. now sued for, conform to the said statement herewith produced, wherein the said assessments are separately set forth in detail for each of the said premises. The pursuer, by special notice sent to the defender as owner of the said premises, on or about 24th September 1879, intimated the said assessments on the occupiers of premises, payable on 3d November 1879, and the resolution of the Commissioners to hold the owner responsible therefor in terms of section 89 of the statute above quoted, and the defender was thereby required to pay to the pursuer accordingly, on the 4th day of January 1880, such of the said rates and assessments as the occupiers should at that date have failed to pay. Intimation was also thereby given of the opportunity allowed to owners for appeals, all conform to a printed form of the said notice herewith produced."

The Lord Ordinary (CURRIEHILL) decreed against the defender in terms of the conclusions of the summons.

His Lordship added this note—"This action has been raised by the collector and treasurer of the burgh of Partick for the purpose of having an authoritative judgment of this Court as to the true meaning of the 89th section of The General Police and Improvement (Scotland) Act 1862. The form of the action is that of an ordinary petitory action, in which the pursuer asks decree against the defender, as owner of certain houses and premises within the burgh, for payment of certain police and other assessments imposed on these subjects by the Commissioners of the burgh for the year from Whitsunday 1879 to Whitsunday 1880, for the purposes and under the powers conferred by said statute. The liability of the defender depends upon the applicability of the 89th section of the statute to his case.

"The statute provides by section 84 that once in each year the Commissioners shall, for the

year then current, *i.e.*, from Whitsunday to Whitsunday, 'assess all occupiers of lands or premises within the burgh, according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the police purposes of this Act.'

"A question which I shall afterwards advert to is raised, as to whether the assessments sued for were properly imposed according to the valuation-roll for 1878-79. But the main question is, whether the defender as 'owner' of the subjects in question is liable for these assessments which the Act, section 84, directs to be 'imposed' upon 'occupiers'?

"Now, the statute, section 89, directs the tax so 'imposed' upon 'occupiers' to be also 'levied' from them; but it contains an exception from the general rule in cases where the premises are let for less than a year. The words are—'The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient.'

"It is admitted that none of the premises belonging to the defender are let for a whole year. They are all let to tenants on contracts of tenancy for periods short of a year, although in some—perhaps in many—cases these contracts are from time to time renewed, so that in point of fact the same tenant may and does occupy his house for an entire year. None of the houses were unlet or unoccupied for three months consecutively, so that the present question turns upon the construction of the latter part of the 89th section.

"The defender maintains that as the premises were *de facto* let for the whole year 1879-80, he does not come within the scope of the 89th section at all, while the pursuer maintains that he does, and points out that a decision in favour of the defender would in very many cases lead to the result that the assessments could not be recovered except to a very limited extent. A tenant under a monthly contract might often find it difficult, and would almost certainly refuse, to pay a whole year's assessments, especially as he has no means of recovering any part of it from his landlord or from succeeding tenants.

"It must be admitted that the enactment is not very well expressed, and that the meaning of the words used is by no means clear; but after hearing and considering a very able argument from both sides of the bar, my opinion is in favour of the pursuer's view. I think that as the defender's houses are admittedly let for periods less than a year, the defender as well as his tenants are responsible for the assessments applicable to the several periods less than a year for which they are respectively let to the tenants. Thus, let it be supposed that one of the defender's houses is let

for a month to A, then for a month to B, and so on to other ten tenants, each for a month. In such a case it could not be maintained with success that within the meaning of the statute the defender has not let his house for rent or hire for several distinct periods each less than one year. If so, it follows not only that the 'occupiers' would be responsible each for at least one month's assessment, but that the defender would also be responsible for each and all of the assessments, *i.e.*, for the whole year's assessments, and that these would be recoverable from him if the Commissioners of the burgh should choose to exercise their option of proceeding against him. Now, does it or can it make any difference that instead of having twelve tenants each for one month, the defender lets his house to one tenant twelve times during the year for one month at a time? I think not, and I am therefore of opinion that the defender is responsible for the whole year's assessment. And I fail to see any force in the defender's argument that the pursuer is not entitled to assess both him and his tenants. He may not recover the assessment from both, for that would be taking payment twice over; but he is surely entitled, if not bound, to intimate the assessment both to the defender and to his tenants, in order that all parties may know the amount of their responsibility, and that the defender as owner may in letting his premises be able to arrange matters so that the rates are taken into account in fixing the rent.

"But then the assessment must be duly imposed in terms of the statute, and the defender says that instead of imposing it according to the valuation roll for 1879-80, 'made up and completed,' the Commissioners imposed it on 8th September 1879, whereas the roll was not completed till after that date. I do not, however, think the objection well founded. It is not said that an excessive assessment has been imposed upon the burgh collectively, or that the defender's houses are assessed upon values higher or other than that which appears in the roll for the year current at the date of the resolution of the Commissioners to assess. By the 8th September annually the new roll must be made up by the county assessor and lodged with the town-clerk if there be one, or with the Sheriff of the county if there be no clerk. It is no doubt subject to revision on appeal, and until that is concluded the roll is not 'completed in terms of the Valuation Acts.' But when the roll leaves the assessor's hands and passes into public custody on 8th September, it is sufficiently accurate to enable the Commissioners of the burgh to estimate what sum will be required for public purposes. It is always necessary to allow a margin in laying on such assessments; perfect accuracy is unattainable. There may be in the course of the year irrecoverable arrears, or houses, &c., unlet, or exemptions, which unless a moderate margin is allowed would leave a deficiency to be met either by a supplementary assessment or by an increased assessment in the following year. Unless, therefore, it can be said (and it is not here pretended) that the Commissioners of this burgh have assessed for an unreasonably large aggregate sum, I am of opinion that they have followed the directions of the 84th section of the statute, seeing that the assessments for 1879-80 imposed in

respect of the defender's houses, and now sued for, are imposed according to the annual value thereof appearing in the valuation roll made up and completed for that year.

"On the whole matter, therefore, decree is given to the pursuer in terms of the conclusions of the summons, with expenses."

The defender reclaimed.

At advising—

LORD PRESIDENT—This action is raised on behalf of the Magistrates of Partick for recovery of certain assessments for police purposes which were imposed upon the premises belonging to the defender for the year running from Whitsunday 1879 to Whitsunday 1880. The defender is not the occupier of the premises; and it becomes necessary to advert to the particular grounds on which the pursuer says he has become liable for payment of a tax which is primarily an occupier's tax. The pursuer says—"The premises of which the defender is owner are situated at Nos. 152, 142, 138, 130 Castlebank Street, 13 Graham Street, 61, 65, and 62 Merkland Street, 2 Marshall Place, and 52 Merkland Street, all within the bounds of the burgh of Partick. These premises were all, during the year ending 15th May 1880, from time to time let by the defender as owner for rent or hire, on monthly or other tenancies, for periods of less than one year. All the said premises were occupied during the said year by monthly tenants, or other tenants for periods less than a year; and none of the said premises stood unlet or unoccupied for three months consecutively during the said year. The rents for the said premises are each £4 and upwards per annum, conform to statement herewith produced, showing the rents and occupiers of all the said premises as appearing on the valuation roll for the said year." And in another part of the record it is stated—"All the occupiers, according to the said valuation roll of the premises of which defender is owner as aforesaid, received special notices of the amount of their respective rates for the said police and public health assessments, of the time for appeals, payment, and other matters. A first notice was issued to them on or about 6th October 1879, a second on or about 2d December 1879, and a third and final notice in or about the month of February 1880, all in the terms set forth in the printed forms herewith produced. Notwithstanding these notices, and of the simultaneous notices to the defender after mentioned, these occupiers of the said premises have all failed to pay the said police and public health assessments, which amount together to the sum of £30, 13s. 6d. now sued for, conform to the said statement herewith produced, wherein the said assessments are separately set forth in detail for each of the said premises." These statements are practically admitted by the defender, and the question comes to be, whether in these circumstances the defender is liable in payment of these assessments under section 89 of the General Police Act of 1862? In construing that section it is necessary to go back to a previous section which authorises the imposition of the assessment, and it is very necessary to keep in view the distinction between the imposition and the levying of the tax.

The 84th section is concerned entirely with the imposition, and it authorises the Commissioners

of Police in each year to "assess all occupiers of lands or premises within the burgh, according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the police purposes of this Act, in so far as the same may have been adopted;" and when they come to this resolution they are to publish the resolution by handbills in the burgh and by advertisements in the newspapers; and it further provides that such assessments shall be imposed as from 15th day of May in any one year to 15th day of May in the following year, and shall not in any year exceed the rate of 2s. 6d. in the pound of the gross yearly value of such lands or premises. Now, what the Commissioners of Police are to do under this section is to pass a resolution, and publish it, and all that the resolution is required to contain is that a certain sum is to be imposed upon the burgh by a certain rate per pound. That is the resolution, and that is the notification required under this section. The levying of the assessment is a totally different matter, and there is nothing in the statute, after the 84th section, about the matter of levying until we come to section 89, except section 87, which provides that "the commissioners shall assess the owners in place of the occupiers of all lands or premises let at a rent under £4, and levy such assessment from such owners; but the commissioners shall allow to such owners a deduction from such assessment equal to one-fourth of the amount thereof; and such assessments shall be recoverable from such owners along with any penalty which may have become exigible thereon, in the same way as herein provided with respect to the recovery thereof from occupiers." That is an exceptional provision, and does not interfere with the continuity of the provisions. Therefore we see that while section 84 of the statute, regarding the tax generally, provides for the mode of imposing the assessments, section 89 is one which provides for the mode of levying the assessment. Now, the 89th section plainly consists of two parts. The first directs (and for the first and only time directs) how the tax is to be levied, and from whom. The words are these—"The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises." That is the general and leading enactment, and applies universally, with the exceptions after mentioned. The assessments are to be levied from the occupiers; "but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year." That is not a well-expressed clause, but it plainly means this, I think, that if any premises are unoccupied for a part of a year not less than three months, then deduction corresponding to the period that the premises are unoccupied may be made from the assessments; and it is to be observed that that is not in the least degree confined in its action to the case where premises are let for shorter periods than a year, but would apply to any want of occupation of the premises assessed through any other cause. Such a state of matters might occur from various circumstances. A man may take a house for a year, occupy it for six months, and

then abscond without paying any rent for the remaining six months; that would fall under this clause of the statute very plainly, and no doubt other cases will fall under it also. Cases where the premises are let for a shorter period than a year, and the owner fails to find a tenant for the remaining part of the year, would also fall under the clause. The next part of the section applies to all assessments imposed, and provides that they are to be paid by the occupiers, and allows deductions for premises unoccupied during a certain part of the year. Then comes the second portion of the section—owners who shall let for rent or hire lands or premises for a period less than a year, shall themselves, as well as the occupiers, be responsible for the assessments applicable to any period less than a year, and these assessments may be recovered from such owners or from such occupiers as the commissioners shall judge expedient. Now, there is one class of cases, admittedly, upon the face of this statute, which appears to fall under this provision—if the owner lets his premises for a part of the year, and they are not let at all for the remainder of the year, the case plainly falls within the clause, and the owner may be made answerable. But the pursuers contend that it is of no consequence whether the premises are occupied only for a part of the year or occupied for the whole year, provided they are occupied upon contracts for a less period than the whole year, and I think it very plain that the words of the clause are quite sufficient to cover that case, which is the case now before us. The premises with which we are dealing here were fully occupied during the year from May 1879 to May 1880, and they were occupied upon contracts of tenancy of shorter endurance than one year. Now, the words of the Act are very general in describing, in the first place, owners as those who shall let for rent or hire lands or premises for less than a year, and what is it that is predicated of them? they shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year. Now, the argument is that these words are applicable to any period less than a year, and limit the liability of the owner to the assessment applicable only to fractions of a year, and that he cannot be made answerable for the assessments for the whole year. That depends, it appears to me, on the circumstances of the case. If he is representing only a tenant who occupies for a fraction of a year, then he will be liable to pay an assessment applicable to that fraction of the year that that occupant was in occupation. But suppose that there are several occupants or consecutive occupations producing an occupation uninterruptedly during the entire year—Is there anything in these words to exclude liability for the whole year in such a case? Plainly not; and for this reason, that the statute says the owner shall be responsible for the said assessment applicable to “any period less than a year,” which must apply to “period or periods less than a year.” That is the plain common sense of the language, because if a man as a tenant occupies for one period of the year, and that tenant is succeeded by another who occupies for the rest of the year, the plain intention of the enactment leads one to the conclusion that the landlord is to be equally answerable, along with the tenant, for the assessment applicable to that period, the object

being to give the commissioners readier means of levying the assessments than they otherwise could have. Tenants of this description are not generally to be found in the valuation roll. There may be a great deal of difficulty in finding them out, and still greater difficulty in inducing them to pay the assessment, because they are generally of course of a very poor class, and therefore it is that this statute, when premises are let in this way, makes the owner equally with the occupier liable in the assessments. We have had a very ingenious and subtle argument upon this section from the defender's counsel, but I confess there is no foundation for it upon the words, or upon the plain meaning of the Act of Parliament. I am therefore of opinion that the defender is liable for these assessments under section 89, if these assessments have been properly imposed.

But it is said there was an imperfection in the manner in which it was imposed, and that question depends on other considerations than those to which I have already adverted. Section 84 of the statute, as we have seen, provides that the assessment is to be imposed “according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland;” and it is said that the assessment here was not imposed in terms of the valuation roll, because it was imposed on 8th September 1879, and the valuation roll was not, in the words of the Act, “made up and completed” till the 30th of that month. I think it appears to me, that looking to the language of this 84th section of the statute, there is no force in this objection at all. All that the Commissioners have to do is to pass a resolution to the effect that they require a certain sum of money, and in order to raise that amount of money they will assess, and do thereby assess, the community at the rate of so much per £ on their rentals. That is all that is required to be done in following out the provisions of the 84th section of the statute. It is not a thing that is to be completed at once, so that the assessment may be levied the next day after the resolution is passed. It is only a resolution that the thing is to be done—that is to say, that such an assessment is to be levied—and in the meantime the assessment is imposed; that is to say, the resolution is made that what is to be hereafter levied is to be levied at a certain rate per £ upon the rental. Now, the resolution which the Commissioners passed upon 8th September appears to me to be quite within the meaning of this clause of the Act of Parliament. They resolved to assess upon the valuation roll; and if the Commissioners had added to their minute, which they might quite well have done, “according to the valuation roll when it is made up and completed for the year,” I think the defender could not have had a word to say against the validity of the resolution. In short, the date of making the resolution appears to me to be of no consequence at all if in point of fact it is carried out and ultimately the tax is levied according to the valuation roll. The defender does not, I understand, say—and if he had done so he would have had to say explicitly—that he has been charged more in name of police assessments than is justified by the valuation roll as made up and completed on 30th September; and that being so, it appears to me that this objection fails altogether,

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—Macbair & 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'BAY 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 assoltized 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