to go unattended into an admittedly dangerous place.

LORD MURE—I am of the same opinion. The view of the Sheriff is that the child came suddenly out from under the waggon where it had been playing, and that in this way its presence was unobserved by those in charge of the train. This, I think, is clearly proved by the evidence of Cheyne, the crane-driver, who was working close to the spot at which the accident occurred. Of course when a contractor is engaged in making a railway it is incumbent upon him to take every precaution for the public safety, but in this case I can see no evidence of neglect; on the contrary, it is proved that those in charge of the waggons took the greatest care, and therefore the accident cannot be said to have occurred from their negligence.

LORD SHAND—I quite agree with my brother Lord Mure in the view which he takes of the cause of this accident, and I think that the pursuer has failed to prove that ordinary precautions were not taken to prevent any such sad occurrence as has taken place. But even supposing that there was some negligence on the part of the contractor, was there not much greater negligence on the part of this child's parents? They knew that the place was dangerous, and that the child was in the habit of going there. Yet in spite of this no steps seem to have been taken either to prevent the child from going to the spot, or at any rate to have it properly looked after while thereabouts.

The Court pronounced this interlocutor:—[*After the findings in fact above quoted*]—"Therefore refuse the appeal, and decern."

Counsel for Pursuer—Guthrie Smith—M'Kechnie. Agent—W. B. Glen, S.S.C.

Counsel for Defender—Young—Orr. Agent—J. H. M. Bairnsfather, S.S.C.

Wednesday, October 24.

SECOND DIVISION.

[Lord Adam, Ordinary.

WATSON *v.* TORRANCE AND OTHERS.

Writ—Notary—Subscription of Notary—Execution of Notary's Docquet—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 41, *Schedule I.*—"*Gone Over and Explained.*"

A deed bearing to be executed by a notary-public on behalf of a person unable from weakness to write was challenged on the grounds (1) that it had not in point of fact been read over to the granter in the presence of two witnesses, and (2) that the docquet appended to it did not bear, in accordance with the requirements of the above Act, that it had been so "read over," but only that it had been "gone over and explained" to him. The defenders answered that the extended deed was identical with a draft previously read over to the granter, and was carefully gone over by the notary clause by clause and approved of by the granter. The Court (*diss.* Lord Rutherfurd Clark) *allowed* both parties a proof of their respective averments.

By the 41st section of The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) it is enacted—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter, who from any cause, whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses. Such docquet may be in the form set forth in Schedule I. hereto annexed, or in any words to the like effect."

"SCHEDULE I.—*Form of Docquet where Granter of Deed cannot Write.*

"By authority of the above named and designed A B, who declares that he cannot write on account of sickness and bodily weakness (*or* never having been taught, *or otherwise as the case may be*), I, C D (*design him*), notary-public (*or* justice of the peace for the county of (*name it*), *or as regards wills or other testamentary writings executed by a parish minister as notary-public in his own parish*, minister of the parish of (*name it*), subscribe these presents for him, he having authorised me for that purpose, and the same having previously been read over to him, all in presence of the witnesses before named and designed who subscribe this docquet in testimony of their having heard (*or* seen) authority given to me as aforesaid, and heard these presents read over to the said A B.

"E. F., witness. (Signed) A B,
"F. H., witness. Notary-public, *or* Justice of the Peace, *or* Parish Minister."

Thomas Watson died on the 19th July 1878, leaving a deed bearing to be a trust-disposition and settlement of that date. It bore to have been executed on his behalf by a notary-public in presence of two witnesses, he having been unable to write on account of sickness and bodily weakness. The notary's docquet was as follows:—

"By the authority of the above-named and designed Thomas Watson, who declares that he cannot write on account of sickness and bodily weakness, I, William Pollok, solicitor, Hamilton, notary-public, subscribe these presents for him, he having authorised me for that purpose, and the same having been previously gone over and explained to him all in presence of the witnesses before named and designed, who subscribed this docquet in testimony thereof, and of their having heard authority given to me as aforesaid by the said Thomas Watson.

"*Fac.*

"Robert Cross, *witness.* "WM. POLLOK,
"Robert Brunton, *witness.* Notary Public."

William Watson, the deceased's eldest son, and Mrs Macnair, one of his daughters, who were less favourably dealt with than Mr Watson's other

children under this deed, brought a reduction of the deed against the trustees and beneficiaries on the grounds, *inter alia*, that "the said deed was not read over to the said Thomas Watson either in the presence or absence of witnesses," and that the "docquet appended to the deed omitted the words 'and the same having been previously read over to him,' which are contained in Schedule 1 appended to the Act 37 and 38 Vict. cap. 94, as provided for by section 41 thereof, and substituted the words 'and the same having been previously gone over and explained to him," &c.

They pleaded with reference to this averment —(3) "The solemnities requisite to the due and valid notarial execution of the said deed not having been observed, the same ought to be reduced."

Both the trustees and the beneficiaries defended the action.

The defenders averred that the draft of the deed sought to be reduced had been carefully read over to the deceased, who was in full possession of his mental faculties; that the draft had been then immediately extended for signature; that the extended deed was exactly the same as the draft; that it had been gone over by the notary clause by clause to the deceased, and approved by him, and then notarially executed at his desire.

The Lord Ordinary (ADAM) appointed the defenders *quam primum* to state in a minute "whether the extended deed was read over to the deceased before it was signed by the notary and witnesses, and if so by whom."

The defenders stated by joint minute that "while the lapse of time had thrown difficulties in the way of their getting accurate information, they averred and offered to prove that the deed of which reduction was sought had been twice read over to the granter before subscription—the first time verbatim, and the second time, if not verbatim, at all events substantially, no material word being omitted. The first of these readings was made from the draft, and the second was made from the extension. On both occasions the deed was read by Mr William Pollok, writer, in Hamilton, who executed the deed notarially. The defenders aver and offer to prove that the whole requirements of the Conveyancing (Scotland) Act 1874 in regard to notarial subscription were duly complied with."

The Lord Ordinary thereafter found "that the trust-disposition and settlement of the late Thomas Watson had not been validly executed in terms of the law and practice of Scotland with reference to the notarial execution of deeds, and in particular had not been validly executed in terms of the 41st section of the Conveyancing (Scotland) Act 1874: Therefore reduces, decerns, and declares in terms of the conclusions of the summons.

"*Note.*—In this case the trust-disposition and settlement of the late Thomas Watson is sought to be reduced at the instance of William Watson, his eldest son, and Mrs Macnair, one of his daughters.

"Thomas Watson died on 19th July 1878. The trust-disposition and settlement bears to have been executed of the same date on his behalf by a notary-public in presence of two witnesses, he having been unable to write on account of sickness and bodily weakness.

"One ground of reduction is that the execution by the notary is invalid because the docquet appended to the deed does not bear that the deed had been "read over" to the granter in presence of the witnesses.

"The Lord Ordinary has had considerable doubt whether he should not before disposing of the case, have allowed the parties a proof of their averments, and the more so, because having regard to the terms of the minute, he can only safely do so on the assumption that the deed had been in point of fact read over to the granter, and therefore that the objection to the execution of the deed merely amounted to this, that that fact had not been set forth in the docquet. On the other hand, if the Lord Ordinary's opinion on the matter is sound, an expensive litigation will be avoided by now deciding the question.

"It was admitted by the defenders that the deed was not validly executed according to the law and practice in force prior to the Conveyancing Act of 1874, and still in force, and therefore that the only question was whether the deed was validly executed in terms of the 41st section of that Act.

"It appears to the Lord Ordinary that whether the docquet to the deed be in the form set forth in the schedule annexed to the Act, or in words to the like effect, two things must be set forth in the docquet—(1) That the granter of the deed authorised the execution of it; and (2) That the deed had been read over to him in presence of the witnesses. These two things are clearly statutory requisites, which must be set forth in every docquet, and are necessary to the valid execution of a deed by a notary.

"In this case the docquet does not set forth that the deed had been 'read' over to the granter in presence of the witnesses. It sets forth that the deed had been 'gone over and explained to him in presence of the witnesses.' Assuming that words equivalent to the words 'read over' might competently be used, the Lord Ordinary does not think that the words 'gone over and explained' are at all equivalent to a statement that the deed had been 'read over' as required by statute. They rather suggest a different operation, and it is sufficiently clear that a deed may be 'gone over and explained' although little or none of it may be verbatim read, which in the Lord Ordinary's opinion the statute requires.

"The Lord Ordinary is therefore of opinion that this deed is not validly executed in terms of the 41st section of the Conveyancing (Scotland) Act 1874, and must therefore be reduced. . . .

"The Lord Ordinary was referred to the following cases—*Thomson* v. *M'Cummons Trs.*, 18 D. 470; *Græme* v. *Græme's Trs.*, 7 Macph. 14; *Aitchison's Trs.* v. *Aitchison*, 3 R. 888."

The defenders reclaimed, and argued—The docquet contained all which was prescribed by the 41st section of the 1874 Act, and it was not necessary to follow the precise words of the schedule. The form contained in the schedule was merely suggested by statute as a good form, but not as the only one—*Aitchison's Trustees* v. *Aitchison*, January 21, 1876, 3 R. 388. The expression "gone over" used here was perfectly equivalent to the expression "read over."

The pursuers replied—It was not clearly on record what in point of fact had been read to

the granter. The 41st section enacts that the deed is to be read over. Now, all that the defenders averred in their joint-minute was that the draft deed had been read over. But (2) even though the extended deed had been read, the Act of 1874 was a relaxation of the law on certain conditions, and these must be strictly complied with. The form, then, contained in the schedule was an obligatory one, or at least it was essential that it be stated that the deed was "read" over.

At advising—

LORD JUSTICE-CLERK—I think that on the whole we should be in a better position to decide the not unimportant question raised here if the facts were ascertained. The Lord Ordinary, it seems, once thought that it would be the most desirable course to adopt, and now that we have heard the case argued, I think that is what we should do. Whether the words used in the docquet are "to the like effect" as if it had been said that the deed had been "read over" to the granter is a question upon which I would rather not enter till I know the facts.

LORD YOUNG—I think the course proposed by your Lordship is the most expedient, and, indeed, is the only course to follow. One has sympathy with any departure from form or style made by a private party whereby prejudice is incurred. But where a public officer departs from statutory words and forms it is altogether inexcusable. However, I am averse, if it can be legally avoided, to allow a private party to suffer wrong if it was owing to an accident, and if relief can be given without injustice. A proof may disclose that in fact all was done which is required by statute. In that case the question arises sharply whether the deed is to fall from the fact that the very words required by statute were not used. But on that question I abstain from indicating any opinion. In my opinion there is practically no other course open than to ascertain the facts, which may, and I hope will, relieve the case from further difficulty.

LORD CRAIGHILL—It occurred to me early in the discussion of the case that we should adopt the course proposed. On the technical question raised I have not formed any opinion. I think that we shall be much better able to decide it after we have had the facts cleared up by a proof.

LORD RUTHERFURD CLARK—I am sorry to differ. I think this is a purely technical question, and is just whether this deed has been executed with or without the statutory solemnities. It is a question in which we can get no aid from extraneous evidence, and must be determined solely and exclusively by reference to the terms of the deed itself. Even assuming that it turned out that the notary had read every word of the deed over to the party who executed it, the technical question would still, I think, remain, whether the words used in the docquet were to be held as in accordance with the word "read," which I look on as a statutory solemnity. Personally, then, I am disposed to think that the question should not be settled by resort to extraneous evidence.

The Court recalled the interlocutor of the Lord Ordinary, and "before answer allowed parties a proof of their respective averments."

Counsel for Pursuers — Brand — M'Watt. Agent—A. Morison, S.S.C.

Counsel for Defenders (Beneficiaries)—Guthrie Smith. Agent—W. R. Patrick, Solicitor.

Counsel for Defenders (Trustees) — Lang. Agents—J. Young Guthrie, S.S.C.

Friday, October 26.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HERITORS OF ANNAN *v.* M'LEAN AND OTHERS.

Manse — Repairs — Rule of Assessment where Parish partly Landward and partly Royal Burgh—Usage.

In a parish partly burghal and partly landward, the owners of lands and houses within the burgh are heritors in the sense of the Act 1663, imposing on heritors the duty of providing a manse for the minister, and the heritors may assess themselves for the fulfilment of the obligation according to the real rent of such lands and houses as well as that of the lands in the landward portion of the parish, there being no usage to assess for such repairs only on the valued rent.

The Valuation of Lands (Scotland) Act, sec. 33, enacts, *inter alia* — "Where in any county, burgh, or town, any county, municipal, parochial, or any other public assessment, or any assessment, rate, or tax under any Act of Parliament, is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the valuation roll in force for the time under this Act in such county, burgh, or town shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding: Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents as appearing upon the present valuation rolls, all assessments for the repair thereof shall be imposed according to such valued rent."

The parish of Annan is partly landward and partly burghal, the latter part consisting of the royal burgh of Annan. In 1871, on the occasion of the death of an incumbent, a meeting of heritors deemed it necessary to repair the manse for his successor. In conformity with the resolution of the meeting a remit was made to an architect, who recommended certain repairs and additions. In February 1872 another meeting of heritors, convened in terms of the Ecclesiastical Buildings