your Lordship that it is quite clear that the interlocutor in question is reclaimable as a final interlocutor.

LORD KINNEAR—I quite agree. The objection is that we are prevented from holding that this interlocutor, which would otherwise have been final, is a final interlocutor in the sense of the statute, because although expenses have been found due they have not been modified. They have been found due subject to modification, and the modification has not been made. But then the statute says in so many words that it shall not prevent a cause being held as finally decided that expenses if found due have not been taxed, modified, or decerned for. It appears to me that that directly and in terms meets the objection. I have no difficulty in holding with your Lordships that the reclaiming-note is competent. I cannot agree with the statement made at the bar that there is something ambiguous in the use of the term "modified." That appears to me always to mean one and the same thing. It means the exact ascertainment of the precise sum that is to be paid. If the Lord Ordinary thinks that it is necessary that before expenses are paid some further deduction should be made from what may have been made in taxation, then he makes that deduction before the expenses are finally decerned for. The words have only one meaning.

LORD M'LAREN was absent.

The Court repelled the objection and sent the case to the roll.

Counsel for the Pursuers and Respondents—Campbell, K.C.—P. Balfour. Agents—Alexander Morison & Company, W.S.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—Nicolson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, October 22.

SECOND DIVISION.

GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND *v.* LORD OVERTOUN.

(*Ante*, August 1, 1904, vol. 41, p. 742.)

Process—Petition to Apply Judgment of House of Lords—Motion to Discuss whether Application of Judgment should be Delayed—Duty of Court of Session in Applying Judgment of House of Lords not Judicial but Purely Ministerial.

A petition was presented to the Court to apply the judgment of the House of Lords and to declare in terms of the direction to the Court in that judgment to make certain specific declarations.

When the case was put out in the Single Bills, the unsuccessful parties appeared and moved the Court to send the petition to the Summar Roll for discussion as to whether the Court had any discretion to delay applying the judgment of the House of Lords, and, if so, whether such discretion should be exercised in the exceptional circumstances of the case.

The Court *refused* to send the petition to the Summar Roll, and *granted* the prayer of the petition *de plano*, on the ground that the duty imposed on them by the remit from the House of Lords was not judicial but purely ministerial—*diss.* Lord Young, who was of opinion that the case should be sent to the Summar Roll for full discussion.

On 1st August 1904 the House of Lords pronounced judgment in the case of the General Assembly of the Free Church of Scotland and others (pursuers and appellants) *v.* Lord Overtoun and others (defenders and respondents), reversing the decision of the Court of Session and remitting the cause to the Court of Session in Scotland with a direction "to declare (1) that the association or body of Christians calling themselves the United Free Church of Scotland has no right, title, or interest in any part of the whole lands, properties, sums of money, and others which stood vested as at the 30th day of October 1900 in the Right Hon. John Campbell Baron Overtoun and others, as general trustees of the Free Church of Scotland; and (2) that the said appellants (pursuers) and those adhering to and lawfully associated with them conform to the constitution of the Free Church of Scotland, are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them and their successors as constituting the true and lawful Free Church of Scotland, and that the defenders, the said Right Hon. John Campbell Baron Overtoun and others, as general trustees foresaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same (subject always to the trust after mentioned) for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland, or its duly appointed Commission for the time being, and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland or its duly appointed Commission for the time being, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900, and to do therein as shall be just and consistent

with this judgment and direction." . . . These two declarations were in terms of the third and sixth conclusions of the summons.

On 5th October the Commission of the General Assembly of the Free Church of Scotland appointed certain gentlemen as general trustees to hold for behoof of the Free Church, *inter alia*, the various properties, sums of money, and others falling under the judgment of the House of Lords.

On 15th October 1904 the successful parties, the General Assembly of the Free Church of Scotland and others, presented a petition to the Court of Session craving their Lordships to apply the judgment and declare as directed. The prayer of the petition craving for declarator proceeded exactly in the terms of the House of Lords judgment set forth above, except that it contained the names of the persons elected as general trustees at the meeting of 5th October.

On October 18th counsel for the petitioners appeared in the Single Bills and moved the Court to grant the prayer of the petition.

Counsel for Lord Overtoun and others, the unsuccessful parties in the House of Lords, opposed the motion, asking for delay and for leave to lodge a minute and documents. Their motion was that the petition be sent to the Summar Roll for discussion. They argued —It was within the discretionary powers of the Court of Session to delay obtempering the directions of the House of Lords in exceptional cases. The present was such a case. They were prepared to show that the judgment of the House of Lords could not in fact be implemented, the general trustees, in whose favour they were directed to denude, being incapable upon their own confession of administering the funds. This fact was *res noviter veniens ad notitiam* since the judgment. In any case, therefore, in applying the judgment, the Court must qualify it by reserving to the objectors their right to refuse to hand over the funds when demanded. Further, a Bill was about to be submitted to Parliament with the object of altering the state of matters which would result from carrying into effect in its entirety the judgment of the House of Lords. The petition should be sent to the Summar Roll for full discussion of all the questions raised.

Argued for the petitioners—The Court should grant the prayer of the petition *de plano*. In applying the judgment of the House of Lords its duty was purely ministerial, and it had no discretion but was bound to carry out literally the directions given—*Stewart* v. *Agnew*, March 12, 1823, 1 Shaw's Appeals 413. There was nothing exceptional in the present case.

At advising—

Lord Justice-Clerk—The Court has in this matter a purely ministerial duty—the duty to give effect to the judgment of the House of Lords as the highest constitutional Court of Appeal by pronouncing a decerniture in accordance with its order. Whether it would be permissible in any circumstances to delay for a time on cause shown the giving of such an executive judgment may be a question, but I am clearly of opinion that no ground has been brought forward in the present case for departure from the usual practice, under which when a petition is presented to apply a judgment of the House of Lords that petition is at once granted as an act of obligatory ministerial duty.

The only grounds hinted at for delay are (1) that the unsuccessful party intends to apply to Parliament to deal with the matter which was in dispute by legislation, and (2) that the petitioners have admitted their inability to administer the trust which, as a consequence of the House of Lords judgment, will be committed to them—an allegation which is denied. I am unable to see how this Court could be justified in declining to perform the duty laid upon it on any such grounds, and I would therefore move your Lordships to grant the prayer of the petition and to apply the judgment.

Lord Young—This petition to apply the judgment of the House of Lords and to decern or declare in the terms therein specified is one of a familiar character, occurring in the case of every unimplemented judgment of the House of Lords, and invariably granted without opposition so far as my experience goes. The purpose of such an application, and the purpose of the order or decree upon it, such as is asked here, is to enable the applicants to take such steps as may be necessary for the compulsory enforcing of the judgment, which may require the intervention of officers of the law, from Sheriffs and magistrates down to sergeants-at-arms and policemen and jailors, who perform their duties under the supervising and overseeing power and authority of this Court. No other purpose has ever been, or possibly could be, achieved by the application of any House of Lords judgment such as the petitioners before us now desire. The judgment of the House of Lords is in itself final and conclusive, and this Court cannot change it in any way, or even criticise it, or properly permit it to be criticised, whether favourably or unfavourably, in any debate on the petition to apply. The motion of the respondents just now before us, and which was made when the petition was in the Single Bills, is only this—that we should in the meanwhile delay dealing with the petition. That motion was made in the view that this was an exceptional case, and that it was in the legitimate interests of a great multitude of people in this country, in the legitimate interests of the public, and reasonable in itself, that our interposition now to pronounce the first step with the view to the compulsory enforcement of the decree should be delayed. The existence or non-existence of any discretionary power on the part of this Court to delay giving decree for the application of the judgment is a question which I thought worthy of argument. If it does

not exist, there is, of course, an end of the matter; we must grant decree as in a case presenting no exceptional circumstances for our delaying to grant decree as we usually do, so far as I know. As I have already said, such an application is never opposed. I never knew it opposed, and therefore the Court was never, as it is now, asked to delay granting it. Here we are asked to delay granting it upon the ground that the case is of an exceptional character, and legitimately in the apparent reasonable interests of a very large part of the public of Scotland, and that it is according to reason and good sense that we should delay. Now, what are these circumstances? The judgment—the soundness of which I assume—and I shall not indicate any impression whatever against its soundness in every respect—the import of the judgment, indeed, and expression of it in language which is not doubtful, is to take the whole property that belonged to the Free Church before the Union with the United Presbyterian Church from those in whose possession it now is, and to hand it over to those who dissented from the Union. That is to say, to put the congregations of the United Church—the Church which was united in October 1900—out of possession of the churches of which they have always hitherto been in possession, and the ministers out of the manses in which they have always hitherto dwelt, and to remove them from any use or enjoyment by them of the funds from which to a large extent the stipends of the ministers and the expenses of administration of the whole affairs of the Church must come, to hand that all over at once—I assume in pursuance of the very sound judgment, a judgment which may be found to be so, and which I regard as being so at present—and to put all that property, heritable and moveable, amounting in value to a number of millions, into the hands of a very small minority, not one in a hundred but about one in a thousand, of those who agreed to the Union. Now, if the judgment is to stand—if it is not to be interfered with by any power obtained to interfere with it — that must be the result, for the necessary effect of the judgment is that such use and enjoyment and application of these funds as have been made during the last four years have been in breach of trust, so gross breach of trust that the trustees in whose possession it was and who made that expenditure have to restore all the money out of which they made that expenditure. That may not be asked, but it is the effect of the judgment. Now, we were told upon this motion — the only motion before us—that we should delay pronouncing decree, which is the first step towards the compulsory enforcement of the judgment, that is, the compulsory ejection from houses and churches and manses, and the stoppage of any payment from the funds which existed in the hands of the Free Church prior to October 1900—we were told in support of the motion that we should delay doing so in the meantime, that there was no urgency in the matter unless we thought it urgent that that should be immediately done, and we were assured—and I cannot take the assurance as idle—that the whole case was to be brought before Parliament. It may be by the Government of to-day—the proper officer of the Government of to-day, the Secretary for Scotland, or the Prime Minister, or any other; but if not brought before Parliament by the Government for their judgment upon the matter, it would, we were assured, be brought by one or more members of Parliament either in one House or the other. I cannot but take the statement, coming as it did from responsible counsel representing such a body as the United Free Church of Scotland, that that is to be done. How Parliament may deal with it in the bill or in any other Parliamentary process, bringing the question before them—whether this divestiture of such numbers of people of their property and the investiture of a few with that property is to stand and be enforced—will be a matter for the consideration of Parliament. It would be very unbecoming on my part to indicate any opinion or any expression of opinion, if I had any, as to how Parliament would deal with it. If they refuse to deal with it at all, and leave the matter to the law without any intervention on their part, then the result will be undoubtedly that the judgment will stand and must be enforced with whatever force the law can afford to those desirous to enforce it. It must be enforced as it stands. It was represented to us that it was just possible that Parliament might take another view and interfere, and therefore it was reasonable that we in the meantime should delay our interposition to give immediate enforcement of the judgment, and the motion made to us in the Single Bills was that the case should go to the Summar Roll for argument upon the question as to whether it is within our power, if we thought it would be just and reasonable to do it—to delay in the meantime to grant the application in this petition—to allow it to stand off in the meantime. Now, we were told by Mr Guthrie that he had a good deal to say on the matter, and that he had even facts to bring before us in the matter as to the consequences of handing over this estate to the minority who dissented from the Union, and who are now the Free Church. He desired to have the matter argued, and his concluding motion was that the matter should be sent to the Summar Roll, where arguments might be heard. I thought that was a reasonable motion, and I hesitate to express any opinion upon the question—although I have an opinion upon it—whether we have the power to delay if we think it is just and reasonable to exercise it. I should desire argument upon that, as such was the desire of the party who made the motion, and I should desire all the assistance that could be given to the Court by argument upon either side, or any authority quoted by either side. Your Lordships are of another opinion, and think that the matter is so clear and so urgent that it would be

unreasonable to listen to the request for any delay, and that we should put the successful party in the House of Lords into the position of now being able to invoke all the powers of the law and legal officers in order to enforce the immediate execution of the decree. As to the propriety or impropriety of granting delay, I should like to have had further argument from both sides. I think it is a proper matter for argument on both sides, and in accordance with the motion made by the respondents I think that the case should be sent to the Summar Roll for full discussion. Upon that matter your Lordships, I was informed only I think the day before yesterday, had come to a different opinion, and thought there was no occasion for argument at all, and that argument ought not to be allowed. I was desirous of having even the present advising put off — having heard that opinion only the day before yesterday — until next week, that I might consider the matter more carefully and be able to express my views more carefully than I have done; but your Lordships were of opinion that even that delay which I personally requested ought not to be granted, but that the prayer of the petition ought at once to receive effect. I assume that is the correct view of the majority of the Court and that that is to be done, but I must, in justice to my own views, express what I have done on the subject. I think we ought not to grant the prayer of the petition until we have heard argument as to whether or not it is within our discretion to delay dealing with the matter, and also whether there are grounds for exercising that discretion in the way moved for by the defenders and respondents.

LORD TRAYNER — The House of Lords have remitted to us to pronounce a certain order. The terms of that remit are not ambiguous or open to construction. The petitioners now ask us to give effect to the remit by pronouncing an order in conformity therewith. The defenders move us to delay pronouncing any order, and ask in effect an opportunity of showing cause why the order asked by the petitioners should not be pronounced. I think there is no occasion, and indeed no room, for any such discussion as that which the defenders ask us to hear. The duty which the remit from the House of Lords imposes on us is not in any proper sense judicial. It is purely ministerial. Our only duty is to do what we have been requested to do, and we have no choice or discretion in the matter. What may be the consequences of our present decree are matters of which we can take no account. I am therefore of opinion that the prayer of the petition should be granted *de plano*.

LORD MONCREIFF — I agree with the majority of your Lordships that we should without further discussion pronounce decree of declarator in terms of the third and sixth conclusions of the summons.

The House of Lords has remitted this case with explicit and unambiguous directions to do so.

It is not open to us to question the judgment of the House of Lords nor the binding authority of the remit, and it is equally beyond our power, were we so disposed, to delay giving effect to the remit from any considerations of consequences which may follow upon decree of declarator being pronounced—consequences which it must be presumed the noble and learned Lords foresaw when they pronounced judgment.

In these circumstances, there being no dispute as to the form or meaning of the remit, discussion is, and in my opinion was, from the first, incompetent.

Mr Guthrie, however, was allowed to state his objections at considerable length, but he did not state a relevant or practicable reason for granting delay, and did not cite a single authority for departing from our well-established constitutional duty to give implicit obedience to the orders of the Court of last resort without question or delay. If authority were required for the course we propose to adopt, I may refer to the opinion of Lord Redesdale in the case of *Stewart* v. *Agnew*, March 12, 1823, 1 Shaw's Appeals 413, at p. 426; and that of Lord Justice-Clerk Inglis in *Stuart* v. *Moore*, May 25, 1861, 23 D. 902, at p. 913.

The Court refused to send the petition to the Summar Roll, and granted the prayer *de plano*.

Counsel for the Petitioners — Henry Johnston, K.C. — Salvesen, K.C. — J. R. Christie. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Guthrie, K.C.—Shaw, K.C.—Orr. Agents—Cowan & Dalmahoy, W.S.

Thursday, May 5.

OUTER HOUSE.

[Lord Low.

GRACIE *v.* PRENTICE.

Partnership—Date of Termination—Duration of Partnership—Partnership at Will or for Definite Period—Lease of Land for Partnership Purposes.

A proposed to B that they should enter into partnership and take a lease of a particular field and start a fruit-farm there. B agreed to this proposal. A and B accordingly obtained a lease of the field for 19 years, the lease excluding assignees and sub-tenants, and containing stipulations which showed that the field was to be used for the purpose of fruit growing.

Held (*per* Lord Low, Ordinary) that although there was no express contract of partnership for nineteen years, and although as a general rule the mere fact that partners lease land for a term of years for the purposes of their business does not in itself prove an