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,

without objection or demur to carry out said order, fetched the new plate to the place, and began to lift off the old one (the wheel still revolving) and was in the act of lifting it when, his right foot having slipped, his leg got entangled in the wheel, whereby the said leg was so much injured that, after removal to the Glasgow Infirmary, it was necessary to have it amputated at the middle of the thigh. . . . . (12) That the defender has failed to prove that the said injury was caused or contributed to by negligence or carelessness on the part of the pursuer. (13) That the said injury was caused by the defender employing the pursuer in a work of the dangerous character aforesaid, and culpably neglecting to take precautions for his safety: And finds, in point of law, that the defender is liable to the pursuer in damages; assesses the damages at the sum of £100 sterling; and decerns against the defender for payment to the pursuer of the said sum, in terms of the conclusions of the summons.

"*Note.*—The Sheriff has found this case to be attended with difficulty; but after full consideration of the proof (which he thinks was properly allowed), he has been unable to arrive at the same conclusions as the Sheriff-Substitute. He is of opinion that the proof supports the pursuer's claim. The difference between him and the Sheriff-Substitute arises upon the facts, and not upon the law. It consists mainly in this—that the Sheriff considers it proved that the work which the pursuer was ordered on the occasion in question to perform was of a dangerous character; that the risk involved in it was not a risk arising in the ordinary course of the pursuer's employment, and was not apparent to the pursuer, as it was or should have been to the defender; and that the defender was to blame in not taking any precaution to enable the pursuer to do the work in safety.

"If this be a true view of the facts, the Sheriff cannot doubt as to the law applicable to the case. For the defender's allegation of contributory negligence is entirely unsupported by evidence; and his plea that the danger was equally manifest to the servant and to the master, and that the pursuer should have refused to obey the order if he had considered the work to be out of the ordinary course of his employment, is entirely displaced if the pursuer has succeeded in making out his case, viz., that he was employed as a common labourer, entirely inexperienced in the dangers of machinery in motion; and that the risk attending the removal of a heavy plate having a revolving wheel of 4 feet diameter immediately underneath was not an ordinary risk occuring in the course of his employment, and was not apparent to him.

"It is well established 'that where a master employs a servant in a work of a dangerous character he is bound to take all reasonable precautions for the safety of that workman' (per Lord Cranworth, Chancellor, in *Paterson* v. *Wallace & Co.*, 1 M'Q. 751.) The decisions of the Court of Session in *O'Byrne* v. *Burn*, July 8, 1854, 16 D. 1025, and *M'Millan* v. *M'Millan*, June 13, 1861, 23 D. 1082, afford illustrations of the observance of this rule.

"The question here appears to be, whether the present case is within that rule, or is within another rule referred to by the Sheriff-Substitute —that a servant 'is to be considered as contemplating and taking the chance of ordinary risks properly incident to the particular kind of employment in which he engages.'

"It is admitted by the defender on record that the pursuer was employed as an unskilled labourer; and it appears to the Sheriff to be proved by the evidence that 'the pursuer did not consider the work hazardous,' that he 'had no knowledge of machinery, or skill concerning it,' and that he 'did not think whether there was hazard or not.' He had never seen the plate taken off, and, so far as appears, had never been employed to do any work of the kind before. The Sheriff is further of opinion, on the evidence, that there was danger in the work to which the pursuer was put, performed under the conditions disclosed, of that taking place which actually occurred. Whether that danger was a seen danger, equally apparent to the servant as to the master, is a separate question; but that there was, in the circumstances, danger in the work, he cannot doubt. It may be that the work in itself was of a simple character, but that is not conclusive. Walking is quite a simple operation; but walking upon a slippery floor, in close proximity to dangerous machinery, usually covered up, and where the 'consequence of any slip is immediate injury from the machinery, is an operation of a dangerous character,' especially to an inexperienced person. In the present case the pursuer was sent to lift a weighty plate which usually covered the revolving wheel. He received no assistance or special directions, and the precaution of stopping the wheel was not taken. Was there here no risk? Was the slipping of a foot upon such a floor in lifting a weight of three quarters of a hundredweight an accident which could not happen without fault or carelessness on the part of the workman? And was the workman exposed to no danger by the occurrence of such an accident while the wheel was revolving immediately underneath? The Sheriff cannot doubt as to the answers to be made to these questions. He considers it to be proved that the pursuer's foot slipped into the hole where the wheel was revolving while he was in the act of lifting the plate, and also that it slipped accidently, and without fault on his part.

"It only remains, therefore, to be considered whether the risk of the wheel being allowed to continue in motion ought to have been considered by the defender, or was a risk which the pursuer must be considered to have contemplated and undertaken. The Sheriff is of opinion that it should have been considered by the defender, and that he was bound to take some precaution for the pursuer's safety, and that he was bound in a special degree to consider that risk, and to use some precaution in putting a common surface labourer to execute such a piece of work under the conditions already mentioned.

"The case of *Crighton* v. *Keir and Crighton*, 14 February 1863, 1 M'Ph. 407, was referred to by the defender. But it seems to the Sheriff to differ in this respect, that the danger in that case was of a nature clearly within the scope of the servant's employment, and as to which he was quite as capable of judging as his master. Such was not the case here; at least the Sheriff thinks not. He does not attach much weight to

the evidence of the witness Cameron as to his labourers having taken off the plate while the wheel was in motion. In the first place, he does not understand that before the accident the plate required to be taken off to oil the wheel as he states; but, in the second place, it is not explained what description of labourers they were who lifted it on these occasions, or what assistance they had. It is certainly not proved that any labourer in the situation of the pursuer had ever before been employed to remove the plate under similar circumstances.

"The Sheriff has therefore held the defender liable in damages. In assessing these damages he has taken into consideration the wages the pursuer was earning, the length of time he has been out of employment, and the permanent injury he has suffered. But looking to the meagre character of the proof on this point, he cannot assess the damage at a higher amount than £100, which is nearly two years' wages at 24s. a-week."

The defender appealed, and argued—The accident was due to the carelessness of the pursuer, for the danger was evident to any one, and that being so, he was bound to take reasonable precautions for his safety. The master could not be made liable for the rashness of the workman himself. As was laid down in the case of *Cook* v. *Bell*, Nov. 28, 1857, 20 D. 137, when a workman was engaged in a dangerous employment, knowing its nature, a master was only bound to take ordinary precaution and use ordinary safeguards, it being the duty of the workman to look to his own safety.

Authorities—*Paterson* v. *Wallace*, July 6, 1854, H. of L., 17 D. p. 16, *dictum* of Lord Chancellor. See also *Cook* v. *Bell*, Nov. 28, 1857, 20 D. 137; *Crighton* v. *Keir*, Feb. 14, 1863, 1 M'Ph. 407; *Pollock* v. *Cassidy*, Feb. 26, 1870, 8 M'Ph. 615; and *Trail* v. *Small*, July 4, 1873, 11 M'Ph., p. 888.

Counsel for Respondents were not called on.

At advising—

Lord President—We are not concerned here with the common case of a workman injured in the course of his ordinary employment. The removal of this plate was no part of the pursuer's ordinary work, and it ought to have occurred to the master that there was very great risk that a man of this class, an ordinary unskilled workman, with boots so constructed that they were very apt to slip in lifting a plate weighing three-quarters of a cwt., might slip, and so become entangled with the engine. This is, therefore, undoubtedly one of those cases where there is a duty on the one side on the part of the master to take precautions to protect his servant against risk, and no duty on the other side on the part of the servant to take any precautions for his own safety. The labourer could not have foreseen the danger in the same way as the master must have foreseen it, and to obviate all risk the master had only to order the engines to be stopped. A person of ordinary sense, with the slightest foresight, would have taken this precaution; and besides, the servant, even if he had foreseen the danger, as I think he clearly did not, had no power to stop the engine. I think the Sheriff's judgment should be affirmed.

Lord Deas—I am of the same opinion. This belongs to a delicate class of questions, and it is necessary to distinguish the circumstances very precisely. The pursuer is an ordinary unskilled workman. His duty was to attend to burning the iron ore, to break stones, and to empty the hutches. It was no part of his duty to do anything on the incline. We are not therefore in a case where something happens to a servant in the ordinary course of his employment. An order was given on the spot by the master to this man to take off, while the engine was going, one plate and put on another in its place. Now, it was plain to any person of sense that this was dangerous. A man of skill might perhaps have done it without accident, but this man was just an ordinary labourer, and such an operation was certainly hazardous, while the master might have prevented all risk by stopping the engine. It is difficult to say that the servant would have been entitled to refuse to obey the order, and the more ignorant and inexperienced he was the less likely he was to know his danger. While he was removing the plate his foot slipped—the man's boots being full of iron tacks no doubt—and went through the hole on to the revolving wheel of the engine. In consequence of this he was much injured, and has lost his leg. The result is very well stated by the Sheriff—"the Sheriff considers it proved that the work which the pursuer was ordered on the occasion in question to perform was of a dangerous character; that the risk involved in it was not a risk arising in the ordinary course of the pursuer's employment, and was not apparent to the pursuer, as it was or should have been to the defender; and that the defender was to blame in not taking any precaution to enable the pursuer to do the work in safety,"—that is by stopping the engine. I am therefore for affirming the Sheriff's judgment.

Lord Ardmillan—I am entirely of the same opinion. The operation to be performed here might be either safe or dangerous. The question whether it was safe or dangerous turns upon the question whether the machinery was going or not. It was not by any means necessary that the machinery should be going, and the master held in his hand the power of making the operation safe by ordering it to be stopped. The pursuer was an unskilled labourer, and therefore the danger to him was all the greater if the master did not ensure his safety by ordering the engine to be stopped. I think that the Sheriff has put the matter quite rightly.

Lord Mure—I quite subscribe to the doctrine of the Sheriff-Substitute, that a workman takes the risk of his ordinary employment. This was not the pursuer's ordinary employment, and as I think there was negligence here on the part of the master, I agree, on these grounds, with the Sheriff.

The Court affirmed the judgment of the Sheriff.

Counsel for the Pursuer—Millie. Agent—Thomas Lawson, S.S.C.

Counsel for the Defender—M'Kechnie. Agent—Thomas Carmichael, S.S.C.