of alteration executed in terms of a declaration of reserved power to that effect which, although quite unnecessary, is found in the close of her settlement. On that ground, and on that ground alone, I am prepared to concur with your Lordships.

LORD MACKENZIE—The first parties have failed to convince me that the second codicil operated revocation of the first. In my opinion, the whole case turns upon the true construction to be put upon the expression "trust-disposition and settlement" occurring in the second codicil.

The argument of the first parties was founded, in the first place, upon the opening words of the second codicil—"I do hereby make the following codicil to the foregoing trust-disposition and settlement." They start with the point that inasmuch as the trust-disposition and settlement and the second codicil are written on the same paper, therefore what is referred to in the latter portion of the codicil is limited to the actual writing on the paper which contains the trust-disposition and settlement and the second codicil. I think that is much too narrow a construction to give to the term "trust-disposition and settlement" occurring in the last clause of the second codicil. The argument is that the testatrix when she confirmed her said trust-disposition and settlement in all respects thereby revoked the first codicil. But the settlement is contained in all the writings which express the testamentary intention. In order to find out what the testamentary intention is, one must not confine one's attention to the original trust-disposition and settlement, but must also look at the other writings, because it is evident how closely the first codicil is linked up with and made part of the trust-disposition and settlement. The trust-disposition and settlement closes with a reservation of power to revoke in whole or in part, and to supplement, alter, or amend, these presents by any writing under her hand. The first codicil begins "with reference to my trust-disposition and settlement," and then the testatrix proceeds to nominate another trustee "under my trust-disposition and settlement in addition to the persons therein named, and that to the same effect in all respects as if he had been named in my trust-disposition and settlement as one of my trustees." And yet it is contended by the first parties that the effect of the second codicil, which confirms the trust-disposition and settlement, is to write out the name of that additional trustee.

I certainly think that if any man of business making the second codicil had the intention to revoke the first he would have said so in terms. It appears to me that nothing was further from the purpose of the testatrix in making the second codicil than to recal the first, because by that first codicil she supplied a want in her testamentary arrangements. She had made provision—as the first codicil expressly narrates—in implement of an obligation to her niece—a *persona predilecta* for a certain sum of her money in connection with marriage. As time went on and there was no issue of the marriage, the testatrix thought it was right to supply a power which was not in the settlement of giving the niece power to test—that is the effect of the leading provision, and the effect of holding that revocation of the first codicil was operated by the second would be to leave a considerable sum of money not disposed of by the testatrix.

I think the construction we are putting upon the second codicil is in accordance with the intention of the testatrix as expressed in all her testamentary writings.

LORD SKERRINGTON — In the circumstances stated in the Special Case I do not feel myself compelled to hold that when the testatrix executed the codicil of 5th November 1913 she intended to revoke the codicil of 18th December 1912. The trust-disposition and settlement which the testatrix confirmed was a writing which on the face of it contemplated that further writings might be executed for the purpose of supplementing, altering, or amending its terms, and it even contemplated that some of these might be writings not properly executed in terms of law, but which might receive legal effect on the theory that they had been adopted in anticipation as part of the trust-disposition and settlement. The codicil of 18th December 1912 happened to be formally executed, but it was a writing of the nature contemplated by the trust-disposition and settlement, and it must, in my opinion, be regarded as a part of it. I therefore concur with your Lordships.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Parties—Chree, K.C. –T. Graham Robertson. Agents—Henderson, Munro, & Aikman, W.S.

Counsel for the Second and Third Parties —Macphail, K.C.—Wilton. Agents—J. & A. F. Adam, W.S.

Wednesday, June 7.

FIRST DIVISION.

(SINGLE BILLS.)

WHITWELL *v.* WALKER.

(See 51 S.L.R. 438, and 1914 S.C. 560, and *ante* p. 129.)

Expenses — Process — Appeal to House of Lords — Petition to Apply Judgment of House of Lords—Necessity of Petition.

In a petition under the Conveyancing (Scotland) Act 1874, section 39, to have certain testamentary writings declared to be duly attested, the respondents appealed to the House of Lords against the decision of the First Division. The House of Lords reversed and sent the case back to the First Division "to do therein as shall be just and consistent with this judgment." *Held* in a petition to apply the judgment of the House of Lords, that the petition to apply was

necessary, and expenses *awarded* to the petitioners.

Reid's Trustees v. *Dawson*, 1915 S.C. 844, 52 S.L.R. 680 *distinguished.*

Henry E. L. Whitwell and Edward L. Whitwell, his father, as his guardian, *petitioners*, having presented a petition craving the Court (*a*) to apply a judgment of the House of Lords pronounced on 15th December 1915, (*b*) to refuse the prayer of a petition presented by Harry Walker and others on 17th September 1913 under the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39 to have it declared that certain testamentary writings of Mrs Isabella Thomson or Walker had been duly attested, and (*c*) to find the petitioners entitled to the expenses of the petition out of the trust estate of the said Mrs Isabella Thomson or Walker, moved for decree in terms of the prayer of the petition in the Single Bills, which motion, in so far as it dealt with expenses, was opposed by Harry Walker and others, *respondents.*

On 15th December 1915 the House of Lords reversed the interlocutor of a Court of Seven Judges pronounced on 10th March 1914 on the petition under the Conveyancing Act 1874, and remitted the case back to the Court of Session "to do therein as shall be just and consistent with this judgment" (*see ante*, p. 129).

Argued for the respondents—The petition was unnecessary. The judgment of the House of Lords was purely declaratory and diligence could not be done upon it, consequently the petitioners were not entitled to their expenses—*Reid's Trustees* v. *Dawson*, 1915 S.C. 844, 52 S.L.R. 680.

Argued for the petitioners—*Reid's* case (*cit.*) was to be distinguished, for it was a special case in which the House of Lords directed the Court of Session to answer the questions in a certain way, and to get an interlocutor from the Court of Session so answering the questions was an utter formality and quite unnecessary. Here the interlocutor of the Court of Session was reversed and the case remitted back, consequently there was no operative decision in the original petition extant, and therefore the present petition was necessary, and the expenses ought to be awarded out of the trust estate as the other expenses in the case were.

LORD PRESIDENT—In this case the House of Lords have remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with the judgment of their Lordships. Accordingly this petition to apply the judgment appears to me to be necessary, and in my opinion we ought to follow the ordinary course and find petitioners entitled to the expenses of the petition, and ordain that the expenses be taken out of the trust estate of the deceased as the other expenses in the case were.

Whether the case of *Reid's Trustees* v. *Dawson*, 1915 S.C. 844, 52 S.L.R. 680, in the Second Division of the Court was well decided or not I do not say. On the question there raised I desire expressly to reserve my opinion. It is sufficient for our judgment to-day to say that this case differs from the case of *Reid's Trustees* (*cit.*), where, as I understand, the Second Division held that the petition was unnecessary. In my opinion it is necessary in the present case, and therefore expenses ought to be given as craved in the prayer of the petition.

LORD JOHNSTON—I agree that the petitioners here are entitled to have the judgment of the House of Lords applied in terms.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

The Court granted decree in terms of the prayer of the petition, with expenses.

Counsel for the Petitioners—D. Jamieson. Agents—Sharpe & Young, W.S.

Counsel for the Respondents—Chree, K.C. —T. Graham Robertson. Agents—Elder & Aikman, W.S.

HOUSE OF LORDS.

Monday, June 5.

(Before the Lord Chancellor (Buckmaster), Viscount Haldane, Lords Kinnear, Atkinson, and Parker.)

LYAL *v.* HENDERSON.

Process—Appeal to House of Lords—Jury Trial—Competency—Judgment for Party Unsuccessful at Trial after a Hearing on a Rule on Ground that Verdict Contrary to Evidence—Jury Trials Amendment (Scotland) Act 1910 (10 *Edw. VII and* 1 *Geo. V, cap.* 31), *sec.* 2.

Where the Court of Session has, under the power conferred by section 2 of the Jury Trials Amendment (Scotland) Act 1910, after hearing parties on a rule in terms of section 6 of the Jury Trials (Scotland) Act 1815, on the ground that the verdict is contrary to evidence, set aside the verdict and in place of granting a new trial has entered judgment for the party unsuccessful at the trial, an appeal to the House of Lords, notwithstanding that no appeal is competent under section 6 of the 1815 Act, is competent.

Reparation—Slander—Privilege—Malice Deducible only from the Language Used on the Privileged Occasion.

"To submit the language used on privileged occasions to a strict scrutiny and to hold all excess beyond the actual exigencies of the occasion to be evidence of express malice would greatly limit if not altogether defeat the protection which the law gives to statements so made (*Laughton* v. *Sodor & Man*, L.R., 4 P.C. 495). The real question is whether, having regard to the circumstances, the statement is so violent as to afford evidence that it could not have been fairly and honestly made; for the very essence of a privileged occasion is that it pro-