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-

> tects statements that are defamatory and false, when apart from the protection the very character of the statement itself carries with it the implication of malice. If once the privilege be established, unless there be extrinsic evidence of malice, there must be something so extreme in the words used as to rebut the presumption of innocence and to afford evidence that there was a wrong and an indirect motive prompting the publication (*Spill* v. *Maule*, L.R., 4 Ex. 232)"—*per* Lord Chancellor Buckmaster.

The Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42) enacts, sec. 6—". . . In all cases in which an issue or issues shall have been directed to be tried by a jury it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of the undue admission or rejection of evidence, on the ground of excess of damages or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case: Provided also that such interlocutor granting or refusing a new trial shall not be subject to review by reclaiming petition or by appeal to the House of Lords." Section 7—". . . It shall be competent to the counsel for any party at the trial of any issue or issues to except to the opinion and direction of the judge or judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial; and . . . on such exception being taken the same shall be put in writing by the counsel for the party objecting and signed by the judge or judges; but notwithstanding the said exception the trial shall proceed and the jury shall give a verdict therein for the pursuer or defender and assess damages when necessary; and after the trial of every such issue or issues, the judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues and a copy of the verdict of the jury endorsed thereon, to the Division by which the said issue or issues were directed, which Division shall thereupon order the said exception to be heard in presence on or before the fourth sederunt day thereafter; and in case the said Division shall allow the said exception they shall direct another jury to be summoned for the trial of the said issue or issues, or if the exception shall be disallowed the verdict shall be final and conclusive as hereinafter mentioned: Provided always that it shall be competent to the party against whom any interlocutor shall be pronounced on the matter of the exception to appeal from such interlocutor to the House of Lords, attaching a copy of the exception to the petition of appeal certified by one of the clerks of session . . . and upon the hearing of such appeal the House of Lords shall give such judgment regarding the further proceedings, either by directing a new trial to be held or otherwise as the case may require."

The Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31), sec. 2, enacts—"If after hearing parties upon (*a*) a rule to show cause why a new trial should not be granted in terms of section 6 of the Jury Trials (Scotland) Act 1815 on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

On 6th May 1913 Alexander Lyal, farmer, Greenknowe, Gordon, Berwickshire, *pursuer*, brought an action against George Henderson, farmer, East Morriston, Gordon, and Thomas Henderson, retired tea planter, Fawside Lodge, Gordon, *defenders*, to recover from each defender £500 as damages for slander.

The action arose out of the business of the School Board of Gordon, Berwickshire, of which all three parties were for a time members, and was based on the following motion moved at one of the board's meetings, held on 10th May 1912, by the defender George Henderson, who was chairman, seconded by the other defender and duly recorded in the minutes—"The chairman drew the attention of the meeting to the fact that the mover of the amendment," *i.e.* Lyal, "was the defender in the *Leitch* v. *Lyal* case and had to pay £400 damages and expenses to the headmaster," *i.e.* Leitch, "for slander; and moved that this be recorded in the minute as showing that Mr Lyal in moving the amendment is a prejudiced party. . . ."

The pursuer *averred*—"(Cond. 6) The said motion relating to the pursuer was intended by the defenders to represent, and did falsely, calumniously, and maliciously, and without probable or any cause represent, that the pursuer had sought and obtained election as a member of the said School Board, and continued to sit thereon, not with the object of impartially discharging his duties as a member of said Board, but solely for the purpose of gratifying a private animosity which he entertained against the headmaster Mr Leitch, in total disregard of the interests of the School Board and the education of the parish. In any event the said motion falsely, calumniously, and maliciously represented that in moving the said amendment the pursuer was actuated not by a sense of public duty but by private animosity which he bore towards the said headmaster, and was thereby guilty of dishonourable conduct. . . . . (Cond. 8) . . . . [*Referring to a motion on a subsequent date by a Mr Hogg to expunge this minute, and an amendment agreeing thereto as it had served its purpose, but reasserting its truth*] . . . When the said amendment was carried the pursuer inquired of the chairman why the amendment had been moved

if there was no desire to hurt the feelings of any individual member. In reply to the said inquiry the chairman stated that the pursuer had manifested a great anxiety to use his position to get at Mr Leitch, and that his support of Mrs Ogilvie in the position as infant mistress had been prompted solely by the said purpose."

The *facts* are given in the opinion (*infra*) of Lord Salvesen.

The defenders pleaded—"(3) The defenders, not having slandered the pursuer, are entitled to absolvitor. (4) The motion and amendment complained of having been made by the defenders in the *bona fide* discharge of a public duty, are privileged, and the defenders having acted without malice are entitled to absolvitor."

On 25th June 1915 the Lord Ordinary, having previously sisted the trustees and executors of Thomas Henderson as parties to the cause on his death, dismissed the action with expenses, holding that the words complained of were not reasonably capable of bearing the meaning sought to be put on them. The Extra Division (LORDS DUNDAS, MACKENZIE, and CULLEN), on a reclaiming note, recalled his interlocutor, laying stress on the averment in Cond. 8. They allowed this *issue*—"It being admitted that the statement contained in the schedule hereto was made by the defenders of and concerning the pursuer at a meeting of the Gordon School Board at Gordon on 10th May 1912, whether the defenders or either of them, and which, by the said statement represented falsely, calumniously, and maliciously that in moving the said amendment the pursuer was actuated not by a sense of public duty but by private animosity which he bore toward the said headmaster, and was thereby guilty of dishonourable conduct. Damages laid at £500 from each defender. Schedule—That the pursuer as moving the amendment that Mrs Ogilvie be retained as infant mistress pending the inquiry by the Education Department was a prejudiced party, in respect that he (pursuer), in the *Leitch* v. *Lyal* case, had to pay £400 damages and expenses to the headmaster (Mr Leitch) for slander."

At the *trial*, which was held on 31st May 1915, the Lord Ordinary, on the conclusion of the evidence adduced for the pursuer, withdrew the case against George Henderson and directed the jury to return a verdict in his favour, on the ground that there was no evidence of malice against him and no legal evidence on the said issue. Counsel excepted. The trial proceeded as against the trustees and executors of Thomas Henderson, and the jury returned a verdict for the pursuer, assessing the damages at £100.

On June 8 Thomas Henderson's trustees moved in the Second Division for a new trial, and subsequently obtained a rule. On June 11 the pursuer presented a bill of exceptions in the case against George Henderson against the Lord Ordinary's charge, on the grounds (1) that the terms of the slander, if interpreted by the jury as set forth in the innuendo, were in themselves evidence of malice on the part of the said George Henderson, (2) that the circumstances in which the slander was uttered were evidence of malice on the part of the said George Henderson, (3) that the antecedent and subsequent history, and in particular the circulars of the defenders, and the action and words of the defender George Henderson at the meeting of 29th March 1913, were evidence of malice on his part, (4) that malice on the part of Thomas Henderson was in respect of the consistent collaboration of George Henderson, and in respect of the uttering of the slander by the joint act of Thomas and George Henderson, imputable to the said defender George Henderson.

On November 9, 1915, the Second Division pronounced the following interlocutors:—". . . Having heard counsel for the parties on the rule formerly granted, make the rule absolute, set aside the verdict found by the jury as against the defenders, the trustees and executors of Thomas Henderson, and being unanimously of opinion that the said verdict is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, assoilzie the said defenders from the conclusions of the action, and decern: Find the pursuer liable to the said defenders in expenses. . . ." and ". . . Having heard counsel for the parties on the pursuer's bill of exceptions, disallow the bill of exceptions: Find the pursuer liable to the defender George Henderson in expenses in connection with the bill of exceptions. . . ."

LORD SALVESEN—We are asked to set aside the verdict in this case on two grounds—(1) that the statement for which the defenders are sought to be made responsible being not in itself defamatory, that the innuendo embodied in the issue remitted to the jury has in fact not been established by the evidence; and (2) that the occasion on which the alleged defamatory statement was made being privileged, there was no evidence on which the jury could reasonably find that the defenders had been actuated by malice in making it.

(1) As regards the first matter, although personally I think the innuendo was very strained and far fetched, I am unable to hold that it has not been supported by sufficient evidence to justify the verdict. Several witnesses of intelligence and standing say that they put substantially the same meaning on the statement as is expressed in the innuendo. They all say in different language that the words suggested to their mind that the pursuer had used his position as a member of the School Board in order to gratify a grudge which he had against Mr Leitch, the schoolmaster, who had some years before obtained a verdict against him for £400 in an action for slander. If that be held to be the true meaning, then as there is no plea of justification the verdict of the jury, apart from privilege, could not be challenged. On this matter the jury were the final judges, subject only to review if there was not evidence on which they could reasonably proceed. If this then were the only question in the case, I could not have been a party to upsetting the verdict.

(2) It was admitted that the statement complained of was privileged, and that accordingly malice must go into the issue. On record there was in my opinion a sufficient averment of malice. The pursuer set forth that the defenders were well aware of the irrelevancy of their motion to the topic under discussion, and that the motion was made by them solely for the purpose of defaming the pursuer and wounding his feelings; and again, "the defenders have repeated, and continue to repeat, that in his actings as a member of the School Board he, the pursuer, has prostituted his position in order to gratify motives of private malice against the headmaster, of which he is entirely innocent." These averments are not specific, but they were considered by the Extra Division sufficiently so to allow the pursuer an opportunity of establishing them. They postulated rather than averred that the defenders had a grudge against the pursuer which they sought to gratify under the cloak of a privileged statement. If there was evidence from which this could reasonably be inferred by the jury, I think their verdict must stand, however much I might be disposed to differ from it, and even although the judge who presided at the trial entertained a strong opinion that the jury had erred.

Having considered very carefully all the evidence adduced by the pursuer and the comments made by his counsel on that evidence, and his criticisms on the evidence led for the defenders, I have come to a clear conclusion that there was no evidence from which malice could reasonably be inferred. Although the parties lived in the same parish and met frequently at meetings of the School Board—and the evidence covers several years — no words or acts of the defenders can be pointed to as supporting the theory of a private grudge. The pursuer himself does not say so. When he is asked by the Court to summarise the grounds on which he had formed the opinion that Thomas Henderson was maliciously disposed to him he could think of nothing but the terms of a circular issued in 1906, to which I shall afterwards refer, and the terms of the motion itself which formed the subject of the action. Apart from these two statements, which are in writing, he admitted that he had never seen any manifestation of ill-will towards him on the part of either defender. I should not hold the pursuer thereby precluded from proving malice by other evidence or documents which were not in his recollection at the time of the trial, but there is none such. The parties, indeed, took different views of the policy which ought to be followed in educational matters connected with the parish of Gordon, but the presumption is that both honestly entertained the views which they expressed as recorded in the various minutes of the School Board to which we were referred, and no adverse inference can be drawn from this difference of opinion in the one case any more than the other. Extrinsic evidence of private animosity there is absolutely none. On the contrary, both the defenders seem to have treated the pursuer with courtesy and forbearance in circumstances that must often have proved very trying.

In regard to the circular of 5th April 1906, on which the pursuer's counsel was at last driven mainly to found, it is necessary to have fully before one's mind the circumstances under which it was issued. The School Board of the parish of Gordon administers the affairs of a single school attended by about 100 scholars. The headmaster Mr Leitch has held his position as such since his appointment in November 1889. In 1903 the pursuer seems to have formed an unfavourable opinion of Mr Leitch, and at a meeting held on 18th March of that year he used language with regard to him which a jury who tried an action subsequently raised held to have falsely and calumniously represented that Mr Leitch was a person unworthy of trust and unfit to hold the position of schoolmaster. The award of damages, which was £400, is conclusive evidence that the jury regarded the statements so made as highly prejudicial to the schoolmaster. The pursuer says he regarded the verdict as unjust, but that he resolved not to move for a new trial. He accordingly paid the damages awarded and expenses, the amount of which must have been considerable.

In April 1906 the election of a new School Board fell to be made. The pursuer, who had formerly been a member of the School Board but had decided not to seek re-election in 1903, was one of the candidates. The late Mr Thomas Henderson also sought election, and on 5th April issued a circular setting forth the grounds on which he solicited the votes of the electors. In that circular occurred the following passage:—"Mr Lyal has again seen fit to come forward as a candidate, and I am sure all right thinking persons will agree with me that after the result of *Leitch* v. *Lyal* case he cannot be a proper man to sit on a board where he may have to vote on questions affecting the headmaster and the staff generally, and I trust the electors will show their disapproval of his action." I can find nothing in this passage to take exception to. It may have been disagreeable to the pursuer to be reminded of the issue of the action raised against him, but this fact was common knowledge in the parish. I agree with the defenders that it was not desirable that a gentleman should be elected to the School Board who had so recently shown so marked hostility to the schoolmaster that he had slandered him at a public meeting. It is not in human nature that the hostility should have diminished in consequence of an adverse verdict which the pursuer believed to be unjust and to have been procured by false evidence; for it would be difficult for the pursuer not to associate the schoolmaster with the evidence which he adduced and which the pursuer regarded as false. In the circumstances I think it would have been more prudent if the pursuer had not sought re-election to the School Board at all. Even if one could suppose—and it makes a large draft on one's credulity—that the pursuer had forgotten or for-

given all, it was certain that uncharitable people would be disposed to connect any unfavourable view which the pursuer might form of the schoolmaster's conduct in relation to his office with the issue of the previous trial. I think therefore that Mr Thomas Henderson was quite justified in calling the attention of the electors to this aspect of the pursuer's candidature, and the electors appear to have thought so too, for the pursuer was not elected on that occasion.

In 1909 there was a rumour that the pursuer intended again to seek re-election. Mr Thomas Henderson remained of the same opinion as he had expressed in his circular of 1906, that it was undesirable that the pursuer should form a member of the new School Board. He expressed his views to Mr Hogg in the letter of 23rd March 1909, and frankly stated that if the pursuer were nominated he would arrange to have him opposed so that there would require to be a poll. In this he was acting entirely within his rights. His attitude throughout this parish controversy is, I think, fairly stated in a passage in that letter—"I do hope," he says, "for the good of the parish, there will be no need. It is hateful to restart the whole story, but it will not be my fault."

The pursuer did not in fact come forward as a candidate in 1909, but he was elected in April 1911. The other members of the Board were the two Messrs Henderson, Mr Weatherhead, and Mr Hogg. At that time and for several years before there had been great friction between the headmaster and a Mrs Ogilvie, who was mistress of the infant department. This was connected with the fact that the Board had created the infant school as a separate department. In consequence of the independent attitude which Mrs Ogilvie took up, and her refusal to recognise any authority over her on the part of the headmaster, difficulties arose which seemed to be insoluble unless the headmaster was again placed in full control. This was the first matter that engaged the new Board's attention, and a motion was proposed by Mr Weatherhead on 31st May 1911 that the headmaster be replaced in full charge over the whole school as formerly. Mr Weatherhead had at the last Board meeting held a different opinion, but had evidently come to think that the existing arrangements were not workable. The pursuer signalised his first appearance as a member of the School Board by moving a direct negative, but the motion of Mr Weatherhead having received the support of the two Messrs Henderson, was carried. From that time forward the pursuer persistently opposed every motion which was made with the view of carrying out the policy that had met with the approval of the majority. It is not easy to suppose that his actings in this matter were entirely unbiassed. Mr Leitch, whose position was terminable at the pleasure of the School Board, not unnaturally interested himself in the election against the pursuer, whom he had only too good reason to believe did not regard him with favour. This was made matter of specific complaint by the pursuer, who at the next meeting moved that the Education Department should be asked how far it was in order for the headmaster of a public school to associate himself with the election of a school board in his parish. The motion was defeated by a majority, but at every subsequent meeting the pursuer continued actively to espouse a policy that he knew the headmaster considered to be injurious to his usefulness. On 16th March 1912 he propounded serious charges against the headmaster which he desired to have inquired into, and this although the Board had unanimously agreed at the previous meeting to ask for a Departmental inquiry into the whole case of Mrs Ogilvie since her appointment. I need not go into further details, because it is quite obvious that in every matter which concerned the headmaster the pursuer took up an adverse position, and although he was outvoted on every occasion he was at pains to have his dissent recorded from the decision of the majority. It was in these circumstances that the defender George Henderson moved that the statement referred to in the issue should be recorded in the minutes.

The pursuer's counsel strongly argued that the mention of the verdict in the old slander case was wholly irrelevant to the subject-matter of the impending departmental inquiry. If this were clear it might found an inference that some indirect motive such as the gratification of a previous grudge against the pursuer had prompted the defenders in causing it to be inserted. On the other hand the defender George Henderson explains in his evidence that it was in his opinion necessary that whoever inquired into the charges against Mr Leitch or the propriety of dismissing Mrs Ogilvie from her position as mistress of the infant school ought to know something of the prior relationship between the pursuer and Mr Leitch. He goes on to say—"We did not think it right that the Department should have an opportunity of examining our minutes, which recorded all Mr Lyal's complaints without showing who Mr Lyal was and his position in regard to Mr Leitch." And, again, in answer to the question—"As the framer of this resolution tell me what you refer to when you refer to him being a prejudiced party?" he answered—"Well, he was biassed consciously or unconsciously against the headmaster, and the headmaster came into the whole controversy, and I think if the thing is going before the Department this should be put before them. We did not know whether they would send anybody down or whether it would be documentary evidence they would take, and that they ought to have the whole thing before them." I think this view is perfectly intelligible, and that the nature of the relations between the pursuer and Mr Leitch was quite pertinent to the inquiry. It might tend to explain the apparently factious opposition to the views of the majority which had characterised the pursuer's actings from the first day that he joined the School Board in 1911. At all events there is nothing to indicate that either of the defenders did not

honestly believe the facts which they recorded or that they might not have a bearing on the result of an inquiry which covered not merely the charges against the headmaster but the conduct of the majority in dismissing Mrs Ogilvie.

One other point which is recorded in the minutes of the School Board on 29th March 1913 was also made the subject of adverse comment. At the meeting on that day Mr Hogg moved that the portion of the minutes of 10th May 1912, which is the subject of the action, should be rescinded and expunged. They did so on the representation that the statement complained of implied a slanderous imputation of an even wider nature than that contained in the innuendo. The defenders agreed to the motion for recission on the footing that it did not affect the truth of the motion as recorded in the previous minute, and they repudiated the slanderous interpretation that was put upon what they had said. In so doing I think they acted in a dignified and proper manner. The purpose which they had in view in framing the original motion had been served, and in their view it was unnecessary that the record should remain in the minutes of the School Board as that might be construed as a wish to hurt unnecessarily the feelings of the pursuer.

The last argument urged by the pursuer's counsel was that as the jury had found that the motion recorded in the minutes was capable of a slanderous meaning, that meaning must now be attributed to the defenders; and as they have taken no counter issue they must be held as confessed that they knew the falsity of the imputation which has been extracted from the language. This might be so if the occasion had not been privileged, but it would be most unfair to hold that the defenders are to be dealt with as having made an imputation which they repudiate and which is not the natural meaning of the words they actually used, because other people think that the words are capable of bearing a defamatory meaning. There can in my view be no constructive malice any more than constructive fraud. The question whether words were uttered in the knowledge that they were untrue or recklessly without caring whether they were true or false is a question of fact or inference from fact. It would have been possible in the case of the pursuer if he had made an untrue statement reflecting on the schoolmaster to have inferred from the history of their previous relations and of the pursuer's conduct and utterances as recorded in the evidence that his hostility towards the schoolmaster had not ended with the verdict against him, but there is nothing in the relation between the pursuer and the defenders which even faintly suggests that the defenders were actuated by other than a sense of public duty in what they did. I am accordingly of opinion that the verdict for the pursuer cannot stand.

The only other matter which we have to decide is whether we should order a new trial, and to have this whole miserable story again gone into, or should exercise the power conferred upon us by the Act 10 Edw. VII and 1 Geo. V, cap. 31, sec. 2. I am of opinion that we should adopt the latter course. The pursuer's counsel was unable to point to any evidence that he could reasonably expect to obtain relative to the cause other than that which has been already adduced. A period of more than two years intervened between the date of raising the action and the date of trial, and the pursuer had therefore ample time to prepare his case. He does not say that he has made any new discovery since which might influence a jury, and I am therefore of opinion that we should follow the precedent set us by the First Division in the case of *Mills* v. *Kelvin*, 1913 S.C., p. 533, 50 S.L.R. 331.

It follows from what I have said that the bill of exceptions must be disallowed. If there is no evidence of malice against the late Mr Thomas Henderson it is not pretended that there is any against the other defender. The Lord Ordinary was therefore justified in withdrawing the case against the latter from the jury, and indeed to have at once nonsuited the pursuer. Personally I think it would have been a safer course and more in accordance with our practice to have allowed the evidence for both defenders to proceed, in case some point on which an argument could be founded had been overlooked, but in this case the matter is of little consequence as it may be assumed that no separate evidence would have been adduced on behalf of Mr George Henderson. I move your Lordships accordingly.

LORD JUSTICE-CLERK — I have had an opportunity of perusing the opinion of Lord Salvesen, in which I concur, and I have nothing to add.

LORD DUNDAS—So have I.

LORD DEWAR—I agree, and as I presided at the trial it is perhaps right that I should briefly state my reasons for thinking that the judgments your Lordships are about to pronounce is just.

The substance of the case which the pursuer presented on record, and on which he obtained an issue, is contained in condescendence VI, where he avers that the defenders were well aware of the irrelevancy of the motion to the topic under discussion, and that the motion was made by them solely for the purpose of defaming the pursuer and wounding his feelings.

If these averments had been proved I should have agreed with the verdict, but in my opinion they were not proved; on the contrary, I think they were disproved.

It was the quarrel between the headmaster Mr Leitch which lay at the root of the whole trouble, and I am afraid that quarrel is not yet at an end. So far as I could judge, neither of them appeared to be prepared to forget and forgive. They both appear to be strong-minded masterly men, each determined to have his own way, and neither given to compromise. After the slander action in 1903 Mr Leitch did not regard the pursuer as a fit and proper person to be a member of the School Board,

and did his best to prevent his return, and apparently the pursuer did not regard Mr Leitch as a fit and proper person to be headmaster of the school, and although he did not admit it, I think it is proved that he did his best, when opportunity offered, to remove him from that office.

But the pursuer ceased to be a member of the School Board in 1903, and there was harmony for about six years. But in 1909 fresh trouble arose. In that year Mrs Ogilvie, a new headmistress of the infant department, was appointed. So far as one can judge from the documents, she appears to have been a strong-minded lady, and she very soon quarrelled with Mr Leitch. This quarrel continued for about three years, and gave the School Board a great deal of trouble. They tried various methods to restore harmony, but all failed. The quarrel in time became so acute—it was occasionally carried on in presence of the school children—that the Board finally resolved that one or other of the parties must go, and the Board was divided in opinion as to whether it should be Mrs Ogilvie or Mr Leitch. When this controversy was at a critical stage the pursuer again became a member of the Board in the year 1911, and he at once espoused Mrs Ogilvie's cause. He thought she should be retained, and was supported in that view by the witness Mr Hogg. The other three members of the Board thought she should be dismissed.

In considering whether the motion complained of was relevant to the topic under discussion, it is necessary to examine the minutes of the School Board meeting to understand clearly what the discussion involved, and the part the pursuer took in it. I do not think I am wrong in saying that these minutes show that the pursuer opposed and dissented from every proposal the majority of the Board made with regard to Mrs Ogilvie. At the very first meeting which he attended after being returned to the Board—when it was proposed to replace the headmaster in charge of the school—he moved a direct negative, and when the motion was carried he dissented, and insisted upon his dissent being recorded. He opposed and dissented from the proposal to ask Mrs Ogilvie in the interests of the school and in her own interest to resign, and he dissented from the proposal to dismiss her. He also moved that the Education Department be asked to inquire into "the treatment of Mrs Ogilvie by the headmaster," and various other matters. It is a very long motion, covering nearly two pages of print, and the matters he wishes inquired into are grouped under separate heads. The manner in which this motion is framed appears to suggest that Mrs Ogilvie had not been properly treated by the headmaster, and it also appears to reflect upon Mr Leitch's conduct and efficiency as a headmaster. All this was minuted, and as the pursuer and Mrs Ogilvie had appealed to the Education Department these minutes would in due course be submitted to the Department for consideration.

I do not suggest that the pursuer was not fully entitled to do all this. I think he was, and I assume that he did it in what he honestly believed to be the discharge of his duty as a member of the School Board. But the question is whether looking to the attitude he had taken with regard to the dismissal of Mrs Ogilvie and the question he had raised regarding the conduct and efficiency of the headmaster, it was not relevant and proper for the defenders to inform the Department that, in their opinion, the pursuer was prejudiced in respect of the action of slander which Mr Leitch had brought against him? I think it was. It might have had a very important bearing on the question which the Department was asked to decide. In weighing evidence it is always important to know whether and to what extent witnesses are "interested," and as a rule the evidence of a disinterested witness carries more weight. If the defenders honestly believed that the pursuer was in fact prejudiced—and that must be assumed—I think it was their right, and perhaps their duty, to say so in the interests of education and for the protection of the headmaster.

If I am right in thinking that the pursuer has failed to prove his averments that the defenders were well aware that the motion was irrelevant, and made solely for the purpose of defaming him, I confess I have some difficulty in finding evidence sufficient to establish the innuendo. I do not think that the pursuer would ever have obtained an issue if he had not put these averments on record, and if they are not proved I do not see on what evidence the jury held that the innuendo had been established. It is true that a number of intelligent witnesses stated that they attached the same meaning to the words complained of as the pursuer did in his issue, but I presume that this evidence was based on the assumption that the pursuer's averments were true. If so, I think that is important, because the "innuendo must represent what is a reasonable, natural or necessary inference from words used, regard being had to the *occasion and the circumstances of their publication*," *per* Lord Shaw in *Russel* v. *Stubbs*, 1913 S.C. (H.L.), p. 14, 50 S.L.R. 676. Now if the witnesses were misled by the pursuer's averments and did not know the true circumstances, I do not think their evidence is of much value. But as your Lordships have decided the case on other grounds the question is perhaps not of importance.

I agree with what your Lordships have said on the question of malice. During the trial I watched carefully for evidence of facts from which malice might reasonably be inferred, and as I was unable to detect any I asked the pursuer at the end of his evidence to assist me. The only thing he could remember, apart from the motion itself, was the circular issued by Mr Thomas Henderson in 1906, and with that he did not associate George Henderson. I quite agree that such an answer cannot preclude him from founding on any other facts proved in evidence which he might have forgotten at the moment, but I think it may at least be assumed that the circular was the most

important fact he had to found upon, and as the parties were near neighbours, and there must have been many opportunities for showing ill-feeling, if any existed, I do not think that the pursuer had much to complain about. The real truth, I think, is that Thomas Henderson was an exceptionally fair-minded and tolerant man who treated the pursuer in difficult circumstances with great forbearance, and at no time showed any ill-feeling towards him. The pursuer indeed admits in course of cross-examination that "he was exceedingly kind to everybody," and that is consistent with all we know of him. He died before the trial came on, and the jury had no opportunity of seeing and hearing him, but all spoke well of him. He was a man of wide experience and sympathies. For many years he had been tea-planting on an extensive scale in India, and took an active part in public life there and was universally respected. He returned to this country in 1903 and devoted the remainder of his life to his native parish, and he was known as an extremely fair-minded tolerant man. If that be his true character, and the witness who spoke to it was not cross-examined, it is not surprising that the pursuer had difficulty in remembering any evidence of malice. In my opinion there was none. I could discover no trace of it at the trial, and since then I have read the evidence and listened to the able and careful arguments presented by pursuer's counsel and I agree with your Lordships, for the reasons stated by Lord Salvesen, that there is no evidence on which the jury could reasonably find that the defenders had been actuated by malice.

The pursuer appealed to the House of Lords, and referred to *Metropolitan Railway Company* v. *Wright*, L.R., 11 A.C. 152, Lord Halsbury at 153; *Brown* v. *Croome*, (1817) 2 Stark 297; *Williamson* v. *Freer*, 1874, L.R., 9 C.P. 393; *Cowles* v. *Potts*, (1865) 34 L.J., Q.B. 247; *Simpson* v. *Robinson*, (1848) L.R., 12 Q.B. 511; *Thomas* v. *Bradbury, Agnew, & Company*, [1906] 2 K.B. 627; *Portobello Magistrates* v. *Edinburgh Magistrates*, 1882, 10 R. 130, 20 S.L.R. 92; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431; *Crawford* v. *Adams*; *Crawford* v. *Dunlop*, 1900, 2 F. 987, 37 S.L.R. 322; *Mackellar* v. *Duke of Sutherland*, 1859, 24 D. 1124.

The respondents (appellants in the cross-appeal) referred to *Bernhardt* v. *Abrahams*, 1912 S.C. 749, Lord Dunedin at 752, 49 S.L.R. 574; *Capital and Counties Bank* v. *Henty*, (1882) L.R., 7 A.C. 741, L.C. Selborne at 745; *Russell* v. *Stubbs*, 1913 S.C. (H.L.) 14, Lord Kinnear, p. 20, Lord Shaw, p. 23, 50 S.L.R. 676.

At delivering judgment—

LORD CHANCELLOR—The appellant in this case is the pursuer in proceedings brought by him against George Henderson and Thomas Henderson claiming damages for libel. Since the commencement of the suit Thomas Henderson has died, and his executors and trustees are with George Henderson the respondents in this appeal.

It is admitted that the libel sued on was published on a privileged occasion, and it is therefore essential for the pursuer to furnish evidence of malice in support of his claim. The Lord Ordinary, before whom with a jury the action was heard, ruled that there was no evidence of malice against George Henderson, and accordingly, under direction, a verdict was returned on his behalf. But as against Thomas Henderson the case was left to the jury, and they found in favour of the pursuer and granted damages £100. The pursuer appealed to the Court of Session by bill of exceptions against the ruling of the Lord Ordinary and his direction to the jury in favour of George Henderson, and the executors of Thomas Henderson appealed against the verdict granting damages and asked for a new trial. The Court of Session dismissed the bill of exceptions against George Henderson, and by virtue of powers conferred on them by section 2 of the Jury Trials Amendment (Scotland) Act of 1910, in lieu of granting a new trial they entered judgment in favour of Thomas Henderson's executors. The pursuer's appeal is against both these judgments.

There is no doubt that so far as George Henderson is concerned this appeal is rightly brought. The judgment in his favour was on the bill of exceptions, and in such a case an appeal to this House is expressly given by section 7 of the Jury Trials (Scotland) Act 1815. The executors of Thomas Henderson, however, say that the appeal against them is incompetent, and finally all the respondents have brought a cross-appeal claiming that the libel was incapable of the innuendo which the pursuer alleged it to possess—an innuendo which was expressly included in the issue approved by the Court and appointed to be the issue for trying the cause.

Before considering the merits of the appeal it is desirable to deal in the first instance with the question as to whether it is open to this House to entertain the appeal brought against the executors of Thomas Henderson. This question depends upon the true construction to be given to sections 6 and 7 of the Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42) and section 2 of the Jury Trials Amendment (Scotland) Act 1910. By section 6 of the former statute the conditions are laid down under which a new trial may be applied for where an issue has been tried by a jury. The grounds upon which such an application can be based may be summarised as follows:—(1) That the verdict was contrary to evidence, (2) misdirection, (3) undue admission or rejection of evidence, (4) excess of damages, (5) *res noviter veniens ad notitiam*, or (6) for such other reason as is essential for the justice of the case.

But upon whatever ground the application depends it is expressly provided that the interlocutor granting or refusing a new trial shall not be subject to review by reclaiming petition or by appeal to the House of Lords. It is noticeable that in this section there are well-defined questions of law which may be raised on an application for a new trial, but if this method of procedure be

adopted the finding of the Court of Session is none the less final and conclusive as against both parties. Section 7, however, of the same statute enables the questions of law to be raised in a form which permits appeal to this House. That section provides that exceptions may be taken at the trial of any issue on the opinion and direction of the judge, the competency of witnesses, the admissibility of evidence or other matter of law arising at the trial. Such exception must be presented in a certain form and subject to certain conditions, and can then be heard before the Court of Session, who, if they allow the said exception, are empowered to grant a new trial; but whether they allow or disallow the exception an appeal can be taken against their judgment to this House. It is noticeable that in neither of these sections is power reserved for the Court of Session to enter judgment on behalf of a party against whom the verdict has been given, and it was this omission that was remedied by the later Statute of 1910. This Act by section 2 provides that if, after hearing parties upon a rule in terms of section 6 of the Jury Trials (Scotland) Act 1815, on the ground that the verdict is contrary to evidence, "the Courts are unanimously of opinion that the verdict under review is contrary to evidence, and further that they have before them all the evidence that could reasonably be expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

It is urged on behalf of the respondents (the executors of Thomas Henderson) that this section, though it gives an added power to the Court of Session on application for a new trial, leaves their judgment under the same restriction as that imposed by section 6 of the Act of 1815. I am unable to accept this contention. Apart from the negative provision of the Act of 1815 an appeal would lie to this House from the judgment of the Court of Session by the common law of Scotland. Since the case of *Bywater* v. *The Crown*, (1781), 2 Cr. St. and P., p. 563, this right has been well recognised. It is accepted in every book of authority on the practice of this House and of the Court of Session, and can no longer be open to dispute. I do not think that such a right ought to be taken away by implication. If the Act of 1910 intended to impose upon the power thereby conferred upon the Court of Session the same fetters which were attached to their interlocutors by section 6 of the Act of 1815, I think clear words were required for the purpose. Nor do I think that the power to enter judgment for the litigant who had been unsuccessful in the Court of first instance is in *pari materia* with the power of granting or refusing a new trial conferred by section 6 of the Act of 1815. It is quite true that there follows from this interpretation of the statute the result that a judgment in favour of one litigant confirming the verdict of the jury is not appealable and a judgment in favour of the other litigant is. But such a distinction is not without reason. In the one case a verdict has been confirmed, and it is obvious that the earlier statute desired that this should be final. In the other case a judgment has been entered against a verdict, and the unsuccessful party has been deprived of a right he would formerly have enjoyed of having the matter retried. In these circumstances there is nothing unreasonable in permitting him to enjoy the ordinary right of a litigant to appeal against such a judgment to this House.

I think therefore that the pursuer is entitled to appeal against the judgment in favour of the executors of Thomas Henderson as well as against the judgment in favour of George Henderson. Upon the merits, however, I think that both appeals must fail.

This dispute arises out of unfortunate differences of opinion entertained—and I doubt not quite honestly—by the pursuer and the defenders with regard to the management of the public school of Gordon in the county of Berwickshire. In order to do justice to the appellant's case it is necessary to examine in some detail the circumstances that caused this disagreement.

It appears that the pursuer and the defenders have for many years past devoted themselves to the important public duty of assisting in the affairs of the Gordon School Board. From 1885-1903 the pursuer was a member of the Board, and acted as its chairman from 1894-1900. In 1906 he stood for election but failed to be returned, but in 1911 he again became a member. George Henderson and Thomas Henderson were both re-elected at the same election in 1911, and Thomas Henderson was appointed chairman of the Board. The headmaster of the school from 1889 down to the present time was a Mr Leitch, and differences of opinion arose between himself and the pursuer as early as 1902. It is not relevant to inquire what was the cause of this disagreement. It is quite possible in determining this case to assume that the pursuer was acting in what he believed to be the best interests of the school in the course that he took. But unfortunately in the pursuit of his object he was led into uttering defamatory statements about the headmaster which resulted in an action for libel, and a verdict given in favour of the headmaster for the sum of £400 damages.

In the election of 1906, when the pursuer was standing for election, Thomas Henderson thought it was his duty to issue a circular to the electors referring to this fact. The circular is dated the 5th of April 1906, and the important passage in it is this—"Mr Lyal has again seen fit to come forward as a candidate, and I am sure all right-thinking persons will agree with me that after the result of the *Leitch* v. *Lyal* case he cannot be a fit man to sit on a board where he may have to vote on questions affecting the headmaster and the staff generally, and I trust electors will show their disapproval of his action."

Again in 1909 Mr Henderson wrote to Mr Hogg on the eve of the election of that year, stating that he intended to get a nomination ready for opposition to Mr Lyal unless he could get an assurance that he was not going to stand.

In this same year a Mrs Ogilvie was appointed mistress of the Infants' School, and unfortunately for the welfare of education in the Gordon district disputes appear quickly to have arisen between herself and the headmaster—disputes which continued until they culminated in the dismissal of Mrs Ogilvie in 1912. Throughout this quarrel the pursuer actively championed the cause of Mrs Ogilvie. Messrs George and Thomas Henderson, on the other hand, supported the headmaster. This dispute appears to have been acute when the new Board of 1911 assumed its duties. Various motions were made and recorded in the minutes of the School Board meetings with regard to the matter throughout 1911; and in the early part of February 1912, on the pursuer's motion seconded by Mr George Henderson, it was resolved that the Education Department be asked to make a departmental inquiry into the whole case of Mrs Ogilvie since her appointment. Following this, on the 16th of March 1912, the pursuer moved that a number of inquiries be made with regard to the action of the headmaster in relation to Mrs Ogilvie, and a motion that a copy of all such statements should be sent to the Department was therefore moved by Thomas Henderson, but it does not appear from the minutes whether or not it was carried. From the minutes of this meeting it appears that the Board had written a letter to Mrs Ogilvie on the 2nd December 1911, the terms of which are not given, and at this meeting of March 16th a motion was carried that unless her reply was forwarded within ten days the Board would proceed to serve her with a formal notice.

The dispute continued, and on May 10th 1912 a meeting took place at which it was resolved on the motion of Mr George Henderson that Mrs Ogilvie should be dismissed. It was on this occasion that the libel complained of was published. There appears to have been a vehement discussion as to the dismissal of Mrs Ogilvie, and the pursuer moved as an amendment that she should be retained as mistress. The minutes then contain the following statement:—"The chairman drew the attention of the meeting to the fact that the mover of the amendment was the defender in the *Leitch* v. *Lyal* case and had to pay £400 damages and expenses to the headmaster for slander. And moved that this be recorded in the minute as showing that Mr Lyal as moving the amendment is a prejudiced party, seconded by Mr Thomas Henderson." And it is this statement that is the subject of the libel.

Now as far as George Henderson is concerned it is not suggested that there is any evidence of malice against him beyond that furnished in the minute itself and the circumstances under which it was recorded. But it is contended on behalf of the pursuer that the very language of the minute, and in particular the fact that it is suggested that Mr Lyal was prejudiced by reason of the slander action in moving his amendment, is itself sufficient to show that the matter was recorded owing to a malicious motive. I am unable to accept this view. 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. (See *Laughton* v. *Sodor & Man*, L.R., 4 P.C. p. 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 protects statements that are defamatory and false when apart from the protection the very character of the statement itself carries with it the implication of malice. If once the privilege be established, unless there be extrinsic evidence of malice, there must be something so extreme in the words used as to rebut the presumption of innocence and to afford evidence that there was a wrong and an indirect motive prompting the publication —*Spill* v. *Maule*, L.R., 4 Ex. 232.

In the present case I can find nothing in the statement, read in relation to the circumstances, to afford evidence of spite or ill-will against the pursuer. It is, I think, perfectly consistent with the belief honestly held both by George and Thomas Henderson that in the circumstances that had arisen they should state their view that the past history of the quarrel between the pursuer and the headmaster had biassed the pursuer's view upon the latter's conduct. This was a perfectly fair inference to draw and affords no evidence of malice on the part of those who made the statement.

Although in the present case there is a long history of difference of opinion between the parties, so far as George Henderson is concerned there is no evidence whatever to suggest that he has ever been prompted by motives of ill-will towards the pursuer. The pursuer himself says that "apart from the motion George never harmed me, and I have no reason to suspect George." Now in making the motion it must be remembered that the parties were contemplating an inquiry by the Education Department into the whole circumstances of Mrs Ogilvie's conduct, that they necessarily involved the complaints which had been made against the headmaster, and that this in turn might well lead the inspector who investigated the matter to examine the minutes which contained the record of the motion made by Mr Lyal, which was full of suggestions of improper conduct on the headmaster's part. It was to my mind only right that in these circumstances there should also be recorded the fact that the pursuer, by whom that motion had been made, had himself quarrelled with the headmaster and had in the eyes of the jury done him a grievous wrong. To state as a conclusion from this that he was biassed in the view that he took as to the headmaster's action does not appear to me by itself to afford any evidence of a malicious purpose.

I think that the Lord Ordinary therefore was quite right in stating that as against

George Henderson there was no case for the jury to consider.

As against Thomas Henderson the only added matter is that to be found in the circular and letter to which I have referred, and the Lord Ordinary thought that these were matters which the jury might fairly take into account for the purpose of seeing whether Mr Thomas Henderson had been prompted by malicious motives. I do not think that they afford any evidence in support of this view. The circular is a plain statement made by a man who regarded the return of the pursuer to the School Board in the circumstances which I have mentioned as one unfortunate in the best interests of education, and the letter is nothing but a step in the same direction.

I cannot see how evidence of malice is to be obtained by showing that two parties took a different view as to the best way in which the true interests of education should be served in a particular district, and neither the circular nor the letter amounts to more than this. It would indeed be an unfortunate thing if difference of opinion upon public subjects, coupled with a fair though strong criticism of an opponent's position, should be regarded as evidence of personal rancour and ill-will. In my opinion the judgment of the Court of Session was perfectly right, and I think that the appeal both against George Henderson and the executors and trustees of Thomas Henderson should be dismissed with costs.

In the cross-appeal the question arises of whether the Court was right in permitting the innuendo alleged by the pursuer to be included in the issue left to the jury. Upon the view that I have already expressed, the determination of this point can only be relevant upon the question of costs. It is, however, in my opinion unnecessary to enter upon a strict investigation of this matter. Even if the cross-appeal succeed, the respondents, who are the executors and trustees of Thomas Henderson, would have failed in their contention that the appeal against them was incompetent. All the respondents appeared by the same counsel, and in my opinion no further direction as to costs is necessary than that which I have already indicated.

VISCOUNT HALDANE—I am of opinion that this appeal fails. Into the merits I do not propose to go further than to say that I am satisfied that the circumstances under which the statement complained of was made rendered it a privileged statement and excluded malice in law, and further, that on the evidence no inference could properly be drawn of malice in fact. My reasons for arriving at this conclusion are fully expressed in the judgments in the Inner House of Lord Salvesen and Lord Dewar.

But in order to be able to say even so much it is necessary to dispose of the preliminary question raised by the respondents as to whether the appeal to this House was competent. Although the appellants have failed on the merits I am of opinion that they were entitled to appeal to the House of Lords, and that the respondents were wrong on this point.

The Statute 55 Geo. III, cap. 42, which established jury trials in Scotland, enacted by section 6 that an application to the Division of the Court of Session which directed the trial of an issue might be made for a new trial on the ground of the verdict being contrary to evidence, or of misdirection, or of undue admission or rejection of evidence, or of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as was essential to the justice of the case. The section, however, contained a proviso that the interlocutor granting or refusing a new trial "should not be subject to review by reclaiming petition or by appeal to the House of Lords." Section 6 having thus provided for an application to the Inner House for a new trial, section 7 went on to provide for a method of excepting at the trial to the direction of the presiding judge, and in this case recognised a right of appeal to the House of Lords, but under narrow restrictions as to time. Under this section counsel was empowered to tender exceptions in writing for signature by the judge. The trial was then to proceed, but when the verdict was given the judge was to present it with the exceptions to the Division, which might allow the exceptions and direct a new trial or disallow the exceptions, in which case the verdict was to be final. But it was declared competent for either party to appeal to the House of Lords within a limited time. Section 9 enacted that in cases in which the Court should pronounce a judgment in point of law as applicable to or arising out of the finding by the verdict an appeal should lie to this House. By section 18 the Commissioner, as he then was, who had presided at the trial was enabled to attend the Division and give explanations. By a subsequent statute—the Court of Session Act of 1868—the judge, as he had then become, who so presided was to sit with the Division and give his judgment.

In the principal Act I have referred to—the 55 Geo. III, cap. 42—another instance of restriction on the right of appeal to this House is afforded by section 24, which excludes such an appeal in the case of an interlocutor for striking a jury. Similarly in the amending Act of 59 Geo. III, which was passed in order to provide among other things for motions for new trials where there had been a special verdict or special findings, the appeal is again in terms excluded. The principle adopted in these statutes was thus where it was intended to exclude the appeal to say so specifically.

With a view to avoiding re-trials where not really necessary the Jury Trials Amendment (Scotland) Act 1910, by section 2, made a new provision—". . . [*quotes*] . . ."

I have set out somewhat fully the language of these successive enactments, because it is upon the terms there used that the respondents have contended that an appeal to this House was excluded. They argue that section 2 of the Act of 1910 was passed for the purpose merely of amending section 6 of the Act of 1815, and that section 2 ought to be read as among other things amending the proviso of section 6 by extending it so as to include within the pro-

hibition of an appeal to this House the case where the Court are unanimously of opinion that the verdict is contrary to evidence, and that further they have all the evidence that could reasonably be expected to be relevant before them, and are therefore entitled under the Act of 1910 to enter judgment.

I am unable to accept this view of these sections. There is a general right of appeal to the House of Lords in cases where it has not in some fashion been specially excluded. The policy of the Legislature in the statutes under consideration appears to have been, as I have already said, to exclude the appeal in express terms in certain cases with which they deal, and I see no reason in the context of either the original Jury Trials Act or of the later Act of 1910 why section 2 of the second Act should have read into it words which it does not contain, or be treated as enlarging the scope of the proviso to section 6 of the earlier Act. I am prepared to hold that the respondents are wrong on this point on the simple ground that there is no reason why the words should not receive their natural meaning. Whether, if there were even plausible grounds for inferring the implication of an intention to cut down the appeal to this House, that would be sufficient to effect it, raises a further question on which I think it better to express no opinion, especially as it was not fully argued. I will only remark that although the appeal here is commenced by petition to the House of Lords it is expressed to be an appeal to the King in his High Court of Parliament. It has been held that the prerogative of the King in his Privy Council to entertain appeals cannot be taken away without clear words. The prerogative right of the Sovereign as the original fountain of justice, recognised by the form of petitions of appeal to the House of Lords, may conceivably stand in a different position because of the constitutional right of Parliament to guide the Sovereign which has been developed, to the exclusion of his Privy Council, in Scotland, just as it has been in England and Ireland. But that this is actually the case is a proposition to which I should not be prepared to assent without having been satisfied by a full argument in support of it. It is enough to repeat that the question is one which it is unnecessary to discuss on this appeal.

I think that although the appellant is entitled to succeed in asserting his right to appeal in this case he fails on the merits. The respondents have a cross appeal against an earlier interlocutor allowing the innuendo placed by the appellants on the language used. With this cross appeal it is now unnecessary to deal. I do not think that the fact that the appellant has succeeded in establishing his right to appeal while failing on the merits should, under the circumstances, make any difference as regards costs. He ought, in my view, to pay the costs of the main appeal in which he has failed in substance. As to the respondents' cross appeal, any extra costs this has occasioned cannot be large, and although your Lordships do not consider it necessary to make any pronouncement on a point which has not arisen, I do not think that the successful respondents should on this account be excluded from any costs to which they are entitled as having succeeded on the main appeal.

LORD KINNEAR—I agree on both points. I do not think it doubtful that an appeal lies to this House from the judgment of the Court of Session. It is a final judgment disposing of the merits of the cause, and therefore it does not fall within the prohibition introduced I think first by the 48th of George III against an immediate appeal from interlocutory orders; it does not fall within the words of section 6 of the Act of 1815; and the notion that the exclusion of the right of appeal contained in that enactment has been transferred by implication to the Act of 1910 is not in my opinion tenable. The Jury Court Act of 1815 has been more than once the subject of consideration in this House, and the exposition of it which has been given to-day by my noble and learned friends is entirely in accordance with what has been laid down on previous occasions. I will not detain the House by repeating what has been already so clearly explained or by again examining the Act in detail. But the true intent and effect of the particular clause with which your Lordships are concerned cannot be rightly understood unless it is read in connection with the other parts of a comprehensive enactment. The material point to be observed is that the Act gives ample jurisdiction to the Court for the purpose of preventing or correcting miscarriage, but peremptorily excludes the appellate jurisdiction of this House except upon certain definite questions of law. There can be no appeal against an interlocutor granting or refusing a trial by jury, nor against an interlocutor granting or refusing a new trial. This last rule is so far modified, as the Lord Chancellor has pointed out, as to allow an appeal on certain conditions against an interlocutor allowing or disallowing exceptions to the ruling of the judge at the trial, although such exceptions are among the specified grounds on which application may be made for a new trial. But the questions which may be raised in this way are all of them questions of law. There is no similar modification of the prohibition in so far as it applies to the case in hand where the motion for a new trial is rested on the ground that the verdict is contrary to evidence. In that case there can be no appeal against a judgment granting or refusing the motion. There can be no final judgment which would be appealable until a verdict has been obtained which the Court is able to accept; and when once a verdict has been accepted, whether after a first or second trial, it is provided by the 8th section that such verdict shall be final and conclusive as to the fact or facts found by the jury, and shall be so taken by the Court of Session in pronouncing their judgment, and shall not be liable to question anywhere—that is to say, it is to be the foundation of the judgment of the Court of Session, and it is not to be ques-

tioned in this House. On the other hand there may be appeals in the manner already explained against interlocutors pronounced on exceptions which may be taken to the ruling of the judge, and at the end of the cause an appeal will lie where the Court pronounces a judgment in point of law as applicable to, or arising out of, the verdict. As Lord St Leonards points out in *Morris* v. *Morgan*, 1885, 2 Macq. 342 at 272, as the result of a detailed examination of the statute, the difference between matters of law and matters of fact is marked throughout. It is to be kept in view, as my noble and learned friend opposite (Viscount Haldane) observed, that the Act was passed for the purpose of introducing jury trial for the first time as an ordinary form of civil process in Scotland. It was therefore carefully designed to make the new form as effective as possible, and it seems to me that the main purpose and intent of the clauses we have been considering is to secure that when a case has once been sent to the Jury Court, the question or questions of fact in dispute shall be finally determined by the jury and by no other tribunal whatever.

I have dwelt upon this point because I think it affords a complete answer to the most plausible of the arguments which were urged by the learned counsel for the respondents. It was said that the Act of 1910 simply amends the Act of 1815 by providing a shorter and less expensive method for making effective a jurisdiction already vested in the Court by the earlier Act, and it is for that reason that it was maintained that the original restriction of the right of appeal must be carried by implication into the amending Act. But the difference between the power to set aside a verdict in order to grant a new trial, and the power to enter judgment for the party who was unsuccessful before the jury, is by no means a difference of procedure only. The Court had, no doubt, a jurisdiction to consider a verdict on its merits, and to determine whether it should stand or not, but if they set it aside they could do nothing but send it to another jury to be tried again. They had no jurisdiction to displace the jury altogether after the verdict had been given and decide the whole matter of fact finally for themselves. That is the new power which is given to them by the Act of 1910. It is a jurisdiction which is not in pursuance of the Act of 1815, but directly contrary to what is peremptorily prescribed in that statute. I think it extravagant to maintain that the restriction of the right of appeal from an order to send a case for jury trial, or from a verdict of the jury when it has been so tried, is by implication to be turned into a prohibition of the right to appeal against a final judgment of the Court of Session. But that is the argument of the respondent's counsel. That in order to reach that judgment the Court must have pronounced an interlocutory order which could not have been appealed by itself is nothing to the purpose. But then if the change had in fact been one of procedure only, I should still have thought that restrictions of the right of appeal on questions of procedure prescribed by one Act of Parliament cannot be carried by implication into another Act prescribing a different procedure. It would be perfectly easy to express this if Parliament so intended, and if no such restriction is expressed in the second Act it cannot in my opinion be implied. The question is not a new one, because a very similar point was decided by this House in *Johnston* v. *Johnston*, 1859, 3 Macqueen, p. 619. In that case it appeared that a new form of procedure for adjusting issues had been prescribed by 13 and 14 Vict. cap. 36. On an appeal from an interlocutor pronounced under the authority of that Act it was argued that an appeal would have been incompetent under 6 Geo. IV, cap. 120, by which the adjustment of issues had been previously regulated, and that that restriction had been carried by implication into the Act in question. But this House held that if any restriction had been intended under the new Act it must have been expressed in the Act itself, and Lord Campbell puts exactly the question which I think must be asked in this case—"What is there to show that there is not a right of appeal? . . . What is there to show that what was done under 6 Geo. IV is at all transferred to 13 and 14 Victoria? . . . This is a new procedure. It is a different mode of settling issues from that which before existed, and whether there might have been an appeal before or not, I do not see anything whatever to introduce into this new mode of settling issues any restriction that there might have been when a different mode was prescribed." The learned Lord goes on to point out that the Court having pronounced an interlocutor under the authority of the new Act, *prima facie* there must be an appeal to this House, and it is quite clear that the *onus* is cast upon the respondent to show that it is forbidden. It may be forbidden, but the question is, is it forbidden? The assumption which I think is at the bottom of this reasoning, and which I find underlay a good deal of what has been said in many other cases as to competency of appeal, is this, that there is a general right to appeal to this House against any interlocutor or decision of the Court of Session except in so far as it has been expressly excluded by Act of Parliament. That appears to me to be the rule established by a very long practice. I do not think it is at all necessary, nor would it be at all appropriate on this occasion, to examine into the history of the right of appeal although a good deal was said about it in the course of the debate. I take it to be perfectly clear that although there was at one time a somewhat violent controversy as to the existence of the right to appeal from the Court of Session to the Scotch Parliament, it was at an end before the Union; it had been finally established that an appeal lay to the Scotch Parliament, and the right so to appeal is one of the rights maintained in the Claim of Right of 1689. Then it is quite as clearly established that the right to appeal to the Scotch Parliament had been transferred to the Parlia-

ment of Great Britain after the Union. That the Parliament of Great Britain exercises its appellate jurisdiction through this House is again a matter as to the history of which it is unnecessary to inquire; it is absolutely established by a persistent practice of centuries. I think further that the series of enactments by which appeals from Scotland are regulated proceed upon the same assumption. They do not confer a right of appeal as if any intervention of Parliament was necessary for that purpose, but assuming that the aggrieved suitor may appeal to this House *de jure* they interpose to regulate or restrict that right in particular circumstances. I take it therefore that the question must always be, as Lord Campbell puts it, whether an appeal is clearly prohibited. If not so prohibited, it rests upon a general right which cannot be called in question.

I am therefore very clearly of opinion that this appeal is competent. There is nothing against it in the Act which authorises the interlocutor which has been pronounced, and there is no reasonable ground for implication from any other statute.

Then I also agree with my noble and learned friends as to the merits. If the appeal is competent I think it fails upon the merits, because the judgment of the Court of Session that the verdict cannot be sustained in respect of its being contrary to evidence appears to me to be perfectly right. But since I have spoken of something like a new jurisdiction in the Court conferred by this statute, I think it is right to observe that I do not suppose there is any enlargement of the jurisdiction to consider verdicts which had been given by the Act of 1815. I have no doubt whatever that the Court, in the exercise of the new power conferred upon them by the Act of 1910, must treat the verdict of the jury precisely as has been settled by a hundred years' practice that they must treat it under the previous Act. I take it to be clearly settled law that they are not to set aside the verdict merely because they disagree with the jury; that has been laid down over and over again. The limitation upon the Court's right of interference has been expressed in a great variety of ways, but I do not know that it is expressed anywhere more clearly than by Lord President Inglis in the case of *Kinnell* v. *Peebles*, 1890, 17 R. 416 at 424, 27 S.L.R. 365, where he explains the difference between the function of the Court in reviewing a judgment upon fact which is brought before it as a court of appeal, and in considering whether the verdict of a jury is to be set aside or whether it is to stand. He says—"We are not entitled to set aside the verdict of the jury as being against evidence unless we become satisfied that it is a verdict which cannot from any point of view be reconciled with the weight of the evidence. In the case of a Lord Ordinary we are entitled . . . to review the judgment of a Lord Ordinary on matters of fact, just as if we were judges in the first instance ourselves, and to take the *onus* of determining whether the Lord Ordinary has arrived at a right conclusion or not—not whether his judgment is based on the great weight of evidence, but whether on the balance of evidence his judgment is right or wrong." That distinction I have no doubt is still applicable to the new procedure introduced by the Act of 1910. But then I think that the conditions so laid down have been entirely satisfied by the learned Judges, because I agree with the conclusions which have been very clearly expressed by my noble and learned friend on the Woolsack, and which are stated, I think, with perfect accuracy by Lord Salvesen and Lord Dewar in the Court below. Lord Dewar concludes that the verdict is one which could not reasonably be given upon the evidence before the jury, and that again is just one of the tests which have been accepted in this House as determining the limit within which the verdict of the jury may be set aside, because in the case of *Wright* v. *The Metropolitan Railway Company*, (1886) L.R., 11 A.C. 152, I think, Lord Halsbury points out that if the verdict is not reasonable, that shows that the jury has not performed the judicial duty imposed upon it. In short, the conclusion is that the decision of the jury is arbitrary and not a decision upon evidence, since it is contrary to or against the great weight of the evidence adduced.

I do not venture to trouble your Lordships with an examination of this question of fact in detail; I think it is very fully before the House, and I can only say again that I agree entirely with what has been said about it by the Lord Chancellor. There are two points only which were argued by the learned counsel for the respondents to which I shall advert. In the first place, it was said that the mode in which the defenders' statement with reference to the pursuer was communicated afforded proof of malice. Now I do not think it at all doubtful that malice may be proved by showing that there was something in the method of communication, or in the terms of the communication itself, which necessarily inferred ill-will or a dishonest use of a privileged occasion. But then the mode of communication in this case is exactly one of the facts which raise the privilege; it was because the defenders were exercising a duty or acting in the public interest in a way in which they were entitled to act when they recorded in the minutes of the School Board the facts upon which the pursuer's claim is founded. The rule is quite clear that a privileged occasion will allow of statements being made which would otherwise be disparaging or injurious to the character of the person concerned, and to raise out of the very facts which constitute the privilege an argument that it has been raised dishonestly and not fairly seems to me to be out of the question.

Then, again, I think the learned counsel were quite right in saying that you may prove malice by the terms of the communication itself; but I must say that I think the jury was not in a very favourable position for considering any point of that kind, because they had before them in the printed

issue, not the terms which were actually used by the respondents, but the terms of the innuendo inserted into the issue by the pursuer. It may very well be that the terms of that innuendo might be said to be much stronger than was necessary for the occasion, and therefore to afford some proof that the defenders were acting not reasonably in the exercise of the privilege, but from some personal feeling against the pursuer. But then if an argument of that kind is to be founded upon the language of the communication which is brought into question, it must be upon the language which was actually used. The language used by the respondent Mr Henderson in the statement he inserted in the minute appears to me to be as moderate as possible. He states the fact, but then it was a fact he was entitled to communicate by its insertion in the minute to the Department and to their inspector.

As to the remaining point, the question raised by the cross appeal, I agree with your Lordships that it is unnecessary to decide it, and therefore I shall follow the example set to me by my noble and learned friends and abstain from expressing any definite opinion upon that question. But since it is before us—although we do not decide it finally—I think it right to say that so far as I am concerned I share the doubts expressed by Lord Dundas and Lord Salvesen in the Court below. I am not persuaded that the words are at all capable of bearing the innuendo put upon them, and I confess that my doubt upon that subject is not so clearly removed as Lord Salvesen says that his was, by a consideration of the evidence of certain witnesses who said that they put that meaning upon the language used. I cannot help thinking that both the witnesses and the learned Judges have failed to consider the distinction which is very forcibly explained by Lord Watson in the case of *Henty*, 1882, L.R., 7 A.C. 741, between the true meaning of the language used and the inferences which people may draw from the facts stated. I say nothing more upon that part of the case except that I am by no means satisfied that the innuendo should have been allowed.

LORD ATKINSON—I concur.

In this appeal the primary questions raised for decision are, first, whether the appeal is competent, and second, whether it was rightly decided that the verdict of the jury found in favour of the plaintiff in the action for libel out of which the appeal has arisen should as against the defenders, the trustees and executors of Thomas Henderson deceased, be set aside and a verdict entered for them with judgment thereon with costs. The grounds upon which it is stated in the interlocutor of the Second Division dated the 9th of November 1915 that the verdict should be set aside and judgment entered for the defendants in the action were that in the opinion of the Court the verdict was contrary to the evidence, and that the Court had before it all the evidence that could be reasonably expected to be obtained relative to the cause. The Judge at the trial had ruled that the occasion upon which the libel complained of was published was a privileged occasion. The soundness of that ruling is, as I understood, not now questioned. He also ruled that there was no evidence of malice against George Henderson. To this ruling the appellant has filed a bill of exceptions. But the learned Judge left the case to the jury as against Thomas Henderson, so that the question for decision as to the trustees of this gentleman, since deceased, resolves itself into this—Was there any evidence proper to be submitted to the jury of malice in fact on the part of Thomas Henderson, or, in other words, any evidence that he was actuated by an improper or indirect motive, or by feelings of enmity or ill-will towards the plaintiff?

First, as to the competency of the appeal. The House of Lords in the case of *Mackintosh* v. *The Lord Advocate for Scotland*, 2 A.C. 41, approved of, and indeed adopted, the judgment of Lord Mansfield in the case of *Bywater* v. *The Crown*, 2 Paton's App. 564, decided in the year 1781. In the judgment the following passage is to be found:—"By the articles of the Union the Court of Session and the Court of Judiciary are to all intents and purposes, with all rights, forms, customs, manners, privileges, &c., to remain just as they were before. At the time of the Union it was clearly established law that there lay an appeal from the Court of Session to the Parliament of Scotland, and therefore that jurisdiction devolved upon this House [*i.e.*, the House of Lords] from the moment of the Union down to this day as your Lordships well know, and it has been very beneficial to that part of the kingdom." In Bell's Dictionary and Digest of the Law of Scotland, at p. 49, it is stated that "in the Claim of Right presented to William and Mary one of the articles bears 'that it is the right and privilege of the subjects to protest for remeid of law to the King and Parliament against sentences pronounced by the Lords of Session provided the same do not stop execution of these sentences.' By the Treaty of Union (1707) no express provision was made as to the right of appeal from the courts in Scotland to the British Parliament; but it has never been disputed that the appellate jurisdiction formerly exercised by the Scottish Parliament was transferred by implication to the House of Lords." To the same effect is Erskine (12th ed.), p. 24, p. 28. It therefore lies upon those contending that the appeal is in this case incompetent to establish that the *prima facie* right of appeal from all judgments such as this from the Court of Session to this House is taken away by statute. To discharge this burden the respondents rely, as I understood, on the provisions of three statutes, viz., 48 Geo. III, cap. 151, sec. 15, 55 Geo. III, cap. 42, secs. 6, 7, and 8, and 10 Edw. VII and 1 Geo. V, cap. 31. The first of these statutes provides that no appeal shall lie to the House of Lords from interlocutory judgments save by leave of the judges of the Division pronouncing the judgment, or where there is a difference of opinion among them, but that such appeals shall be allowed from judg-

ments or decrees on "the whole merits of the cause." The provisions of this section are qualified by those of the second statute, by which trial by jury was extended to civil causes. By section 6 it is enacted that in all cases in which an issue or issues have been directed to be tried by jury the party dissatisfied with the verdict may apply to the Division of the Court of Session which directed the issue for a new trial on the grounds already stated. But the interlocutor granting or refusing a new trial is not to be subject to review by reclaiming petition or by appeal to the House of Lords. By the following section, however, it is provided that counsel for any party at the trial may tender a bill of exceptions to the opinion or direction of the trial Judge as to competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial, but the trial is to proceed notwithstanding the exceptions being taken, and the jury may find for the pursuer or defender and assess damages when necessary. The party against whom an interlocutor is pronounced allowing or disallowing the exception is entitled to appeal to this House, and upon the hearing of the appeal the House can give judgment regarding the future proceedings either by directing a new trial to be had or otherwise as the case may require. By section 8 it is provided that if a new trial shall not be applied for or be refused, or if the exception in the preceding section be disallowed, the verdict shall be final and conclusive as to the facts found by the jury.

From these provisions it appears that the appeals to the House of Lords are disallowed in the case of all interlocutory judgments or decrees when Judges of the Court pronouncing them are unanimous, save by their leave, or when the Judges are divided in opinion. And in the case of trials by jury such appeals are also disallowed in the case of interlocutors granting or refusing new trials, save where exceptions are taken to the opinion or direction of the presiding Judge on the matters of law mentioned in the second section of the above-mentioned statute. If the interlocutor of the 9th November 1915 pronounced by the Second Division falls within the class of interlocutors in which the right of appeal is taken away the appeal is incompetent, not otherwise. That resolves itself into the question what is the true nature of the order authorised to be made by the second section of the Jury Trial Amendment (Scotland) Act 1910. The object of this statute was apparently to assimilate to some extent the practice of the Courts in Scotland to that existing in England. See Court of Judicature Act and the 57th and 58th of the Rules and Orders made thereon; and *Millar* v. *Toulmin*, 17 Q.B.D, 603, and 1 *Allcock* v. *Hall*, [1891] 1 Q.B. 444. When a verdict can properly be set aside as against the weight of evidence is determined by the judgment of this House in *Metropolitan Railway Company* v. *Wright*, 11 A.C. 152. It was there laid down that a new trial ought not to be granted on the ground that the verdict is against the weight of the evidence unless the verdict is one which a jury, viewing the whole of the evidence reasonably, could not properly find. In *Skeate* v. *Slaters*, [1914] 2 K.B. 429, it was held that under Order 36 the Judge at the trial had power to enter judgment for the defendant if upon the case as a whole the evidence for the plaintiff was so weak that a verdict in his favour would have been set aside as unreasonable. That was the state of the law and practice in such matters in England when this Scotch statute for 1910 was passed. The power given by it is not to be exercised unless the Court are unanimously of opinion that they have before them all "the evidence that should be reasonably expected to be obtained relevant to the cause." That, however, is one of the requirements which, as pointed out by Lord Lindley in *Allcock* v. *Hall*, p. 446, is necessary for the exercise of the power conferred by Order 58, rule 4, to "set aside the judgment for one party and enter judgment for the other party." By the words "contrary to evidence used in this statute," nothing more is meant, I think, than "against the weight of evidence." So that this provision of the statute merely amounts to this, that if the Court, viewing the whole of the evidence, are unanimously of opinion that no jury, properly instructed, could reasonably find the verdict the jury have found, and that no new evidence relevant to the cause could reasonably be obtained, the verdict so improperly found should be set aside and such judgment be entered for the unsuccessful party as upon the evidence he is entitled to. In my opinion that judgment is a final judgment on the "whole merits of the cause" within the meaning of the section 15 of the 48 Geo. III, c. 151. It is not interlocutory. No doubt the ground has to be cleared for entering it up by setting aside the verdict found. That, however, is but a preliminary. When that obstacle has been removed the final decision is made and recorded. This is something wholly different from the interlocutors mentioned in section 6 of the 55 Geo. III, c. 19. They merely amount to an award of a new trial or a refusal of the motion for a new trial. In my opinion therefore the *prima facie* right of appeal to this House has not been taken away, and this appeal is accordingly competent.

Then as to the evidence of malice, the libel complained of consists of a resolution passed at a meeting of the Gordon School Board on the 10th of June 1912. Mr G. Henderson was in the chair. Mr Thomas Henderson, since deceased, was present as was also the pursuer. The master of the school then was, and for many years previously had been, a Mr Leitch. A Mrs Ogilvie was the mistress of the infants' school. These two people did not work well together. Disputes arose between them, and the pursuer apparently espoused the lady's cause. Mr Leitch had in the year 1903 received £400 damages in an action brought by him against the pursuer for libel.

The pursuer offered himself as candidate for election as a member of the School

Board in 1906 but was defeated. Mr Thomas Henderson, who was a rival candidate, on the 5th April 1906 published a circular in reference to that election. The pursuer was not a member of the Board from 1903 to 1911. In the latter year he was re-elected. At the meeting of the Board held on the 17th February 1912 the pursuer moved a resolution "That the Education Department be asked to make an inquiry into the whole case of Mrs Ogilvie since her appointment." Mr G. Henderson seconded this resolution. It was agreed to and entered on the minutes. At the meeting of the Board on the 16th of March 1912 a letter was read from the Department referring to the inquiry into Mrs Ogilvie's case. Mr Hogg thereupon moved a resolution that an inquiry be made into the statement made by the headmaster regarding Mrs Ogilvie on the 14th of April 1909 to the Rev. Mr MacCullim and himself in the school as members of the visiting committee. Thereupon the pursuer moved that inquiry be made into fourteen different matters, beginning with the treatment of Mrs Ogilvie by the headmaster since his appointment in June 1911. Almost all of these relate to Mrs Ogilvie and the treatment she was alleged to have received, and many of them make rather compromising suggestions as to the headmaster's conduct towards her. Others call in question the action of the Board itself in reference to several matters. The chairman Mr Henderson then moved a resolution that a copy of the statement of the pursuer be sent to the Education Department as the complaint of the pursuer and Mr Hogg, the minority of the Board, the majority reserving their right to send a reply should they deem it advisable. That resolution was carried.

On the 5th of April Thomas Henderson resigned his position as chairman of the Board for reasons of health, and Mr George Henderson was appointed chairman in his stead.

At the meeting of the Board on the 10th of May 1912 Mr George Henderson proposed and Mr Thomas Henderson seconded that Mrs Ogilvie be dismissed, and that her engagement be terminated on the 10th of June 1912.

The pursuer moved and Mr Hogg seconded a motion that Mrs Ogilvie be retained as "infants' mistress." The chairman's motion was carried. Thereupon the pursuer moved and Mr Hogg seconded a motion that it be recorded that Mrs Ogilvie's letter to the Board of the 9th of May 1912 (which had been previously read in part), appealing to the Board for the opportunity of disproving the reasons given in the Board's letter of the 30th September, was read after the resolution dismissing her was carried, thereby obviously insinuating that the Board had dismissed this teacher without hearing her defence—a most unjust and improper course for such a body to pursue. The chairman then moved that it be recorded that Mrs Ogilvie's agent Mr Adam Laing had fully stated her case, and read part of her letter before the meeting previous to the resolution being passed. The chairman thereupon made the remarks the record of which constitutes the libel. The entry in the minute book runs thus—"The chairman drew the attention of the meeting to the fact that the mover of the amendment was the defender in the *Leitch* v. *Lyal* case and had to pay £400 damages and expenses to the headmaster for slander. And moved that this be recorded in the minute as showing that Mr Lyal, as moving the amendment, is a prejudiced party, seconded by Mr Thomas Henderson. Mr Lyal protested against the chairman's motion and asked for a copy of the motion as this was brought before the meeting when there was no discussion regarding Mr Leitch. Mr Lyal intimated to the meeting his intention of appealing to the Scottish Education Department on behalf of Mr Hogg and himself in this case of Mrs Ogilvie."

The amended innuendo put upon this alleged libel would at first sight certainly appear to me to be rather extravagant, and I have very great doubt whether the words used are susceptible of it.

The pursuer was examined as a witness. He appears to have been asked by the Court on what he based his belief that the late Mr Thomas Henderson was actuated by malice towards him. And he replied because of his election circular, and because he made the motion. He said Mr Thomas Henderson "had no feeling with me otherwise." (I presume he means against me.) He was then asked as to Mr George Henderson and replied, because he moved that motion.

The circular of the 5th of April 1906 was addressed by Mr Thomas Henderson to the School Board electors when he was seeking re-election as a member of that Board, and the pursuer was a rival candidate opposing him. The relevant passage of it has been already read. I am clearly of opinion that it afforded no evidence whatever that the writer was actuated by malice against the pursuer in seconding, six years subsequently, the resolution complained of.

Now as to the resolution itself. The pursuer had moved the resolutions of February and March. They are very provocative to say the least of them. All these squabbles were to go before the Education Department. To it both sides had appealed as the authority to investigate and decide the matters in dispute. All that Mr Thomas Henderson and the majority did was to state, in such a way that it would come before the Board, the fact that this sum of £400 had been recovered against the pursuer in order that the Board might consider whether his action was not influenced by prejudice. In my view the action of Mr Thomas Henderson in this respect is no evidence whatever that he was actuated in what he did by malice. The interlocutor appealed from therefore was, I think, right, and should be upheld and the appeal dismissed.

As to the cross-appeal I concur in what has been said by my noble and learned friends the Lord Chancellor and Lord Kinnear.

LORD CHANCELLOR — Lord Parker has read the opinion I have delivered and expresses his entire concurrence in it.

Their Lordships affirmed the judgment appealed from with expenses.

Counsel for the Appellant in the Appeal and Respondent in the Cross-Appeal — Sir Robert Finlay, K.C. — Watson — Thomas. Agents—Wylie, Robertson, & Scott, S.S.C., Edinburgh — Bower, Cotton, & Bower, London.

Counsel for the Respondents in the Appeal and Appellants in the Cross-Appeal—Solicitor-General for Scotland (Morison, K.C.)—Brown—Wilson. Agents—Ronald & Ritchie, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Tuesday, June 27.

(Before Lord Parker, Lord Sumner, and Lord Wrenbury.)

DAMPSKIBSSELSKABET SVENDBORG *v.* LOVE & STEWART, LIMITED.

(In the Court of Session, February 26, 1915, 52 S.L.R. 456.)

Ship—Freight—Evidence—Measurement of Cargo at Port of Lading — Unproved Measurement.

Freight was to be paid for a cargo of pit-props per intaken piled fathom. The charterers having previously measured the props sent to be taken on board refused to join in a measurement at lading. The ship took a tally. In a question as to the amount of freight due, the ship's mate, who had been one of the two men engaged on the tally, was the only witness adduced to prove it. He admitted that during the taking of the tally he had had occasionally to be away for a short time to see after the proper stowing of the cargo. *Held* that the tally had not been established, his evidence being defective, and in the circumstances no inference from the capacity of the ship or the weight of cargo to rectify the defect being possible.

This case is reported *ante ut supra.*

The pursuers, Dampskibsselskabet Svendborg, owners of the "Chassie Maersk," appealed to the House of Lords on the question of the amount of freight.

At the conclusion of the argument for the appellants, counsel for the respondents being present but not called upon, their Lordships delivered judgment as follows:—

LORD PARKER — I am clearly of opinion that this appeal fails.

The claim of the appellants is for freight, and the amount of the freight has, according to the terms of the charter-party, to be ascertained by measurement of the timber taken on board at the place where it is shipped. The appellants say that such measurement of the timber was in fact taken, and that the timber so measured amounted to 653 fathoms. The question is whether they have proved this. I think that they have proved that the timber was measured, but as regards a not inconsiderable part of the cargo the result of the measurement has not been proved. As to this part the measurements were taken by one person only, who was not called as a witness at the trial. He appears to have communicated the result of the measurement to another person who was called as a witness, but it is quite clear that what was said by the former to the latter is not admissible.

The appellants therefore have failed to prove the figure on which their claim is based, and it does not appear to me that they can fill up the gap in their evidence by inferences to be drawn from the capacity of the ship and from the extent to which and manner in which it was loaded. In fact if we attempt to draw any inference in that way we find that the factors are so uncertain that no proper inference can be drawn. A ship may have a certain capacity, but the amount of cargo which it carries must depend largely upon how its cargo is stowed, and largely also in the case of a timber shipment upon the percentage of moisture which is contained in the timber shipped. I have carefully considered the argument in this respect, and I have come to the conclusion that no inference can be properly drawn by which your Lordships would be at liberty to bridge over the gap in the evidence as to the measurement which took place at the port of shipment.

Under these circumstances, therefore, the appellants appear to me not to have proved their case, and that being so, however much sympathy one may feel for them because they did endeavour to perform the terms of the contract in contradistinction to their opponents in this appeal, yet it cannot be said that they have proved the case they set out to prove. I move therefore that this appeal be dismissed, and dismissed with costs.

LORD SUMNER — I agree. The pursuers having been paid freight on 595 fathoms, and claiming to be entitled to be paid further freight, namely, on the quantity of 653 fathoms in all, have therefore resting upon them the burden of proving that they had shipped and carried and delivered not only an extra quantity but this extra quantity of cargo. The conventional mode of proving that quantity was by the proof of the St Petersburg tally, and although the fact appears to have escaped the attention of the Lord Ordinary, judging by his judgment, the tally at St Petersburg was proved by admissible evidence only up to a certain point, and it is noticeable that the point at which the proof fails left a comparatively small amount of room for error. The excess which is claimed in the present case is about 9 per cent. of the whole 653 fathoms, and the admissions made by the first mate which caused the proof of the tally at St Petersburg to fail were admissions of occasional absences from the deck of the lighter, where for the most part the measuring of the cargo