Argued for the respondent—The act complained of was that of a servant of the firm and the firm alone could be made responsible.

LORD JUSTICE-GENERAL—On 17th March 1916, within the licensed premises of which David Hutton was the sole licensee, a sale was made in contravention of the 6th section of the Order. By whom was that sale made? By a lad named Tracey. On whose behalf did he make the sale? On behalf of the only person in the world authorised to make the sale, viz., the respondent David Hutton. The Sheriff found that the respondent was not guilty because Tracey was an employee of the firm. But he was not an employee of the firm or their servant or agent in making the sale in question, because the firm had no right to make a sale in these premises; and in acting as he did he must be held to have been acting as the servant or agent of the only man entitled to make the sale, and not of somebody who had no right whatever to make any sale in these premises.

LORD MACKENZIE and LORD ANDERSON concurred.

The Court answered the question of law in the negative.

Counsel for the Appellant — Solicitor-General (Morison, K.C.) — Fraser, A.-D. Agent—Sir William S. Haldane, W.S.

Counsel for the Respondent — Dean of Faculty (Clyde, K.C.) — C. H. Brown. Agents—Wallace & Begg, W.S.

COURT OF SESSION.

Thursday, June 1.

FIRST DIVISION.

SCOTT'S TRUSTEES *v.* DUKE AND OTHERS.

Succession — Codicil — Revocation — Intervening Codicil where Will Containing Power to Revoke and Revoking All Prior Deeds Confirmed by Subsequent Codicil.

By her trust-disposition and settlement a testator reserved power to revoke the same in whole or in part, or to alter, supplement, or amend it, and revoked all prior deeds. She thereafter, upon a separate piece of paper, executed a codicil altering the settlement. Still later by a codicil "to the foregoing trust-disposition" written on the paper of the settlement she made other alterations on the settlement, and confirmed her "said trust-disposition and settlement in all respects" except in so far as thereby altered. No notice was taken of the first or intervening codicil. *Held* that the testatrix had not necessarily revoked the intervening codicil, and that, in the circumstances, she had not done so.

The Rev. Walter Scott and others, trustees of the late Miss Anne Scott, *first parties;* Mrs Louisa Scott Lawford or Duke, a niece of the testatrix, *second party;* and Herbert Fortescue Lawford and others, trustees acting under the antenuptial contract of marriage between Lieutenant-Colonel John Charles Duke and the second party, *third parties*, brought a Special Case to determine whether a codicil, dated 18th December 1912, to the testatrix's trust-disposition and settlement had been revoked by a subsequent codicil dated 5th November 1913.

The testatrix by her said *trust-disposition and settlement* conveyed the whole estate which should belong to her at the time of her death in trust to trustees, whom she directed in the third purpose to make payment of certain legacies, including one of £1000 to the second party, and in the sixth purpose—"I direct my trustees, as soon as convenient after my death, to invest in their own names a sum of £2500 in trust for the following purposes:—(First) My trustees shall pay the annual income or produce of said sum to the said Mrs Louisa Scott Lawford or Duke during her life, . . . exclusive always of the *jus mariti* and right of administration of any husband the said Mrs Louisa Scott Lawford or Duke has married or may marry, to whose control or for whose debts or engagements the same shall not be subject or liable. . . . (Second) In the event of the death of the said Mrs Louisa Scott Lawford or Duke, leaving issue, I direct my trustees immediately after her decease to pay the said sum to such issue of the said Mrs Louisa Scott Lawford or Duke, at such ages or times, in such shares, and in such manner and form as the said Mrs Louisa Scott Lawford or Duke shall by a writing under her hand direct and appoint, and failing such direction and appointment to and in favour of the lawful child or whole lawful children of the said Mrs Louisa Scott Lawford or Duke, or their issue, equally among them *per stirpes*, Declaring that if any of the said children or issue shall not have attained the age of twenty-one years at the death of the said Mrs Louisa Scott Lawford or Duke, or if the said Mrs Louisa Scott Lawford or Duke shall not have given directions in terms of the power hereinbefore conferred upon her, my trustees shall pay to such children or issue the income only of their respective shares until they attain the age of twenty-one years respectively, when the capital shall be payable, and such shares shall not vest until the terms of payment respectively arrive. (Third) In the event of the said Mrs Louisa Scott Lawford or Duke dying without issue and survived by her husband, the said Colonel John Charles Duke, my trustees shall pay the annual income of said sum of £2500 to the said Colonel John Charles Duke during his life, the capital of said sum in the event of my said niece dying without issue being divided on the death of the survivor of the said Mrs Louisa Scott Lawford or Duke and Colonel John Charles Duke among the persons who would have been entitled to succeed to my moveable estate if I myself had then died intestate." The testatrix declared that the provisions of her trust-disposition

and settlement so far as falling to females should be exclusive of the *jus mariti* or right of administration of any husband they might have married or might marry, and should not be payable to the trustee or trustees acting under any marriage contract which they might have entered or might enter into. The testatrix expressly reserved to herself "power to revoke these presents in whole or in part, and to supplement, alter, or amend these presents by any writing under my hand however informally executed."

By the *codicil dated* 18*th December* 1912, which was apart from the trust-disposition and settlement, the testatrix provided as follows:—"I, Miss Anne Scott of No. 17 Magdala Crescent, Edinburgh, considering that with reference to my trust-disposition and settlement, dated 31st March 1909, it is expedient and usual that in the event of my death I should appoint three trustees to act thereunder, instead of two as at present, therefore I do hereby nominate and appoint William Campbell M'Ewen, W.S., Edinburgh, to be a trustee under my said 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 said trust-disposition and settlement as one of my trustees and executors; Considering further that in connection with the marriage of my niece Mrs Louisa Scott Lawford or Duke I agreed to bequeath to her the sum of £3400, which I did by trust-disposition and settlement dated 30th August 1900, and that by the said trust-disposition and settlement, dated 31st March 1909, I revoked the said last-mentioned trust-disposition and settlement, making certain alterations with regard to said bequest of £3400 to my said niece, and that I am now desirous of putting matters in accordance with my original intention and arrangement, Therefore I do hereby revoke the bequest of £1000 to my said niece, as also the direction contained in the sixth place in the said trust-disposition and settlement of 31st March 1909 as to the sum of £2500, and do hereby leave and bequeath to my said niece the sum of £3400: And in exercise of the powers conferred upon me by the contract of marriage between Colonel John Charles Duke and my said niece, dated 19th September 1900, I do hereby, in the event of the death of my said niece, survived by her said husband, without issue of the marriage, direct the latter to have a liferent of the sum of £3000 therein referred to, the fee on his death to be paid in such manner as my said niece may direct by any writing under her hand, and failing such, amongst the persons who would have been entitled to succeed to my moveable estate if I myself had died intestate at the date of the death of the said Colonel Duke: And in the event of the said Colonel Duke predeceasing my said niece, and there being no issue of the marriage, I do hereby direct the said sum of £3000 to be paid to my said niece absolutely; Declaring that in the event of my said niece predeceasing me, survived by the said Colonel Duke, the latter shall have the liferent of a sum of £3000, the fee on his death to be paid in the same manner as is hereinbefore directed with regard to the first-mentioned sum of £3000: And further, I do hereby increase the annuity provided to my housekeeper Mrs Mary Anne Lloyd in the foresaid trust-disposition and settlement of 31st March 1909 to the amount of £35 in place of £25: And further, I bequeath to my servant Isabella Moodie, if in my service at the time of my death, a sum equal to two years' wages.—In witness whereof I have subscribed these presents, consisting of this and the preceding page, at Edinburgh on the 18th day of December 1912 before these witnesses—Helen Ogilvie Walker, residing at No. 6 Magdala Crescent, Edinburgh, and Agnes Paul, domestic servant at No. 17 Magdala Crescent, Edinburgh. ANNE SCOTT. Helen Ogilvie Walker, 6 Magdala Crescent, Edinburgh, witness; Agnes Paul, 17 Magdala Crescent, Edinburgh, domestic servant, witness."

By the codicil *dated 5th November* 1913, which was written on the trust-disposition and settlement, the testatrix provided as follows:—"I, Miss Anne Scott, of No. 17 Magdala Crescent, Edinburgh, do hereby make the following codicil to the foregoing trust-disposition and settlement, viz.—*In the first place*, I revoke the legacy of £100 to Mrs Edith Lawford, now deceased, and her issue: *In the second place*, I bequeath the following additional legacies (first), to John Playfair, M.D., 5 Melville Crescent, Edinburgh, the sum of £100; (second), to Cosmo Scott and Ian Scott, the children of my nephew James Scott, the sums of £100 each; (third), to each of my trustees, the Reverend Walter Scott and William Keith Aikman, W.S., the sum of £100; and (fourth), to my cook Isabella Moodie, in the event of her still being in my service at the time of my death, the sum of £25, all to the same effect as if said legacies had been directed to be paid by the fourth purpose of my said trust-disposition and settlement, along with the other legacies directed to be paid by that purpose: And except in so far as hereby altered, I confirm my said trust-disposition and settlement in all respects, and provide that it and this codicil shall be read and construed together as forming one document.—In witness whereof these presents, written by William M'Lennan, clerk to Messieurs Elder & Aikman, W.S., Edinburgh, are subscribed by me at Edinburgh on the 5th day of November 1913, before these witnesses, Mary Anne Lloyd, housekeeper, and Elizabeth Pollock, housemaid, both at 17 Magdala Crescent aforesaid. ANNE SCOTT. Witness Mary Anne Lloyd, witness Elizabeth Pollock."

The Case set forth—"1. The late Miss Anne Scott, who resided at 17 Magdala Crescent, Edinburgh, died on 14th March 1915, leaving the following testamentary writings, viz.—(1) trust-disposition and settlement, dated 31st March 1909; (2) separate codicil, dated 18th December 1912; (3) codicil written on the said trust-disposition and settlement, dated 5th November 1913; (4) holograph separate codicil, dated 5th November 1913; and (5) and (6) two holograph lists of specific legacies, dated May

1914, contained in an envelope addressed 'List of things I wish divided by Mrs E. A. Gillett and Mrs J. C. Duke, with approval of trustees.' . . .

"2. By the said antenuptial contract of marriage the said John Charles Duke made certain provisions in favour of his then intended spouse. On the other part, the second party (first) bound and obliged herself and her heirs, executors, and representatives, immediately upon the solemnisation of the marriage, to pay to the trustees nominated under the contract the sum of £2000, (second) assigned, disponed, and conveyed to the said trustees any share, title, estate, and interest to which she might acquire right as a successor through her aunt, the said Miss Anne Scott, upon the death of the latter, but that only to the extent of a sum of £3000. The said sums of £2000 and £3000 are referred to in the said contract as 'the wife's trust fund,' and it was directed that it should be held for the following purposes, namely—(1) payment of the expenses connected with the trust; (2) payment of the free income to the second party during her lifetime; (3) upon the death of the second party, for payment of the free income of £1000 of the wife's trust fund to the said John Charles Duke during his lifetime; (4) payment of the capital of the wife's trust fund to the children of the marriage; the fifth purpose, *inter alia*, provided as follows:—'Failing a child or children of the said intended marriage or issue thereof, or of their all dying before the term of payment of their shares, the wife's trust fund shall be to the extent of the said sum of Two thousand pounds or the property or investments for the time representing the same (subject always to the foregoing liferent provision in favour of the said John Charles Duke) be paid, conveyed, or made over to the said Miss Louisa Scott Lawford, her heirs and assignees whomsoever, and to the extent of the said sum of Three thousand pounds or the property or investments for the time representing the same be paid, conveyed, or made over in such way and manner as the said Miss Anne Scott may direct by any writing under her hand, and failing such writing shall be paid, conveyed, and made over to her nephews and nieces and the issue of any predeceasing nephew or niece equally *per stirpes* who may be alive at the date of the death of the said Miss Louisa Scott Lawford, should she die without leaving children or issue thereof surviving her, or at the date of the failure of such children or issue should none of them take a vested interest under these presents.' . . .

"6. Of the above-mentioned testamentary writings the trust-disposition and settlement and the codicil thereon dated 5th November 1913 were prepared by and remained in the custody of Messrs Elder & Aikman, W.S., from the date of execution to the date of the truster's death; the separate holograph codicil of 5th November 1913 also remained in the custody of Messrs Elder & Aikman from the date of execution until the date of the truster's death; the separate codicil of 18th December 1912 was prepared by and remained in the custody of Messrs J. & A. F. Adam, W.S., from the date of execution until the date of the truster's death, and the two holograph lists remained in the truster's own custody until the date of her death. The truster did not inform Messrs Elder & Aikman that she had executed the separate codicil of 18th December 1912, nor did she inform Messrs J. & A. F. Adam that she had executed the codicil dated 5th November 1913. The said antenuptial contract of marriage was prepared by Messrs J. & A. F. Adam, and has all along been in their hands."

The first parties *contended* that the provisions of the codicil dated 18th December 1912, in so far as inconsistent with the terms of the trust-disposition and settlement, were revoked by the codicil dated 5th November 1913, written upon the said trust-disposition and settlement; that accordingly the said codicil dated 18th December 1912 was revoked in so far as (1) it revoked the bequest of £1000 to the second party and the directions contained in the sixth purpose of the trust-disposition and settlement as to the sum of £2500, and (2) it bequeathed to the second party the sum of £3400. They accordingly submitted that they were bound to make immediate payment to the second party of the sum of £1000 bequeathed to her by the third purpose of the trust disposition and settlement, and to hold the sum of £2500 on the trusts mentioned in the sixth purpose thereof.

The second and third parties contended that the provisions in favour of the second party in the codicil dated 18th December 1912 fell to be read in place of and as substituted for the provisions in her favour in the said trust-disposition and settlement, that it was not revoked by the codicil of 5th November 1913, and that the first parties were bound to make immediate payment to the second party of the sum of £400, and to the third parties of the sum of £3000.

The *questions of law* were—"(1) Are the first parties bound to make immediate payment to the second party of the sum of £1000 bequeathed to her by the third purpose of the said trust-disposition and settlement, and to hold the sum of £2500 on the trusts mentioned in the sixth purpose thereof? or (2) Are the first parties bound to make immediate payment to the second party of the sum of £400, and to the third parties of the sum of £3000?"

Argued for the first parties—The effect of the codicil of 5th November 1913 was to revoke the codicil of 18th December 1912 *in toto*, or alternatively in so far as that codicil was inconsistent with the trust-disposition and settlement. The codicil of 5th November 1913, written on the trust-disposition and settlement, referred to the "foregoing" trust-disposition and settlement and confirmed it. The result was to make the trust-disposition and settlement operative as from the date of the codicil of 5th November 1913, and as the trust-disposition and settlement revoked all former testamentary writings the codicil of 18th December 1912 was revoked. This was plainly the intention of the testatrix, and the confirmation

of the will in the codicil of 5th November 1913 was not a confirmation of her testamentary writings generally but of a particular specified document which was only one of these writings, viz., the trust-disposition and settlement. That was clear from the use of the word "foregoing"; from the bequest to "each" of the trustees who were there nominated in the trust-disposition and settlement, and did not include the trustee nominated in the codicil of 18th December 1912; from the provision that the codicil of 5th November 1913 and the foregoing trust-disposition and settlement were to be read as one deed, no mention being made of the codicil of 18th December 1912; and from the fact that the legacy to Isabella Moodie after having been dealt with in the codicil of 18th December 1912 was again dealt with by the codicil of 5th November 1913. The case was on all fours with *Mellis* v. *Mellis's Trustee*, 1898, 25 R. 720, 35 S.L.R. 552. English and Irish decisions were relative to a system of conveyancing different from the Scottish in which the questions of probate and interpretation was dealt with by different courts. Further, the requisites of attestation were different in Scotland from those in England, and the English cases merely set up a canon of construction subject to definite limitations. *Stoddart* v. *Grant*, 1852, 1 Macq. 163, differed from the present case, for in it there were no words of revocation and no inconsistency between the deeds. *Crosbie* v. *M'Doual*, 1799, 4 Ves. Jun. 610, was not in point, for the words were not so definite as in this case, and the codicil merely deleted from and did not add to the will as in the present case. *In re Steele*, 1868 L.R., 1 P. & D. 575, turned upon the English Wills Act 1836 (1 Vict. cap. 26), section 22. In *Green* v. *Tribe*, 1878, L.R., 9 Ch. D. 231, the words were different, as also in *Follett* v. *Pettman*, 1883, L.R., 23 Ch. D. 337. The decision in *M'Leod* v. *M'Nab*, [1891] A.C. 471, was in favour of the first parties. Confirmation of the will in a codicil no doubt generally meant confirmation of the whole testamentary writings, but that rule was subject to limitations—*e.g.*, *in re De la Saussaye*, 1873, 3 P. & D. 42; *Burton* v. *Newbery*, 1875, L.R., 1 Ch. D. 234; *Farrar* v. *St Catherine's College, Cambridge*, 1873, L.R., 16 Eq. 19. The contention of the second and third parties resulted in an actual revocation of the trust-disposition and settlement, though it was confirmed by the codicil of 5th November 1913. *Best* v. *University of Edinburgh*, 1880, 8 R. 66, 18 S.L.R. 45, was also referred to.

Argued for the second and third parties—There being no express revocation of the codicil of 18th December 1912 the *onus* was on the first parties to show that the testatrix intended to revoke that codicil, and this had not been discharged—*Stoddart* v. *Grant* (*cit.*). The obvious intention of the testatrix was to confirm her whole testamentary writings, including the codicil of 18th December 1912, and she omitted to refer expressly to the codicil of 18th December 1912 in her confirmation, because the agents who prepared the codicil of 5th November 1913 were unaware of the codicil of 18th December 1912. Further, the testatrix, when she meant to do so, revoked a bequest expressly as she did in the trust-disposition and settlement and the codicil of 18th December 1912. The English and Irish rule was in favour of this contention —*Crosbie* v. *M'Doual* (*cit.*); *Green* v. *Tribe* (*cit.*); *Follett* v. *Pettman* (*cit.*); *in re Vyvyan*, 1883 W.N. 47; *Browne* v. *Browne*, [1912], 1 I.R. 272; *M'Leod* v. *M'Nab* (*cit.*); Jarman on Wills (6th ed.), vol i, p. 198-9; *in re Steele* (*cit.*); Theobald on Wills (7th ed.), p. 64. *Mellis*' case (*cit.*) was not in point, for there the question was one of reviving a dead document, not of killing a live one, as here. But in any event it was consistent with the English cases—*Bankes* v. *Bankes' Trustees*, 1882, 9 R. 1046, 19 S.L.R. 785; Bell's Lectures, p. 982.

At advising—

Lord President—The question for our consideration in this case is—Did the testatrix by her codicil of 5th November 1913 revoke her codicil of 18th December 1912? I am of opinion that she did not. It is certain that she does not revoke it in express terms. It is equally certain that when she desired to revoke a testamentary disposition she knew and used precise and clear language to that effect.

In these circumstances it seems to me that the words of Mr Justice Kay in the case of *Follett* v. *Pettman*, 1883, L.R., 23 Ch. D. 337, at p. 342, are applicable in express terms. "By the first codicil," he says, "the testator shows that when he intended to revoke he knew how to use express and apt words. If he had intended to revoke the clear devise made by the second codicil it must be inferred he would have done it by express words also."

Nor is there any inconsistency between the codicil of November 1913 and the trust-disposition and settlement as modified by the codicil of December 1912. Read together these deeds seem to me to express a clear and consistent scheme for the disposal of the testatrix's whole estate. In these circumstances the *onus* upon those who maintain that revocation has taken place is heavy. In my opinion it has not been discharged. The sole reason given in support of the view that revocation has been effected is that by the codicil of November 1913 the testatrix in express terms confirms the trust-disposition and settlement in all respects, and does not in express terms confirm the codicil of December 1912. To which the answer seems to be that when the codicil in general terms confirms the trust-disposition and settlement, that means and implies the trust-disposition and settlement as modified by any existing and operative codicils.

"The general principle"—to use the words of Mr Justice Fry in the case of *Green* v. *Tribe*, 1878, L.R., 9 Ch. D. 231, at p. 234—"I take to be clear. On the one hand, where a testator in a codicil uses the word 'will' abstractedly from the context it will refer to all antecedent testamentary dispositions

which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. . . . On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question therefore which I have to consider is whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer. . . . (at p. 238) A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils." That appears to me to be very sound law, and to be applicable in terms to the case before us.

The general effect of confirming words such as we find in the codicil of November 1913 is well expressed by Mr Justice Kay in accordance with the English authorities, and his opinion seems to me to be in accordance with the principles of Scots law as well when he says (*Follett* v. *Pettman*) — "The words of confirmation which the testator has used are, according to the authorities which I have referred to, to be read as meaning that he does not intend to alter his general testamentary disposition further than by making the gifts contained in that codicil."

It is said in this case, and with justice, that if the man of business who framed the codicil of 5th November 1913 had had before him the codicil of December 1912 and had intended that it should be confirmed, he would have expressed the general confirming clause in different terms. He would have confirmed the trust-disposition and settlement with the relative codicil of December 1912. No doubt he would; and it is just as certain that if he had had that codicil before him and intended to revoke it he would have revoked it in express terms. But the explanation of the difficulty is clear from the sixth article of the Special Case—the man of business who framed the latter codicil had not the former codicil before him or within his knowledge. Hence the difficulty, if difficulty there be, which has given rise to this case.

I am of opinion, and propose to your Lordships, that we should answer the first question in the negative and the second in the affirmative.

LORD JOHNSTON—While I agree with your Lordships I do so with the utmost difficulty, and chiefly because of two things. First, I accept the principle stated by Fry, J. He says—and I agree with him—that where a man speaks abstractedly of his will he speaks of all testamentary documents which at the date may be said to make up his will, but that where he speaks with definite reference to something in the form of an actual document the inference is different. Now it seems to me that that is exactly apposite to the present question. Here we have the testatrix not making reference abstractedly to her will, but making very precise reference to a particular document which she does not call her will but upon which she writes the second codicil, and which she refers to by its proper name and proper date. It seems to me therefore, if I were quoting Fry, J., I should quote him for an opposite purpose to that for which your Lordship does.

The second difficulty that I have arises from this, that I cannot dispossess my mind of the impression that in this judgment we are not proceeding upon *relevant* surrounding facts, which it is competent for us to do, but upon impressions. I agree that if the second codicil should stand it makes a most reasonable settlement of the lady's affairs, and I think it is extremely likely that she intended to settle them in that way. I do not think, however, that I have any right to proceed upon impression, but must ascertain her intention from what she has written and from the one single relevant fact, which is the only one we are entitled to look at, namely, that when she wrote the first codicil she did not inform her principal agents of what she had done, and when she wrote the second codicil she again did not inform the secondary agent who prepared the first codicil that she had executed the second. From that one fact I am not prepared to deduce anything which can really give assistance in interpreting this document. The whole trouble has arisen from the fact that a second agent, called in for some reason to make the first codicil, who knew that he had not the settlement in his possession although he must have had a copy, chose to keep in his own repositories the first codicil, which he knew was making an inroad upon the will, without intimating till the date of this lady's death to the agent who had prepared and was in possession of that will the fact that such an alteration had been made. That he should have done so is a matter of great surprise to me, and it has caused all this trouble and the doubt which must always remain, notwithstanding the judgment which we are prepared to give, as to this lady's real intention.

The matter which enables me to concur with your Lordship I deduce from the last words of the second codicil. The testatrix confirms her said trust-disposition and settlement in all respects except in so far as hereby altered, but then she goes on to say that it and this codicil shall be read and construed together as forming one document. Now I think I may spell out of that, that what she really was thinking of was that she was interpolating into her settlement the contents of this codicil, and doing so in such a way as not to interfere with the first codicil having effect as a document

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