any other effect, nor, in the second place, of any parole agreement, nor, in the third place, of any facts and circumstances sufficient to set it aside. In the absence of these it is useless to discuss questions that might arise from them. When the case was before the Lord Ordinary this was quite clear, for he refused to admit the amendment No. 9 of process. We have admitted it. But that is a mere question of procedure, and does not mean that its averments are relevant; and I agree with the Lord Ordinary that its averments are irrelevant. I express no opinion as to the relevancy of proof of certain averments that might have been made, as the Lord Ordinary has done, but I find no such averments here.

Lord Ardmillan—The pursuers in this case are Messrs Robert and John Binning; the defenders are Messrs James Scott and Thomas Inglis Scott. The contract of copartnery is dated 18th and 22d July 1871, and on the face of it there are three partners, Robert Binning, John Binning, and Thomas Inglis Scott. James Scott appears in it as the legal guardian of his son Thomas Inglis Scott, taking certain responsibilities and reserving certain rights. The object of this action is to substitute James for Thomas Scott, for there is no ground for making four partners in the business. I cannot get over the position of Thomas Scott. What has he done to destroy his right to the partnership? I do not doubt that it might be proved that his father had come in his place if there had been an averment of an agreement to that effect with Thomas as a party to it, and that followed by definite actings referable to it; but such an agreement must have been clearly connected with the actings, and all the parties must have taken part in such an agreement. Now, it is not alleged that Thomas was a party to anything. What he did, according to the most favourable reading of the facts for the pursuers, was to dispossess himself of his partnership by his absence. But this amounts to nothing relevant to infer that he had been turned out in favour of his father. He could not have been turned out except on the footing that his father took his place, and that is not alleged. It must be remembered that the conclusion of the summons is to turn Thomas out of the partnership and put in James. I concur with your Lordship in thinking that the Lord Ordinary's judgment should be affirmed.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuers—Asher—Young. Agents—Campbell & Smith, S.S.C.

Counsel for Defender (James Scott)—Watson—Mackintosh. Agents—Webster & Will, S.S.C.

Counsel for Defender (Thomas Inglis Scott)—Balfour—Lorimer. Agents—Hamilton, Kinnear, & Beatson, W.S.

Thursday, May 18.

SECOND DIVISION.

[Lord Shand, Ordinary.

THE EDINBURGH STREET TRAMWAYS CO. *v.* TORBAIN.

Company—Edinburgh Street Tramways Acts, 1871, 1873, 1874—*Statutory Agreement—Fares.*

The Edinburgh Tramways Company were bound by their original Act of 1871 to carry passengers at one penny per mile. A statute in 1874 permitted them to establish omnibuses on certain sections in place of laying down lines, and to charge "twopence per mile for first-class passengers on those routes and any tramway routes worked in connection therewith."—*Held* that this provision did not apply to journeys performed in cars only.

Observed (*per* Lord Ormidale) that where where there was ambiguity such statutes must be construed for the public and against those who enjoyed the concession.

This was an action at the instance of the Edinburgh Street Tramways Company against Alexander Torbain, Leith. The summons concluded for declarator that under the Act 37 and 38 Vict. cap. 68, § 4, the pursuers were entitled to demand and take in respect of passengers carried in or by their cars between Leith and the General Post Office, Edinburgh, and *vice versa*, a sum not exceeding twopence per mile for first-class passengers; and also for payment of one penny by the defender, as the difference between his payment and the threepence demanded by the Tramways Company as the fare from Leith to the General Post Office.

The pursuers were incorporated by an Act in 1871, and obtained an Act in 1873 giving them a year more to complete some of their lines. In 1874 they obtained another Act (37 and 38 Vict. cap. 68) entituled "An Act to extend the time for the widening and improvement of the North Bridge by the Corporation of Edinburgh, under an agreement confirmed by the Edinburgh Tramways Act 1871, and to authorise the Edinburgh Street Tramways Company to relinquish the construction of certain of their authorised tramways, and for other purposes." The 4th section of this Act, on which the present action depended, was as follows:—"The Company shall (by themselves or others) if and when required by the Local Authority of Edinburgh, by one month's notice in writing to that effect, provide good and sufficient conveyance by means of omnibuses between such point in Princes Street or Waterloo Place as the Local Authority may from time to time determine, and the bridge across the Water of Leith at Stockbridge, which omnibuses shall not be run less frequently than four times each way every hour, between the hours of nine in the forenoon and nine in the afternoon of each lawful day; and shall also run omnibuses as aforesaid between the Royal Institution in Princes Street, Edinburgh, or such other place as the Local Authority of Edinburgh may from time to time determine, and such point in the place known as or called

Trinity, as the Local Authority of Leith may fix, which last-mentioned omnibuses shall not be run less frequently than four times each way every hour, between the hours of nine in the forenoon and nine in the afternoon on each lawful day during the months of June, July, August, and September, and twice every hour between nine in the forenoon and eight in the afternoon each lawful day during the other months of the year, and such omnibuses shall be run in connection with the various systems of tramways of the Company, and in the event of every failure of the Company to comply herewith, they shall be liable to pay, and shall pay on demand, to the Local Authority of the district in which such failure takes place, a sum of £5 sterling for each day during which such failure shall continue, such sum to be recovered by such Local Authority in the same way and manner as debts are recoverable by the laws of Scotland; and it shall be lawful for the said Company to apply its funds from time to time for that purpose, or for purchasing omnibuses, horses, and premises for that purpose, and demand and take in respect of passengers and parcels carried in or by such omnibuses such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the Company are entitled to charge in the event of the construction of the tramways to Stockbridge and Trinity, and the Company may charge a sum not exceeding twopence per mile for first-class passengers on those routes and any tramway routes worked in connection therewith, and may also charge a sum not exceeding one penny per mile for parcels by such omnibuses not exceeding 56 lbs. in weight, and for parcels in excess thereof such charges as they may from time to time think fit, provided always that the fares between Stockbridge and Newington by omnibus and car shall not exceed threepence first-class and twopence second-class for each passenger."

The Tramways Company on 13th December 1874 demanded a fare of threepence on the section of their lines between Leith and the General Post Office Edinburgh, the rate having been previously twopence; and on the 14th December 1874 the defender, who went in one of the cars, refused to pay more than twopence, which sum he tendered and paid to the conductor. The Company maintained that under the Act of 1874 they were bound to run omnibuses to Stockbridge and Trinity, which they were now doing, and that these omnibuses being run in connection with their various systems of tramways, and, *inter alia*, with the Leith section, they were entitled under the already-quoted section to charge twopence per mile instead of one penny, to which sum under the original Act, § 44, they were expressly limited, and that accordingly they might have asked as much even as fourpence. The defender maintained that the extra charge had reference only to an omnibus journey, or to passengers travelling on a route where both car and omnibus were used, whereas he had not any intention of going either to Stockbridge or Trinity, nor of using any conveyance but the tramway car. The Act of 1874 further expressly provided that nothing therein should prejudice or affect the agreements scheduled to the original Act of 1871, these agreements having reference to the one penny per mile tariff, and having been made with the Tramway Company by the Town Councils of Edinburgh and of Leith.

The pursuers pleaded—"(1) The pursuers being entitled under their said Act of 1874, libelled on, to demand and take the fare set forth in the summons, they are entitled to decree in terms of the first conclusion thereof. (2) The defender being due and resting-owing to the pursuers the sum of one penny, they are entitled to decree therefor, with expenses."

The defender pleaded—"(1) The pursuers not being entitled under the foresaid Acts of 1871, 1873, and 1874, to charge more than one penny a mile for first-class passengers travelling between Leith and the General Post Office, Edinburgh, except in the case of passengers travelling also on the omnibus route to Stockbridge or Trinity, they are not entitled to decree of declarator in the terms concluded for. (2) The defender not having travelled on the occasion libelled on the route between Princes Street and Stockbridge, or between Royal Institution and Trinity, the pursuers were not entitled to demand or take from him the increased fare authorised by section 4 of the Act of 1874."

The Lord Ordinary (SHAND) on 18th November 1875 pronounced an interlocutor assoilzing the defender, to which his Lordship added an opinion as follows:—

"This action has been raised to try the question, what sum the pursuers are entitled to charge as a maximum fare to passengers travelling in the tramway cars between Leith and Edinburgh? The pursuers claim right under their statute of last session of Parliament to make a charge of twopence for each mile or part of a mile, while the defender maintains they are not entitled to charge more than one penny a mile or part of a mile. The question is of importance to the pursuers, and to those who are in use to travel by the pursuers' tramway cars; for although the case relates immediately to the route between Edinburgh and Leith, the decision will apparently apply to all the routes on the pursuers' system, excepting only the journey between Stockbridge and Newington.

"The judgment, whether for or against the pursuers, depends on the construction to be given to the words occurring in section 4th of the pursuers' last statute, immediately after mention of the routes to Stockbridge and Trinity, viz., 'and the Company may charge a sum not exceeding twopence per mile for first-class passengers on those routes, and any tramway routes worked in connection therewith.' The pursuers state that all their tramway routes are now worked, as the statute provided they should be, in connection with the routes to Stockbridge and Trinity, for which a service of omnibuses, not tramway cars, is provided; and they maintain that the copulative word 'and' occurring in the sentence 'those routes and any tramway routes worked in connection therewith,' is to be interpreted disjunctively, as having the force of the word 'or,' thus meaning that the Company by force of the statute may charge a sum of twopence a mile for first-class passengers travelling either on the routes to Stockbridge or Trinity, or on any of the tramway routes used in connection with

these routes, and practically this includes the whole of the Company's system. The defender, while not disputing that the copulative 'and' admits in certain circumstances, and according to the context, of being construed as having the effect disjunctively of the word 'or,' denies that it has this exceptional effect here, and maintains that the power given to the Company of charging twopence per mile for what are called first-class passengers is given in the particular case, and limited to the particular case, of persons travelling as through passengers partly by omnibus and partly by tramway car on the Stockbridge or Trinity routes, and any tramway route in connection with these.

"I am of opinion that the defender is right in this construction of the statute. The same question was raised in a case before Sheriff Hallard, sitting in the Small Debt Court, and was the subject of a carefully considered judgment by him; and I concur in the reasons given by him for adopting the view of the statute maintained by the defender.

"Before the last Act obtained by the Company it is clear that the highest rate which the pursuers could charge on any part of their extensive system of tramways was one penny per mile—a fraction of a mile beyond a complete mile being regarded as equivalent to a mile. This rate of charge was not only fixed by the statute giving the Company the important concessions they obtained in regard to their occupation and use of the public streets, but was so fixed as having been expressly agreed to in two contracts entered into between them and the Magistrates of Edinburgh and Leith respectively. These bodies refrained from opposing the powers asked by the Company in respect, *inter alia*, of the agreement that 'in no case shall the Company demand or take for any passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, tolls or charges exceeding in whole one penny for each mile,' or fraction of a mile, as before explained. These agreements were confirmed as part of the Act by section 44th, and the maximum rates chargeable applied to the tramway lines which the Company undertook to lay down, leading to Stockbridge and Trinity in the same way as to all the other routes.

"During the last session the Company applied to Parliament to be relieved of their obligations to lay down these particular lines of tramway, and they obtained an Act giving them that relief, but imposing on them an obligation, on the requisition of the Local Authority, to keep up a service of omnibuses to be run frequently to and from Stockbridge and Trinity respectively, 'in connection with their various systems of tramways.' It is in the clause imposing this obligation that the words occur which have given rise to the question in dispute.

"It is worthy of notice that there is nothing in the preamble of the statute indicative of any intention to give the pursuers power to raise the maximum charges for passengers throughout their system, and thus to abrogate the clauses in the agreements with the Magistrates of Edinburgh and Leith respectively, already referred to, and nothing to suggest that any reason existed for allowing the charges to be increased. The providing of omnibuses for the more immediate benefit of two particular districts in lieu of the more serious obligation to lay down lines of tramways, which was discharged by the Legislature, does not suggest any good reason for raising the charges to passengers who still continue to use the tramway cars alone, as they did formerly. And in the construction of section 4th of the Act it appears to me to be clear that it is incumbent on the pursuers in these circumstances to shew that the language used unambiguously and beyond all reasonable doubt gives them the power they ask. There is the strongest presumption against the repeal by mere implication of the distinct stipulation as to the charges for passengers contained in the agreements already referred to; and the statute, in so far as its language may be described as ambiguous, is to be construed rather against than in favour of the imposition of higher rates of charge, and against rather than in favour of the Company who obtained it for their own benefit.

"Turning to the clause itself, the first thing enacted after imposing on the pursuers the obligation to run omnibuses to Stockbridge and Trinity, is, that the Company may demand and take 'in respect of passengers and parcels carried in or by such omnibuses such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the Company are entitled to charge in the event of the construction of the tramways to Stockbridge and Trinity.' This clause and the Act of 1871 together fix two things—(1) that the charges for tramway passengers in any part of the whole system shall not exceed one penny a mile; and (2) that the charges against passengers using the omnibuses alone shall not exceed the same rate. It would be surprising if the very next sentence of the Act undid all this, as the pursuers maintain. The only case which remains unprovided for is that of a through passenger using the combined service of omnibus and car, or car and omnibus, and who may on the whole journey travel a distance not exceeding a mile, and naturally enough the case of through passengers which was now to occur for the first time might be the subject of special enactment. The words are—'and the Company may charge a sum not exceeding twopence per mile for first-class passengers on these routes and any tramway routes used in connection therewith.' The words 'these routes' plainly refer to the routes on which omnibuses are to run, and the provision appears to me to apply, and to apply only, to passengers using these routes in conjunction with the tramway cars. The word 'and' is to be taken in its ordinary sense as used conjunctively. Provision is thus made for rates for through passengers, the only class not already provided for. The reading contended for by the pursuers directly contradicts the words which immediately go before, and practically requires the substitution of the word 'or' for 'and.' If the section did necessarily involve a contradiction, which on the pursuers' view it does, I should still say I could not give effect to that construction of a contradictory clause which practically destroys the stipulations of the agreements entered into by the pursuers. But there is no such contradiction if the other view, which I hold to be the sound one, be adopted. This view is also borne out by the concluding words of the section,

which also deal with through passengers 'by omnibus and car' in the special case of the journey between Stockbridge and Newington.

"It was argued that the reference to 'first-class passengers,' made for the first time, aided the pursuers' construction of the Act, but I do not think there is any force in the argument. The use of the words 'first class' cannot take away the effect of the previous enactments, that no passengers, either by tramway cars or by omnibus, shall be charged more than one penny a mile. It is not said that any distinction between a first and second class existed in the use of the tramway cars; and looking to the place in which the words occur in the statute, referring, as I think they do, to through passengers in the sense I have explained, it appears to me they must have been used with reference to the difference of charges which commonly exist for outside and inside passengers travelling by omnibus, and which the pursuers say did exist in the omnibuses formerly on the Stockbridge and Trinity routes.

"Again, it is said there was no use in the Legislature giving a somewhat higher rate as against a through passenger, for the charge would be avoided by the passenger paying separately; first on his journey by car, and afterwards on the remainder of his journey by omnibus. There may be some truth in this observation, though I do not know how the matter may work where the car rate and the omnibus route each embrace a fraction of a mile. But however this may be, it cannot affect the construction of the Act. If the Company really intended to obtain the very important change on their power of charging for the use of their cars of which they now claim the benefit, and the Legislature meant to give this, it could only be done by distinct and precise language to that effect, and there certainly is not such language in this statute.

"Considerable doubt occurred to me as to the jurisdiction of this Court to entertain the action which contains a pecuniary conclusion for one penny, and all the more that the parties have been unable to refer to any reported case of the kind. But the action really is one of declarator to have an important question of legal right tried, and such actions are competent only in this Court. It plainly involves an issue of large pecuniary interest to the pursuers, and it may be also to the defender. In its substance it truly involves a question between the Company and the public, which might properly have been directed against a number of defenders in use to travel by the Company's cars, but which may be conveniently tried in a case against one; and such questions—as, for instance, in regard to rights of way and the like—are proper subjects of trial and decision in this Court."

The pursuers reclaimed.

At advising—

Lord Justice-Clerk—I think this is in every view an important case. The pursuers, the Edinburgh Street Tramways Company, are the owners of certain cars, and before they got Parliamentary sanction to the running of these cars they came to an agreement with the Town Council in Edinburgh, and also in Leith, to limit in a certain way the charges or tolls they were to take from passengers in their cars. This agreement, which was ratified by the original statute and scheduled in the Act, was the price, it might almost be said, that they paid to the Town Council as representing the public for the concession to be obtained by them. Three years later the Company wished to obtain the permission of Parliament to escape certain other obligations undertaken by them as to the construction of lines of rails from Edinburgh to Trinity, and also to the Stockbridge section. An Act was accordingly passed in 1874 relieving them of these obligations upon certain conditions, but that Act does not contain one syllable implying that the Legislature were dealing with the question of convenience and tariffs; and not only that, but that very Act of 1874 contains an express clause setting forth that nothing therein contained should affect the previous Act of 1871 or the temporary Act of 1873.

Now, the Tramways Company say that the meaning of the Legislature was that power was given under the Act of 1874 to double their charge over their whole system. The real terms and purpose of the Act refer to the abandonment of certain tramway lines, and the substitution for them of an omnibus service, to be regulated by the Town Council, and then follow the words on which the present claim is founded. I must say I think it is a somewhat audacious demand. I do not go at all into the question of what is meant by the clause as to the twopence per mile, although I am rather inclined to think the real meaning is the Company may charge for a first-class omnibus passenger twopence per mile, even though part of his journey be performed in a tramway car. But there is no such question here. Mr Torbain never used an omnibus on any part of his route, and, as I read the Act, no passenger who has not availed himself of the omnibus service is bound to pay the twopence rate.

In conclusion, I may remark that had there been any intention on the part of Parliament to repeal the agreements scheduled in the Act of 1871, such repeal would not have been indirect, but express and distinct. I am for adhering substantially to the Lord Ordinary's judgment.

Lord Neaves—I concur. This question is of some importance as affecting the rights of the parties concerned—the Tramways Company on the one hand, and the general public on the other. Further, I think the case is valuable and instructive as to the mode of interpreting Acts of Parliament such as the present. The object of the later Act here—the Act of 1874—was to discharge the pursuers of the obligation to construct Stockbridge and Trinity sections of tramway line, an obligation imposed by the original Act of 1871. The mention of "first-class passengers," made in the 1874 Act was solely applicable to the omnibuses. There was no such distinction recognised between first and second-class passengers in regard to tramway cars. What, then, is to be the construction of the 1874 Act, read in connection with that of 1871? To say that people going from Leith to the General Post Office, or even more, going from Leith a little way up Leith Walk, in a car, were in the same position as people going in an omnibus or in a car and completing their journey in an omnibus, is utterly out of the question. No doubt

at best the words of the Act are ambiguous, but in the absence of specific enactment, I am not disposed to give to these words one whit more than their strict meaning, and that meaning I take to be, that either the use of omnibuses, or their joint use with cars, entitle the Company to make the additional charge of twopence per mile. It is a monstrous supposition that the Leith passengers should be compelled to contribute towards this arrangement as to the Stockbridge and the Trinity omnibuses.

Lord Ormidale—I am of the same opinion, but I cannot say that the question is one entirely free from difficulty. We have here a statutory contract between the Tramways Company on the one hand and the public on the other. Now, I have always understood, and I think it consistent with principle, that any ambiguity in the expression of such contracts is to be interpreted against the persons in whose favour the concession is made, and for the general public, and it is this consideration which enables me to avoid the difficulties and ambiguities of the present case. I cannot think that it was intended by implication only that so material a change in the whole contract should be introduced; that would, I am convinced, have been done by direct enactment. The fault of the ambiguity lies with the company who chose to take the Act in the terms they have done, and by that fault they cannot be permitted to benefit.

Lord Gifford — I have come to the same conclusion. A person might be only at the Leith end of the tramways, and might, according to the pursuers, be called on to pay twopence a mile. But we have a statutory agreement under which in no way were the Company to charge more than one penny per mile, and it is under the relieving statute of 1874 that they seek to maintain their ground. That relief, however, was given on condition of the Company putting on omnibuses between Princes Street and Stockbridge and Trinity. There is no narrative, no sign anywhere, that the Tramways Company in going to Parliament were seeking an increase in their fares. The Company take a general ground and say, "all our routes are in connection with omnibuses." I confess I cannot take that view. The contract must be construed very much according to the *bona fide* intention of the public, and the public would have great and good reasons for complaint if the Company by implication, and by implication only, could repeal the statutory agreement.

The Court adhered.

Counsel for Pursuers—Balfour—Macdonald—Mansfield. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defender — Kinnear — Harper. Agent—W. H. Couper, L.A.

Thursday, May 18.

FIRST DIVISION.

[Sheriff of Stirling and Dumbarton.

ROBERTSON *v.* BROWN.

Reparation—Bodily Injury—Master and Servant.

Held that when an ordinary unskilled workman is ordered by his master to do anything out of the ordinary routine of his work the responsibility of taking precautions for his safety lies altogether upon the master.

The defender in this case was contractor for working certain coal and ironstone pits near Kilsyth, and the pursuer was a labourer employed in his service. The traffic between these pits was carried on by means of an incline railway worked by an endless wire rope revolving round a horizontal wheel. This wheel was covered by a number of iron plates weighing about 70 or 80 lbs. each. The pursuer had been employed by the defender to do ordinary labourer's work, such as emptying hutches, breaking stones, and burning iron ore. On the 22d April 1874 the pursuer was ordered by the defender to remove one of the plates which covered the wheel for working the railway and to put on a fresh one. The wheel was revolving at the time. While engaged in doing this his foot slipped, got entangled with the wheel, and in consequence he was so much injured that his leg had to be amputated. His master denied liability, and therefore the pursuer raised this action in the Sheriff-Court concluding for £200 damages. After proof had been led, the Sheriff-Substitute (Sconce) assoilzied the defender, finding (6) "That the mere lifting or removal of the plate, although the wheel was revolving, was attended with no real danger or hazard, and was often done without injury to themselves by common labourers like the pursuer about the works. Any risk attending the removal was apparent, and might have been avoided with ordinary care. (7) Finds, in law, that in the circumstances foresaid there was no culpable negligence or gross carelessness, or indeed any negligence or carelessness, in the defender giving the pursuer the order foresaid; and therefore assoilzies the defender from the conclusions of the summons, and decerns."

Upon appeal this judgment was reversed by the Sheriff (Lee). The following is the substance of his interlocutor: "Finds (8) that the said operation of removing the one plate and substituting another while the wire rope was in motion upon the horizontal wheel was a work of a dangerous character, especially if performed by a common labourer, such as the pursuer was, without assistance or direction; and that the risk attending it was not an ordinary risk incident to the kind of employment in which the pursuer was engaged, and was not apparent to the pursuer. (9) That the defender in giving the said order took no steps to have the wheel stopped, and left the pursuer to carry it out without assistance or directions, and without using any precautions against the risk involved in lifting such a weight with the wheel revolving underneath. (10) That the pursuer being unaware of any danger, proceeded,