LORD JOHNSTON—I agree. The litigation which determined the rights of the Free Church and of the United Free Church of Scotland was concluded in 1904, and immediately thereafter a Royal Commission, which was appointed to inquire, reported that the Free Church could not adequately carry out all the trusts or administer all the property which the result of the judgment in the original action left in their hands. The Commission recommended that provision should be made for the allocation of that property, with this important rider, that provision should be made thereout for the equipment of the Free Church. I think it is essential and necessary to have regard to that word "equipment" in considering the meaning and effect of the Act which followed in the year 1905, and which provided for the allocation which the preamble of it indicates is desirable.

The property, roughly speaking, consisted of two different kinds. There were heritable subjects, consisting of churches, manses, schools, etc.; and there were income-producing funds—some of them in the hands of the Church itself, or, rather, of general trustees for the Church, and some of them in the hands of private trustees, but devoted notwithstanding to the purposes of the Church. I think that, dealing, as we are dealing here, with the second class of the second kind of assets, it must be perfectly apparent that Parliament approached this subject knowing that necessarily, if there was to be a practical allocation between the two Churches, it was impossible that the purposes of standing trusts should not require, to a certain extent, to be interfered with. The bare trust might remain, and yet to carry out the object of the statute it might be absolutely necessary to abrogate certain of the trust purposes or of the trust directions. I think it is also perfectly clear that in carrying out the object of the statute, to a certain extent the application of a broad axe was necessary. But Parliament did not apply the broad axe itself; they put it into commission for the purpose of doing that which the preamble set forth.

There are two provisions contained in the statute which I would refer to, one of which your Lordship has referred to, but the other is of equal importance. In section 2 (1) it is said that any such orders of the Commission—referring to the orders necessary for giving effect to allocation—"shall have effect as if enacted in this Act." Accordingly the orders of the Commission come by force of the statute to have themselves the force of statute. It is also said, section 2 (5), as your Lordship has pointed out, that no Court shall have power to review or interfere with the orders or other proceedings of the Commissioners.

Now, acting under this statute, the Commissioners have allocated, for certain of the purposes for which they were directed under the statute to provide, the funds under Mr Macknight's trust. In doing so they have acted with the greatest discrimination. They have observed that these funds were held under an irritancy, and that it might so happen that they became forfeit; and accordingly they have not taken the fund itself and transferred it to, or even left it to be held simply in trust for, the Free Church. But they have very carefully worded their order so as to deal only with the interest of the Free Church in the fund. They have therefore left standing what I referred to as a bare trust in the trustees, but they have left the real interest of the Free Church, to be held for the Free Church, but for the statutory purposes. And that real interest was in the income of the fund, subject as I have said to an irritancy.

I concur, therefore, in the judgment which your Lordship proposes.

LORD CULLEN—I agree. Mr MacKnight devoted the income of this fund to the promotion of the Home Mission of the Free Church of Scotland, and he gave to his trustees an administrative power to expend the money themselves in home mission work as an alternative to paying it into the Home Mission Fund. The trustees have so far exercised this power. But now that the income has been appropriated by the allocation orders to the purposes mentioned under heads 4 (*a*) and 4 (*b*) of the first column of the first schedule of the Act of 1905, it seems clear that this discretionary power given to the trustees of expending the money themselves on home mission work is inapplicable and is necessarily displaced, and that the pursuers are entitled to have the income applied in the manner formulated in the first conclusion of the summons as now amended.

The Court recalled the Lord Ordinary's interlocutor and granted the declarator concluded for.

Counsel for the Reclaimers—Constable, K.C.—Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Chree, K.C. —Valentine. Agents—Hugh Martin & Wright, S.S.C.

Friday, November 12.

FIRST DIVISION.

[Lord Ordinary on the Bills.

EDINBURGH MAGISTRATES, PETITIONERS.

Company—Winding-up—Process—Winding-up Order Pronounced in Vacation—Review—Competency—Companies (Consolidation) Act 1908 (8 *Edw. VII, c.* 69), *secs.* 135, 181 (2), *and Sched.* 4.

A winding-up order pronounced by the Lord Ordinary officiating on the Bills in vacation is reviewable.

The Companies (Consolidation) Act 1908 enacts—section 135—"The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of

Session in either Division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during Session, and in time of vacation the Lord Ordinary on the Bills." Section 181—"(1) Subject to rules of Court, an appeal from any order or decision made or given in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction. (2) Provided, in regard to orders or judgments pronounced in Scotland by the Lord Ordinary on the Bills in vacation, that (i) No order or judgment under the provisions of this Act specified in the first part of the fourth schedule to this Act shall be subject to review, reduction, suspension, or stay of execution; and (ii) Every other order or judgment (except as hereinafter mentioned) shall be subject to review only by reclaiming note in common form, presented within fourteen days from the date of the order or judgment. . ."

[A winding-up order is not among those specified in the schedule.]

On 18th July 1912 the Lord Provost, Magistrates, and Council of the City of Edinburgh presented a petition under the Companies (Consolidation) Act 1908 for the winding-up of the Union Billposting Company, Limited, 30 St Andrew Square, Edinburgh.

The petitioners, who were creditors of the company to the extent of £43 odd (being the taxed amount of expenses of an action against them at the company's instance and dues of extract) averred—"The said Union Billposting Company, Limited, is in fact insolvent and unable to pay its debts, and it is just and equitable that it should be wound up by the Court. On 22nd June 1912 the petitioners charged the said Union Billposting Company, Limited, to make payment of the said sum of £43, 18s. 8d., conform to execution of charge herewith produced and referred to. The said charge has now expired and payment has not been made."

The company lodged answers, in which they denied that the company was insolvent, and with reference to the sum of £43 odd, for which the charge had been given, explained that the petitioners had accepted a guarantee of payment in full satisfaction of the debt; that they (the respondents) were in course of raising proceedings for the reduction of the charge, and that the petition should meantime be sisted.

On 3rd August 1912 the Lord Ordinary officiating on the Bills (KINNEAR) pronounced the usual winding-up order.

The company reclaimed.

On the case appearing in the Single Bills counsel for the petitioners objected to the competency of the reclaiming note on the ground that the interlocutor reclaimed against was final.

He argued—The Court having jurisdiction to wind up companies during vacation was the Lord Ordinary on the Bills—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 135; *London County and Westminster Bank, Limited, Petitioners*, 1911 S.C. 1073, 48 S.L.R. 884. His Lordship took the place of the Division during session, and his interlocutor therefore was final. Were this reclaiming note to be held competent, the provisions of the Act *quoad* winding-up during vacation, viz., section 135, would be rendered nugatory.

Argued for the company—The reclaiming note was competent, for all orders were appealable unless the Act had declared them to be final. That was clear from the provisions of section 181, sub-sections (1) and (2), and the terms of Schedule IV. That schedule specified certain orders pronounced in vacation which were to be final, and no mention was made therein of the order in question.

At advising—

LORD PRESIDENT — The Lord Provost, Magistrates, and Council of the City of Edinburgh presented a petition in the ordinary form for the winding-up of the Union Billposting Company, Limited. The usual order for intimation and service having been pronounced, the petition came before the Lord Ordinary on the Bills in vacation, after the induciæ had expired, and his Lordship, on 3rd August, pronounced an interlocutor ordering the company to be wound up. This is a reclaiming note against that interlocutor, and the point was taken for the petitioners, that the reclaiming note was incompetent.

The jurisdiction of the Lord Ordinary to wind up a company depends upon the 135th section of the Companies Consolidation Act 1908. That section has already been under judicial interpretation — *London County and Westminster Bank*, 1911 S.C. 1073— and in accordance with the decision there given there is no question that the Lord Ordinary has jurisdiction to pronounce an interlocutor ordering the winding-up of a company. But section 135 *per se* does not deal with the competency of a reclaiming note against such an interlocutor. That, however, is dealt with by section 181, which says that "subject to rules of Court, an appeal from any order or decision made or given in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction." "The Court" there means the Court of Session in either Division, and it would mean that the ordinary rules apply that apply to appeals to the House of Lords. Where, however, the Court is described as the Lord Ordinary during session, or in time of vacation the Lord Ordinary on the Bills, that introduces the ordinary rules as to reclaiming notes against decisions of Lords Ordinary, and undoubtedly a reclaiming note is competent against any interlocutor of the Lord Ordinary on the Bills.

But section 181, sub-section (2), contains a special proviso as regards orders or judgments pronounced by the Lord Ordinary on the Bills in vacation in the following

terms—"(i) No order or judgment under the provisions of this Act specified in the first part of the Fourth Schedule to this Act shall be subject to review, reduction, suspension, or stay of execution; and (ii) every other order or judgment (except as hereinafter mentioned) shall be subject to review only by reclaiming note, in common form, presented within fourteen days from the date of the order or judgment: Provided that orders or judgments under the provisions of this Act specified in the second part of the Fourth Schedule to this Act shall, from the dates of those orders or judgments, and notwithstanding any reclaiming note against them, be carried out and receive effect until the reclaiming note is disposed of by the Court."

Now when you come to the schedule you find—"Part I. Orders pronounced in vacation in Scotland which are to be final;" and among the orders enumerated there you do not find an order directing the winding-up of a company. In the same way, in part ii again—which enumerates orders "to take effect until reclaiming note disposed of"—you do not find it. It seems to me that the statute has dealt specially with those things which it thought necessary to deal with specially; and this particular case is not one of the cases which are dealt with specially. And then, for everything else, it says that the ordinary rules for reclaiming notes are to obtain. It follows, therefore, I think quite clearly, that this reclaiming note is competent.

LORD KINNEAR—I am entirely of the same opinion. I think the matter is clearly and conclusively provided for by section 181.

LORD JOHNSTON—In this application for compulsory winding up of the Union Bill-posting Company the Town Council of Edinburgh, as chargers on an extract decree, on 18th July 1912 obtained an order for intimation. Answers were lodged by the company, but the Lord Ordinary on the Bills, vacation having commenced, having considered the petition and answers, on 3rd August granted an order for compulsory winding-up. The company on 15th August reclaimed. Is the reclaiming note competent, or is the Lord Ordinary final, so far at least as this Court is concerned?

The Court having jurisdiction to wind up companies registered in Scotland is, under the Companies Act 1908, section 135, in time of vacation the Lord Ordinary on the Bills, for he takes the place both of the Division and, in event of a remit, of the permanent Lord Ordinary—*London County and Westminster Bank*, 1911 S.C. 1073.

It was, I think, accepted that the orders of the permanent Lord Ordinary, where there has been a remit, would be subject to review in ordinary course, unless the Act contained some distinct proviso to the contrary. Not only does it not do so, but it makes the reviewability of such interlocutor matter of express enactment. For section 181, sub-section (1), says that an appeal from any order or decision made or given in the winding up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order of the Court in cases within its ordinary jurisdiction. The Court, where there is a remit, is the permanent Lord Ordinary. And though "appeal" is not, in the ordinary language of our Courts, the appropriate term for the process of review of a Lord Ordinary's order or decision, it is made quite clear that it is used as equivalent to "process of review." For sub-section (3) goes on to provide that the mode of reviewing a permanent Lord Ordinary's order, etc., shall be limited to reclaiming note presented within fourteen days.

Now if the order or decision of a permanent Lord Ordinary sitting in session, and fully seized with the business of the liquidation, is yet subject to review, it would be an unexpected result of these provisions regarding the Court having jurisdiction in winding up, and would on general considerations be anomalous, that the order or decision of the Lord Ordinary on the Bills, called in *ad hoc*, during vacation, and having no necessary acquaintance with the business and progress of the liquidation, should, as contended by the respondents in the reclaiming note, be final. If it was so intended, one would expect to find some very precise declaration to that effect. Instead of that we have in sub-section (2) the provisions, first, that no order of the Lord Ordinary on the Bills specified in the first part of Schedule 4 to the Act shall be subject to review; and second, that every other order shall be subject to review only by reclaiming note presented within fourteen days. As the order in question is not among those specified in the first part of Schedule 4, this would appear to conclude the question. But then it is said that the second provision is coupled with the rider that orders or judgments of the Lord Ordinary on the Bills specified in the second part of Schedule 4 shall not be stayed by reason of a reclaiming note being taken against them. The order in question is not among the orders so specified. But this does not lead to the result that it is not reviewable, but only to the result that if brought under review in the mode defined by the statute the ordinary consequence follows, viz., that its effect is stayed till the reclaiming note is disposed of.

LORD MACKENZIE—I concur.

The Court repelled the objections and sent the case to the summar roll.

Counsel for Reclaimers—A. J. P. Menzies. Agent—Arthur C. M'Laren, Solicitor.

Counsel for Respondents — Morton. Agent — The Town Clerk (Sir Thomas Hunter, W.S.).