his younger daughters and their families is to be divided when the youngest of their children reaches the age of twenty-one, but should there be no family left by either of them, the ultimate destination is left blank. The circumstance that Mr Forsyth was in use, when he made testamentary papers, to employ a law agent, is not to be thrown out of view. His three former testamentary writs were executed by three different firms. All these accordingly appear as tested instruments. He had not left Glasgow, so far as we are informed. It is not said that he was not in Glasgow at the time when he wrote the holograph paper. He had thus immediate access to a man of business to put it into shape. It is not alleged that he was in a state of incapacity to employ a law agent. Although he was taken somewhat suddenly ill, that was at a later period. The imperfect state of the paper, and its important blank, are not therefore to be accounted for by sudden illness followed by death.

Taking the whole circumstances into account, I am of opinion that there is no sufficient reason for taking what the deceased himself has described as a "draft of codicil" to be a completed testamentary paper.

LORD DEAS—I have had great difficulties in regard to this case; but, on the whole, I am not prepared to differ from your Lordship.

LORD ARDMILLAN—I have also felt this to be a question of great difficulty, but there are two or three circumstances which have led me to the same conclusion. In the first place, there is no indication that the testator ever attempted to make a holograph settlement. He made several testamentary papers, and in every one he employed an agent. Next, he lived for three months after this document was written; and I think that, whereas a writing which bears to be only a draft has, in certain circumstances, been given effect to, this is not so where the party has had ample time to have converted it into a formal writing, especially taken in connection with his previous practice to make settlements by formal writings. Again, it is important that he leaves a blank, intended to be filled up either by himself, after further reflection, or by the agent on consultation. He may have intended to form his opinion more deliberately, or he may not have known how to express his intention. This is to be taken into account, although the blank in itself would not necessarily be fatal to the deed. *Lastly*, the paper is not found alongside of his other papers, but in a different drawer, where it is at least as likely that it got by carelessness or accident as that it was deposited by himself. It would not be safe to hold this as part of the settlement.

LORD KINLOCH—I am of opinion that the alleged codicil cannot be held part of the last will and settlement of the deceased William Forsyth.

The paper in question is entitled by the deceased "draft of codicil." This implies that when he wrote it he considered it a mere draft, and not a completed instrument. The same is to be inferred from the circumstance that, in regard to the ultimate destination of his fortune, failing his daughters and their issue, a blank is left in the document for the names to be afterwards filled up. It may be that in a final deed of settlement the want of an ultimate destination would not affect the validity of the writing. But, coupled with the title "draft of codicil," this blank in the document confirms the inference that Mr Forsyth intended this as nothing but a scroll, and did not leave it as a completed instrument.

I do not think it of any conclusiveness that the document is signed by Mr Forsyth. Some people sign even drafts; and we have cases on the books in which the document was signed, and yet held to be a mere draft or instructions. If, indeed, it could have been shown that the document was originally unsigned, and that some time afterwards Mr Forsyth deliberately put his name to it, that would have been strong evidence to prove that he intended to leave it as a completed instrument. But there is no proof of this. From aught that appears, the name was adhibited at the same time that the document was written. And the mere addition of the signature does not, I think, in that case alter its character from what Mr Forsyth himself calls it—a "draft of codicil."

The other evidence in the case all runs in the same direction. Mr Forsyth's will, and two prior codicils, are all regularly tested: and the probability is that he intended to follow the same course with the additional codicil. It was not put up with the will and the other codicils, but found loose in an open drawer. It bears the date of 21st September 1870, and Mr Forsyth did not die till 25th December subsequent, so that he had abundance of time to turn this draft into a formal settlement, if he was so disposed. As he did not do so, I think the only legal and safe conclusion is to hold that he left it, as it bears to be, a "draft codicil," and nothing else.

The Court answered the question in the negative.

Agents for the First and Second Parties—Campbell & Smith, S.S.C.

Agent for the Third Party—Adam Shiell, S.S.C.

Tuesday, March 5.

SECOND DIVISION.

ADAMSON *v.* EDINBURGH STREET TRAMWAYS COMPANY.

General Tramways Act, 1870, *sect.* 33—*Clause of Reference—Court of Session Act*, 1868, *sect.* 9.

Held that the clause of reference, viz., sect. 33, in the General Tramways Act, 1870, did not exclude the application of a private individual to the Court, craving that the Tramways Company should be ordained to fulfill a statutory obligation.

This was a petition presented by certain omnibus proprietors in Edinburgh, craving the Court to order the respondents, the "Edinburgh Street Tramways Company," to construct a passing place or places connecting the one line of tramways with the other line of tramways at a certain place in Leith Street, Edinburgh, where there is a less width between the outside of the footpaths on either side of the road and the nearest rail of the tramway than nine feet six inches, so that by means of such passing place or places the traffic shall, when necessary, be diverted from one tramway to the other.

The 9th section of the "Tramways Act, 1870," which was alleged to have been contravened, was as follows:—"Every tramway in a town, which is

hereafter authorised by provisional order, shall be constructed and maintained as nearly as may be in the middle of the road, and no tramway shall be authorised by any provisional order to be so laid that for a distance of thirty feet or upwards a less space than nine feet and six inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners, or one of the occupiers of the houses, shops, or warehouses abutting upon the part of the road where such less space shall intervene, as aforesaid, shall in the prescribed manner, and at the prescribed time, express their dissent from any tramway being so laid."

The respondents pleaded—"(2) All parties interested have not been called. The complainers are not entitled to insist in the present application without making the said local authorities, viz., the Provost, Magistrates, and Town Council of the city, and the City of Edinburgh Road Trustees, parties thereto. (3) The application is excluded by the clause of reference contained in the said statutes and agreements, and above referred to, or one or other of them."

The reference clauses referred to are contained in section 10 of the special Tramway Act, which is as follows:—"Any difference between the Company and any road authority or surveyor, or other person, with reference to any of the matters foresaid, shall be determined in manner provided by the Tramways Act, 1870, with respect to differences between the promoters and any road authority;" and by section 33 of the said General Tramways Act, 1870, it is provided as follows:—"If any difference arises between the promoters or lessees on the one hand, and any local authority or road authority, or any gas or water company, or any company, body, or person to whom any sewer, drain, tube-wires, or apparatus for telegraphic or other purposes may belong, or any other company, on the other hand, with respect to any interference or control exercised or claimed to be exercised by them or him, or on their or his behalf, or by the promoters or lessees, by virtue of this Act, in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person, or with respect to the propriety of, or the mode of excavation of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or compromised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer, or other fit person, nominated as referee by the Board of Trade on the application of either party, and the expense of the reference shall be borne and paid as the referee directs."

The Lord Ordinary pronounced this interlocutor and note:—

"*Edinburgh*, 16*th February* 1872.—The Lord Ordinary having heard counsel for the parties on the respondents' first three pleas in law, and having considered the argument and proceedings, repels said pleas, and, under a reservation in the meantime of all questions of expenses, appoints the case to be called in the motion roll of Tuesday first, the 20th inst., that parties may be heard on the question, Whether, before further procedure, the process ought or ought not to be intimated to the local authority, and the road authority referred to in the Tramway Acts, that they may have an opportunity of compearing for their interest, if so advised.

"*Note.*—Both parties were satisfied that no investigation into facts was necessary previous to or with a view to the disposal of the respondents' pleas, which have now been repelled.

"It is expressly admitted (*vide* article 6 of the petitioner's statement, with the answer thereto for the respondents) that there is for a short distance at the place in question less width between the outside of the footpath and the nearest rail of the tramway than 9 feet 6 inches, and it was also expressly admitted at the discussion before the Lord Ordinary that there was no passing place such as is required by section 8 of the Edinburgh Tramways Act at the place referred to, although it is by the Act, in very distinct and unambiguous terms, enacted that in such a case 'the Company shall, and they are hereby required, to construct a passing place or places connecting the one tramway with the other, and by means of such passing place or places the traffic shall, when necessary, be diverted from the one tramway to the other."

"It is in this state of the matter that the present petition has been presented to the Court for an order on the respondents to construct a passing place or places in terms of section 8 of their Act. But the respondents have stated and maintained, as preliminary pleas or bars to further procedure, —1st, That the petitioners have no title to sue; 2d, that all parties interested have not been called; and 3d, that the application is excluded by the clauses of reference in the Tramway Acts and relative agreements. The Lord Ordinary being of opinion that these pleas are ill founded, has repelled them.

"1st, In regard to the respondents' first plea, it cannot be doubted that, as citizens of Edinburgh, and as proprietors of omnibuses and cabs having occasion daily to pass along the street at the place in question, the petitioners have a material interest to see that it has not been rendered unsafe, in consequence of the refusal or neglect of the respondents to comply with the statutory obligation incumbent on them in regard to passing places. And if so, it seems to follow that the petitioners must be held to be also *in titulo* to enforce that statutory obligation incumbent on the respondents in regard to passing places, unless it can be shewn that the right and title of doing so have been exclusively vested in some other party. But the Lord Ordinary has been unable to find, in the statutes or elsewhere, any authority for holding that such is the case. There is certainly nothing to that effect in section 91 of the Court of Session Act, 1868, in virtue of which the present application has been made. According to that statutory provision, power is simply conferred on this Court 'upon application by summary petition, to order the specific performance of any statutory duty,' without any mention of the party or parties by whom such application requires to be made; that matter being apparently left to be governed by the general law and practice as previously established. This being so, and as there is nothing to the contrary in the Tramway Acts, the Lord Ordinary thinks there is ample authority to be found, in varying circumstances, in the cases of *Guild and Others* v. *Scott & Ross*, December 21, 1809, F.C.; *Tait* v. *The Earl of Lauderdale*, February 10, 1827, 5 Sh. 330; *Martain* v. *Easton and Others*, June 18,

1830, 8 Sh. 952; *Christie and his Trustee* v. *The Caledonian Railway Company*, December 18, 1847, 10 D. 312; and *Stewart and Others* v. *The Greenock Harbour Trustees*, June 8, 1864, 2 Macph. p. 1155, for sustaining the title of the petitioners in the present application. It may be that the Corporation of Edinburgh and others might also have been entitled to complain, but the Lord Ordinary was referred to no authority, statutory or otherwise, for holding that they alone had the right and title to do so, and that the petitioners had no such right and title.

"2d, As it appears to the Lord Ordinary that the only parties whom it was necessary or essential to call as respondents to the application, viz., the Tramway Company, have been called, he has repelled the second plea in law for the respondents, to the effect that all parties interested have not been called. At the same time, it rather appears to the Lord Ordinary that, before further procedure, it would be well to have the process intimated to the Corporation of Edinburgh and the Road Trust, who are referred to in the Tramway Acts as the local and road authorities, in order that they may compear for any interest they may think they have, if so advised. But as nothing was said as to this at the last debate, the Lord Ordinary has thought it right to give the parties an opportunity of speaking to the point, before deciding whether such intimation ought or not to be made. He does not anticipate that the petitioners can have any objection to the intimation referred to being made.

"3d, As the Lord Ordinary can find nothing in the Tramway Acts sufficient to exclude the present application, in respect of the reference clauses on which the pursuers' third plea is founded, he has repelled that plea. It appears to him that the clauses referred to are applicable to other and different matters from that now in question."

The Tramways Company reclaimed.

The SOLICITOR-GENERAL, SHAND, and MANSFIELD for them.

SCOTT and ROBERTSON in answer.

The Court unanimously adhered.

Agent for Pursuers—D. F. Bridgeford, S.S.C.

Agents for Defenders — Lindsay, Paterson, & Hall, W.S.

Friday, March 8.

MANNERS *v.* FAIRHOLME.

Friendly Society—Permanent Injury—Compensation.

A member of a friendly society having sustained an injury which resulted in the amputation of the forefinger of his right hand, applied to the District Branch of the Society under a rule which provided that £100 should be given out of the funds of the Society to any member who could produce "to the Executive Council satisfactory medical and other testimony of such permanent disablement." The Branch were satisfied with the claim, but the Executive Council refused it, on the ground that the medical testimony of permanent disability was unsatisfactory. *Held*, in an action at his instance against the Society, that the Executive Council was the proper judge of the testimony adduced, and action dismissed.

This was an action at the instance of a member of a Friendly Society against the president and office-bearers of the Kirkcaldy branch of the said Society, for the sum of £100, alleged to be due to the pursuer under the rules of the Association, and in consequence of his having been disabled from working by an accident. On 24th March 1866 Manners had the forefinger of his right hand amputated. He obtained medical certificates that he was permanently disabled from working as an iron-turner, and applied to the Society under Rule 23. By this rule it is provided "that any free member, not more than 16s. in arrears, who may, by losing a limb, or having one disabled by accident, or otherwise, or through blindness, imperfect vision, apoplexy, epilepsy, or paralysis, be rendered permanently unable to follow any of the branches of trade mentioned in the preamble of these rules—provided such was not the result of intemperance or other improper conduct—shall receive the sum of £100, on the production to the executive council of satisfactory medical and other testimony of such permanent disablement."

The Kirkcaldy branch were desirous of granting the request, but the council, not being satisfied with the nature of the medical testimony adduced, refused it.

The executive council referred to in Rule 23 is constituted according to the 9th Rule of the Society, and consists of thirty-seven members, appointed by the branches therein referred to. By the 4th section of that rule it is enacted that "the local council shall consist of the eleven members appointed by the branches of the London district." That six members of the council shall form a quorum, and shall transact the ordinary business of the Society.

By the 7th branch of the 9th Rule it is enacted, with regard to appeals, that "the council shall decide in cases of appeal, such decision to be final, except in the case of a branch, which, being dissatisfied with a decision of the local council, shall appeal to the general council, or in a case where a branch may give notice of its intention to appeal to the delegate meeting, in accordance with the 34th Rule. In all cases of appeal to the general council the members of the local council shall not form part of the general council during the hearing of these appeals, but shall be represented by one of their members, elected by them for that purpose." And by the 3d branch of the 34th Rule there is power given to have the judgment of the local council reviewed by the provincial members of the general council, as a court of arbitration, as follows:—"Any branch feeling aggrieved with the decision of the local council, shall have the power to appeal to the provincial members of the general council, as a court of arbitration, constituted in accordance with the 7th clause of the 9th Rule; and, if the branch be dissatisfied with the decision of that court, it shall have the power to appeal to the delegate meeting, by giving notice of its intention to do so. But, in case of appeal against the decision of the general council, the branch appealing shall only be allowed to appeal after complying with such decision." Delegate meetings are constituted according to Rule 29, and by the 5th branch of that rule it is enacted that "whatever is agreed at the delegate meeting shall be binding upon all the members." The delegate meeting is composed of delegates from each branch of the Society in the United Kingdom, in Australia, and in the United States of America. The rules of the Society are not certified by the Registrar of Friendly Societies. But provision has been made by the statute applicable to friendly societies, 18