WHITEHEAD AND MORTON, ... APPELLANTS.
GALBRAITH, CULLEN, AND GALBRAITH, RESPONDENTS.

1861.
July 19th & 20th.

Enforcement of Costs when awarded by the House.—Case in which the House having affirmed a Scotch judgment with costs, accompanying the affirmance with the usual remit, which directed the Scotch Court to enforce the award of costs, and the Scotch Court having refused to comply, a new Appeal became necessary, upon hearing which the House reversed the refusal of the Scotch Court, and sent the case back with expressions of opinion by the Law Peers.

Per the Lord Chancellor (*a*): The remit by the House imposes upon the Court below the performance of the judicial acts requisite to complete the procedure ; p. 296.

Per Lord Chelmsford : The order of the House having been brought before the Court below by a petition which asked that such summary diligence should issue "as should be necessary and lawful," it was their duty at once to carry out the order by such a course of proceeding as was proper and necessary for the purpose ; p. 311.

Surplusage.—That a Petitioner asks more than his right is not a reason for refusing him his right.

Per Lord Chelmsford : It was the duty of the Court of Session to reject that part of the prayer which was superfluous, and not to treat it as invalidating the whole proceeding ; p. 309.

Appeal — Parties.—A trustee acting as solicitor for the trust, and consenting to an Appeal by his co-trustees, is virtually himself an Appellant. On an Appeal by three trustees, one of them, Mr. Cullen, who was not only a trustee, but also law agent of the trust estate, represented himself in the pleadings as being, not an actual Appellant, but merely a consenter to the Appeal of the other two,—it was held by the House that he was in effect an Appellant, and liable as such for all costs awarded.

(*a*) Lord Westbury.

Per the Lord Chancellor: I think it perfectly clear that, as Mr. Cullen was indisputably a trustee, and in that capacity had appeared and concurred with the two Galbraiths in all the actions and proceedings in the Court below, "the Appeal of Messrs. Galbraith, with the consent of Mr. Cullen," was the Appeal of those two with the concurrence of Mr. Cullen, and if Mr. Cullen concurred in that Appeal, it is impossible to say that he is not an Appellant; p. 302.

Per Lord Chelmsford: As to Cullen, I agree that he is properly treated as an Appellant; p. 311.

The following case throws light upon the manner in which the judgments of the House of Lords upon Scotch appeals are to be carried into execution when the cause returns to the Court of Session. It also illustrates the hopelessness of escaping the payment of costs when awarded by the House, however ingenious and astute the contrivances for that end may be. The circumstances were shortly these:

In an action of reduction, brought before the Second Division of the Court of Session for the purpose of having a certain bond and disposition in security set aside, John Whitehead and Charles Morton were Pursuers, and David Stewart Galbraith senior, John Cullen, writer to the signet, and David Stewart Galbraith junior, were Defenders.

After a variety of procedure, the Court of Session, on the 5th February 1856, pronounced a decree, reducing, rescinding, and setting aside the instrument in question. This decree was extracted; and it was argued that thereupon the jurisdiction of the Court below had ceased in the cause.

The Defenders had been made parties to the action in their fiduciary character as trustees for one Malcolm MacCrummon, deceased.

David Stewart Galbraith senior was resident in

Devonshire, John Cullen in Edinburgh, and David Stewart Galbraith junior in Australia.

An Appeal to the House of Lords was resolved upon; Mr. Cullen being not merely a trustee, but also law agent for the trust.

The Appeal was drawn up in a form quite new.

The purpose of this innovation was exceedingly apparent.

It was not, as it ought to have been, an Appeal in the names of David Stewart Galbraith senior, John Cullen, and David Stewart Galbraith junior, (supposing this last-named individual, who was then in Australia, to have known anything about the matter,) but it was an Appeal in the names of David Stewart Galbraith senior, "*with consent of John Cullen*," and David Stewart Galbraith junior;—so that whether Mr. Cullen was an Appellant or merely a consenter, and whether Mr. Galbraith junior was properly or only nominally an Appellant, it seemed hard to determine.

The Appeal contained the usual prayer that the decree of the Court of Session of the 5th February 1856 should be reversed, varied, or altered. It also contained a "certificate of intimation" in the following terms:—

I, John Cullen, writer to the signet, agent of the petitioners in the foregoing Appeal, do hereby certify that upon the 19th day of February 1857 I gave notice to Messrs. Morton, Whitehead, and Greig, writers to the signet, agents of the Respondents in the Court of Session, that a petition of Appeal against the Interlocutor of 5th February 1856 was intended to be presented to the House of Lords on the 23rd current, or as soon thereafter as conveniently might be.

(Signed) JOHN CULLEN.

This notice described the Appellants in the plural number, but left it open for discussion whether Mr. Cullen was to be included in the computation. He himself contended that he was *not*.

Through the agency and by the instrumentality of Mr. Cullen the Appeal was in due time presented to the House of Lords. On the 23rd February 1857 the House, upon reading the Appeal, ordered that the Respondents should have a copy thereof, and put in their answer thereto in writing on or before the 23rd of March then next, and that service of this order upon the Respondents' known agents in the Court of Session should be deemed good service.

On the 2nd of March 1857 a recognizance to the Crown for costs was entered into before the Clerk of the Parliaments by David Stewart Galbraith senior. The condition of this recognizance was as follows:—

Whereas David Stewart Galbraith, with consent of John Cullen, *and others* (*a*), *have brought their Appeal* to be relieved against an Interlocutor of the Lords of Session in Scotland of the Second Division of the 5th February 1856. If, therefore, the said Appellants, their heirs, executors, or administrators, shall truly pay to the Respondents all such costs as the Lords in Parliament shall appoint, in case the said Interlocutor shall not be reversed, then this recognizance to be void and of none effect, or else to remain in full force and virtue.

(Signed) D. S. GALBRAITH.

The Respondents presented a petition to the House, praying that the Appeal should be dismissed as incompetent. The prayer of this petition, however, on a report from the Appeal Committee, was refused by the House. The Appeal was retained. The Respondents put in their answer and lodged their printed Case.

In the Appellants' printed Case the parties were described as David Stewart Galbraith, "*with consent of John Cullen,*" and David Stewart Galbraith junior, — adhering thereby to the description contained in the Appeal.

(*a*) The framer of the recognizance must have considered Mr. Cullen an Appellant, otherwise he would have said, "Whereas David Stewart Galbraith, with consent of John Cullen, *and another*, have brought their appeal," &c.

After hearing a short argument by Counsel on the 24th March 1859, the House pronounced judgment, affirming the decree complained of; and it was further ordered as follows:—

That *the Appellants* do pay to the Respondents the costs incurred by them in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments; and it is also further ordered that unless the costs certified as aforesaid shall be paid to the parties entitled to the same within one calendar month from the date of the certificate, the cause shall be and is hereby remitted back to the Court of Session in Scotland or to the Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

The Respondents' taxed costs duly certified under the above order amounted to 310*l.* 11*s.*

These costs might have been recovered by estreating in the Exchequer the recognizance which had been entered into by David Stewart Galbraith senior, who was subject to the English jurisdiction. But the Respondents were advised to proceed in Scotland. Now in Scotland the only party against whom they could claim was Mr. Cullen.

Accordingly, in order to obtain the benefit of the judgment and certificate as against Mr. Cullen, the Respondents presented to the Second Division of the Court of Session a petition reciting the prior proceedings, and representing that although applications had been made to the solicitor in London, as well as to Mr. Cullen, the agent in Edinburgh, for payment of the costs, yet nevertheless the order of the House in that behalf had been disobeyed. In these circumstances the Respondents made their application to the Second Division as follows:—

That your Lordships may in terms of the judgment of the House of Lords issue such summary process and diligence for recovery of the costs as may be lawful and necessary.

The formal prayer of the Respondents' petition was as follows:—

May it therefore please your Lordships, in terms of the judgment of the House of Lords, to decern and ordain the said David Stewart Galbraith, and the said John Cullen, and David Stewart Galbraith junior, to make payment to the petitioners, as Respondents in the said Appeal, of the sum of 310*l.* 11*s.*, being the costs incurred by the Respondents in respect of the said Appeal, in terms of the said judgment and relative certificate by the Clerk of Parliament, with interest at the rate of 5*l.* per centum per annum on said sum from the 4th day of July 1859 till payment, and to decern therefor. And farther to find the said David Stewart Galbraith, John Cullen, and David Stewart Galbraith junior, *Appellants in the said Appeal,* liable to the petitioners in the expenses of this application, and procedure to follow hereon, or to do further or otherwise in the premises as to your Lordships shall seem proper.

When this petition was moved before the Second Division, Mr. Cullen contended, first, that the cause did not depend in the Court of Session at all, the decree of 5th February 1856 having been extracted, and that it was therefore incompetent for the Court to pronounce any order in it, or on this petition; secondly, Mr. Cullen urged that the only proper mode of recovering the costs was by enforcing the recognizance, to which he was no party; and thirdly, he denied that he was a party to the Appeal in the House of Lords, inasmuch as he was merely a consenter.

The proceedings which took place before the Court of Session are set out at great length in their Second Series of Reports (*a*). After much argument the Second Division, on the 8th June 1860, appointed the petition and relative papers to be laid before the other Judges of the Court of Session; and opinions were accordingly returned by these consulted Judges.

The *Lord President,* and Lords *Curriehill, Neaves, Mackenzie, Kinloch,* and *Jerviswoode,* were of opinion that the application was objectionable, and should be

(*a*) 23 Sec. Ser. 265.

dismissed, first, because it was not an application to the Court to do that which alone the House of Lords had remitted to the Court to do, viz., to issue summary diligence for the recovery of the certified costs; secondly, because it was an application to the Court to do several things which the House of Lords had not remitted to the Court to do, to wit, (1), give a decree of its own for payment of the costs; (2), to give a decree for payment of interest on the costs; and (3), to give a decree for the expenses of the petition, and of whatever procedure might follow thereon.

Lords *Ivory, Deas,* and *Ardmillan,* on the other hand, were of opinion that they could not hold the petition objectionable, either, first, in respect of competency, or, secondly, in respect of form; and they held that the order of the House included Mr. Cullen, he being in substance one of the Appellants.

Upon considering these several opinions the Judges of the Second Division delivered judgment on the 11th January 1861 at great length. The *Lord Justice-Clerk* stated his concurrence with the majority of the consulted Judges, holding that the petition should be dismissed as incompetent. His Lordship stated that Lord *Wood,* who was absent, agreed with him. Lord *Cowan,* on the other hand, agreed substantially with Lords *Ivory, Deas,* and *Ardmillan.* Lord *Benholme* made the following observations :—

In refusing this petition, I think we are cutting out a great deal of the practice of this Court; and whatever might be my view, had this question occurred for the first time, I should not think of enforcing it where there has been an invariable practice. I agree with Lord Cowan in thinking that the difference between an extracted decree and a decree not extracted is really of very little consequence. In both cases the Court of Session is functus officio. I am of course supposing that the Court has finally decided the whole matter. Our jurisdiction depends on the remit. We have no other authority. I look upon the decree sought here in some measure as a decree conform, in order that ordinary diligence may pass upon it.

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The following was the ultimate decision pronounced by the Court below on the 11th January 1861 :—

In conformity with the opinion of the majority of the whole Judges, find that the prayer of the petition is not in conformity with the remit contained in the judgment of the House of Lords, and prays only for what the Court cannot competently grant under the said remit, therefore dismiss the petition as incompetent. Find the Respondent, John Cullen, entitled to expenses, &c.

Against this decision Messrs. Whitehead and Morton appealed to the House, and the case was heard at the bar on the 19th and 20th of July 1861, Sir *Fitzroy Kelly*, Mr. *Anderson*, and Mr. *A. R. Clark* appearing for the Appellants, and urging that the Court below had clearly miscarried in the decision pronounced by them. The order of the House, they averred, was quite regular, and in conformity with the practice which had been settled ever since 1838. The simple and obvious course which the Court below ought to have pursued was to make the order of the House a decree of their own, and then to issue the summary diligence required.

[The LORD CHANCELLOR (*a*): The objection appears to have originated with the Bench. The House will expect the *Lord Advocate* to explain the course taken.]

The *Lord Advocate* (*b*) and the *Solicitor-General* (*c*) for the Respondents: The remit is not to make an order, but to grant diligence. Cullen did not choose to be an Appellant, but he consented to the others appealing. Why did not Messrs. Whitehead and Morton sue the other parties? They sued Mr. Cullen.

[The LORD CHANCELLOR: Why did not the Court below make our order their order?]

(*a*) Lord Westbury. (*b*) Mr. Moncrieff.
(*c*) Sir Roundell Palmer.

Lord *Rutherfurd's* Personal Diligence Act (*a*) assumes the cause to remain in the Court below; but even under his Act the proper course was to proceed by what is called a plack bill. The cause was not sent to the Court below to repeat your Lordships' judgment.

[The LORD CHANCELLOR: What is the difference between this case and Clyne's? (*b*)]

In Clyne's case there was no decree. The proceeding was still pending in the Court below; so likewise in Ferrie's case (*c*).

Mr. *Anderson* in reply. The language of the order of the House as to costs is in accordance with a precedent very deliberately settled in 1838, and uniformly followed ever since. Under the Personal Diligence Act (*d*) the proceeding here taken was clearly correct. It was asking the Court below to grant the most summary process which that Court could issue. An application by plack bill would have been unprecedented, there being a depending cause in the Court of Session. The application for interest too and costs was reasonable under the circumstances.

The following opinions were delivered by the Law Peers.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*e*):

My Lords, an action was commenced in the Court of Session for the purpose of reducing and setting aside a particular instrument; and an Interlocutor was pronounced by that Court to the effect of the relief prayed, reducing and setting aside that instrument. From that Interlocutor there was an appeal to your Lordships, and this House pro-

(*a*) 1 & 2 Vict. c. 114. (*b*) 23 Sec. Ser. 268, 269.
(*c*) 18th July 1853, cited in the Appellants' case, p. 62.
(*d*) 1 & 2 Vict. c. 114. (*e*) Lord Westbury.

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nounced an order upon that Appeal, by which in fact the Appeal was dismissed, and it was ordered that the Appellant should pay to the Respondents

"The costs incurred by them in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments; and it is also further ordered that unless the costs certified as aforesaid shall be paid to the parties entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary."

In pursuance of that judgment the costs of the Appeal were taxed, and were certified by the Clerk of the Parliaments to amount to the sum of 310*l.* 11*s.*, which certificate is dated on the 4th of June 1859.

Anterior to the Statute commonly called the Summary Diligence Act, which is the 1 & 2 Vict. c. 114., there was a long and tedious process necessary to be taken in the Court of Session for the purpose of executing any Interlocutor or decree of that Court. But by the Act to which I have referred, of which a portion is extracted in these proceedings, it was in effect enacted "That from and after the 31st December 1838, where an extract shall be issued of a decree or act pronounced or to be pronounced by the Court of Session," and so forth, "the extractor shall, in terms of the Schedule No. 1 hereunto annexed, or as near to the form thereof as circumstances will permit, insert a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge under the pain of poinding and imprisonment and to arrest and poind." Then follow some ordinary words of form.

My Lords, that is denominated the Summary Diligence Act. And with reference to that Statute, shortly after it was passed, a particular form of order

was carefully settled by the proper authority in this House, which has been uniformly adopted since that time. The form of order therefore which was then adopted, and which has been since employed, is about 23 years old; and during that period of time it has been, as I shall have occasion to show your Lordships, frequently interpreted and acted upon judicially by the Court of Session; and it is in that form that the order on the former Appeal in this case is worded (*a*).

Now it is desirable to analyze in a few words what things are contained in this form of order. First of all the cause is remitted back to the Court of Session. The Appeal has the effect of bringing the record of the cause into this House, but by that form of words the record is sent back to the Court of Session, which becomes thereby repossessed of the cause, with this addition, that this House has introduced into that cause, or at least has given directions for the introduc-

(*a*) Prior to 1838 petitions had repeatedly been presented to the House for orders to enforce the payment of costs awarded on Appeals. These petitions were referred to the Appeal Committee, which Committee recommended a remit to the Court of Session, or to the Lord Ordinary officiating on the bills during vacation, nearly in the words of the remits now in use. In order to render these petitions unnecessary, the principal Scotch agents applied, in the beginning of the Session 1838, to Mr. Birch, Clerk-Assistant of the Parliaments, that certain words might be added to the ordering part of all judgments for enforcing the payment of costs at once, and they submitted to him the form now used. This form was, it is understood, submitted to the authorities, and was adopted, and has since then been added to all judgments giving costs on Scotch Appeals. The form was slightly amended in 1839, upon application, by the same agents, to Mr. Birch, upon the ground that the remit was considered in Scotland as not complete without the words "and is hereby" (remitted). The form thus advisedly and warily introduced has been studiously adhered to ever since. See *Glendonwyn* v. *Glendonwyn*, Lords' Journals, 2nd February 1838, showing the *old* form of judgment, and *Hamilton* v. *Wright*, Lords' Journals, 12th February 1838, the *new*.

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tion into that cause, of a particular order, namely, the order that the Appellants, parties to that cause, should pay the costs of the Appeal.

Now it is utterly impossible, I think, to mistake the language of the order of your Lordships House. The cause is sent back to the Court of Session in order that the Court of Session might do that which was requisite to enable summary process or diligence to be issued for the recovery of the costs. I think it impossible for any person desirous of carrying that order into effect, even if he had applied his mind for the first time to it, to mistake the mode in which it ought to have had effect given to it. He would have known at once that under the remit with the direction it was his duty to make the direction of your Lordships an order of the Court of Session, and he would have seen that by adopting the obvious step involved in the first direction, the consequence would follow that a summary process or diligence would immediately be issued for the recovery of the costs.

I apprehend that there can be no mistake as to what was the duty of the Court of Session, and what it was competent for the Court of Session to do. I would, however, before I part with the order, point out to your Lordships that the direction is given by you to the Court of Session, because the introduction of the words "or to the Ordinary officiating on the bills during the vacation," is only an expression of the form and shape (if I may use the words) of the Court of Session during the vacation, the Court of Session during the vacation being represented by the Ordinary officiating on the bills. There is but one direction therefore to one Court. It is to the Court of Session if the direction is brought to it during its ordinary time of session. It is to the

Ordinary on the bills if the direction is brought or desired to be enforced during the vacation.

Now, I find that the learned Judges of the Court below agree in the expression that there could be no mistake as to the meaning and intention of this order; but the majority of them have put upon the language of the order a species of literal interpretation which has defeated that which they admit to have been the plain intention of the order. I think your Lordships will agree with me that the words used by the minority of the Judges exactly express what your Lordships intended in your former order:—"The functions of the *Lord Ordinary* on the bills are not confined to vacation, but the remit to him is so confined, which strengthens the inference that the remit to this Court is to the Court of Session, properly so called, and not as the Court of the Bill Chamber."

Then follow passages which I do not think it necessary to read in detail to your Lordships; but I will call your attention particularly to the extract given by the learned judges from an opinion of Lord *Medwin* and Lord *Corehouse* in a former case that occurred some time ago—the case of *Stewart* v. *Scot* (a), and in the latter part of that opinion you will find this passage:—"The judgments of the House of Lords on appeals from the Court of Session are seldom framed so as to admit of a decree being extracted without the intervention of the Court below. The cause therefore necessarily returns that the judgment may be applied, and this is done sometimes by an express remit, but more frequently without any remit except that which is held to be implied in the judgment itself. Whether the remit be express or implied, it imposes upon this Court the performance of the judicial acts requisite to complete the procedure, for,

(a) 14 Dunlop, B. & M. 692.

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in the first place, the Court must consider whether the judgment of the House of Lords has exhausted the whole cause, or whether any points remain to be decided, and, secondly, if they are of opinion that the cause is exhausted, to frame such an Interlocutor as is best adapted to carry the judgment into effect."

I think those words very happily express what was the obvious duty of the Court of Session in this case, namely, instead of insisting that they were bound to give a literal and a purely literal meaning to the words of the order of this House, and that they were unable to execute the order according to that literal meaning, to have adopted the language of this precedent, and to have considered that there was imposed upon them the performance of the judicial act requisite to complete the procedure. My Lords, what was that judicial act? It was plainly involved in the remit. The judicial act was to make an order of the Court of Session for payment of those costs which this House had declared and directed to be given. And if that duty had been discharged, there could have been no difficulty, nor the least possible mistake or misapprehension about the meaning or effect to be given to the subsequent words of your Lordships' order.

But, my Lords, what the Court of Session thought proper to do was to raise a difficulty which the parties themselves had never raised—to raise a technical difficulty as to which there is no trace of its ever having entered into the mind of any person interested in bringing it forward during all that long period of time which has elapsed since the passing of the Act of Parliament, and since the framing of this formula of decision, which, since that Act, this House has in cases of this description always adopted.

My Lords, if you will permit me, I will refer to instances which have been collected, and of which I

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will cite only one or two, in order to show that the whole current of judicial authority (if authority were needed in that which common sense and reason sufficiently govern) preclude the possibility of this technical difficulty being raised.

My Lords, I will refer you in the first place to the instances which are given from the first case of *Sawers* v. *Russell* (*a*), where the circumstances are as nearly as possible identical with those of the present case, and where there was no difficulty made by the Court of Session as to adopting the course which they were desired to take by the Appellants in the present Appeal.

I will refer still more particularly to the case of *Ferrie* and *Ferrie* (*b*), where the form of decision is given, and the form of the order of the Court of Session. Now, if there had been any foundation whatever for this objection of incompetency and irregularity, undoubtedly either of these two cases would have furnished materials for such objection.

In the case of *Clyne's Trustees* and *Dunnett* (*c*), the form of order pronounced by this House was precisely the same as in the present case, and there was no difficulty on the part of the Court of Session in giving full effect to that order. In like manner, in the case of *Colquhoun* v. *Fisher* (*d*), a similar form of language, and under similar circumstances, and no difficulty whatever was suggested about the language of your Lordships' order.

And, my Lords, all this is in point of fact quite consistent with what was done by the Court of Session anterior to the Statute, of which an example is given in the case of *Elliot* v. *The Earl of Minto* (*e*),

(*a*) 23rd June 1855. (*b*) 20th July 1853.
(*c*) 1 Dunlop, 689. (*d*) 24th September 1846.
(*e*) 2 Shaw, D. & B. 770.

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in which there was a judgment of your Lordships' House, dated the 1st of June 1833, dismissing the petition and appeal, and ordering the Appellants to pay the Respondent the sum of 200*l.* for his costs. Then there was a petition to apply the judgment presented to the Lords of the Second Division, and they appear to have had no difficulty in giving effect to that form of order.

My Lords, in this state of things, the language of your Lordships' order being in itself perfectly clear and plain, and having been acted upon without any kind of objection or difficulty during so many years, as is exemplified by the instances which have been produced, a petition was presented by the present Appellants, to which I will next call the attention of your Lordships. That petition stated at length the order that had been pronounced by this House, and the certificate given by the Clerk of the Parliament; and then it went on to state that "by the said judgment the Appellants are called upon to pay or cause to be paid to the Respondents entitled to the same, within one calendar month from the date of the certificate thereof, the amount so certified, but although applications had been made to the solicitor in London, as well as to Mr. John Cullen, the agent in Edinburgh for the Appellants, the order of the House of Lords has been disobeyed, the time for payment having been allowed to expire. In such circumstances, the Petitioners now make the present application that your Lordships may, in terms of the judgment of the House of Lords, issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary." And then they pray, "in terms of the judgment of the House of Lords," that the Court of Session will decern and ordain the parties therein named to make payment to the Petitioners of the

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costs. And they go on to pray for interest upon the ascertained amount of the costs, and they also pray a declaration that a gentleman of the name of Cullen may be found to have been one of the Appellants in the Appeal which had been dismissed by your Lordships.

Upon this petition being presented, it appears that an answer was put in by the Respondents, or rather by the Respondent Cullen, for he alone appeared and put in an answer to the petition. But there does not appear in that answer to be any intimation given by the Respondent of the objection that was afterwards taken by the Court.

Now when this petition came on before the Court of Session, we find from the opinion given by the *Lord Justice-Clerk,* that his Lordship took the objection which has led to the present proceeding. He states that, "Looking at the case in this point of view, I come to the conclusion which is embodied in the opinion of the majority of the consulted Judges, to the effect that the present petition is incompetent and must be dismissed, because it does not ask the Court to do that which alone the House of Lords remitted to the Court to do, and does ask the Court to do several things which the House of Lords did not remit to this Court to do."

The same ground is taken in the opinions of the majority of the consulted Judges. The literal interpretation put by them upon this Act of Parliament, the spirit of which is admitted, is thus stated:—"These costs were not paid within the time appointed, and consequently the cause stands remitted to this Court for the purpose specified in the remit, but for no other purpose. The purpose specified is 'to issue summary diligence for the recovery of such costs.' It is not to hear parties and to give judgment or decree for pay-

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ment of the costs; that has been already done by the House of Lords itself. The sole and declared purpose of the remit is that this Court may issue summary diligence for the recovery of the costs, which the House of Lords has already taxed and ordered to be paid within a fixed time, which has expired. If this Court has power to issue such summary diligence, we can have no doubt that it is its duty to do so, and that under the remit there is nothing else for it to do."

Now, your Lordships will observe that the effect of the remit of the cause by this House to the Court of Session is altogether omitted to be noted in that part of the judgment to which I have directed your attention. And there is an entire disregard of what had been so clearly laid down in the antecedent cases, and particularly in the language which I read from a former decision of the Court of Session, as the elaborate opinion of Lord *Medwin* and Lord *Corehouse*, namely, "Whether the remit be express or implied, it imposes upon this Court the performance of the judicial acts requisite to complete the procedure." That plain duty and obligation is altogether neglected to be observed.

But now, supposing the Judges of the Court of Session had read your Lordships' order as containing in express words that which indisputably it implies and involves, namely, that you sent the cause back to the Court of Session to make your direction an order of that Court, then the words that subsequently follow would be words expressing that which it was your Lordships' intention should be done, namely, that summary diligence might be granted to the party, and which would be granted as a necessary consequence of the statute by reason of the order of your Lordships' House being made an order of the Court

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of Session. Now it is through that not being done that the parties have been reduced to the unfortunate position in which they now stand; for the Second Division of the Court of Session, to which this petition was addressed, having itself *ex mero motu* started this technical objection which the Respondents themselves had not raised, and having invited the rest of the Judges of the Court to join with them in the pursuit of that objection, a great deal of time having been lost and much expensive procedure having been gone through, the petition is dismissed; and the costs of this application, which was an application only in the natural course, appear to have amounted to the very considerable sum of 175*l.* and upwards, only for the costs of the Respondent, and we are undoubtedly warranted in inferring that the costs of the Appellant, the Petitioner, must have been equal in point of amount. That represents, therefore, a loss to the parties of not less than 350*l.*, resulting entirely from the act of the Court in taking a technical objection, in itself without foundation, and which was not suggested by either party.

But, my Lords, the evil does not rest there. In order to obtain justice an Appeal to this House is again rendered necessary. The former Appeal appears to have cost one of the parties 310*l.*, and supposing the expense of the present Appeal to be at all approaching that, we may form some idea of the amount of loss and suffering inflicted by this unfortunate step taken by the Court of Session.

My Lords, it may be said that the petition presented to the Court of Session asked more than was requisite. Supposing that it did, the remedy for any excess in the prayer would of course have been to reject that part which was excessive, and to make the petitioners bear the expenses consequent upon

that excess. But that the petition contained all the materials necessary to enable the Court of Session to do that which it was bound in duty to do, is beyond all question. It is impossible that there can be any rule of Court by virtue of which they may decline to entertain an application calling upon them, and rightly calling upon them, to do something which the applicant is entitled to, because there is added to that some further petition with respect to costs, about which there might be some difficulty as to whether the Petitioner was entitled to it.

Then, my Lords, there was another thing involved in the petition, and as your Lordships have power to make the order which you think the Court of Session ought to have made, it is necessary that your attention should be drawn to this, in order that this subject of litigation may, as far as possible, be altogether put an end to.

A question was raised by the Petitioner of this nature, whether Mr. Cullen was an Appellant. Now it appears that the question in the original cause related to a particular bond or obligation which was vested in the trustees of a certain party, and it appears that three of those trustees were alone competent to deal with that bond, and with the proper rights involved therein. It seems that the Appeal presented to your Lordships' House that was dismissed was thus worded, probably with some design, the nature and object of which I will not stop to inquire. It was made an Appeal of two gentlemen of the name of Galbraith, "with the consent of Mr. Cullen." Mr. Cullen, it appears, is a writer to the signet in Edinburgh. Now I think it is perfectly clear that as Mr. Cullen was indisputably a trustee, and in that capacity had appeared and concurred with the two Galbraiths in all the actions and proceedings in the

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Court below, the Appeal that is so worded, "the Appeal of Messrs. Galbraith, with the consent of Mr. Cullen," was the Appeal of those two with the concurrence of Mr. Cullen, and if Mr. Cullen concurred in that Appeal, it is impossible to say that he is not an Appellant.

I therefore submit to your Lordships that the Court of Session should have pronounced an order upon this petition, in conformity with the established practice, in pursuance of their bounden duty to this House, and in pursuance of the rule laid down for them by this House, and which they themselves have interpreted and fully understood in so many instances, and which was in itself so plain that it did not admit of anything like *boná fide* misapprehension. I think, therefore, it is abundantly clear that upon this Appeal an order ought to be pronounced by this House, directing the payment of costs, as embodied in the certificate, and also declaring that Mr. Cullen was an Appellant and liable to the payment of those costs. In order to prevent the possibility of any misapprehension or any further difficulty, I would suggest to your Lordships that some such form of words as this should be adopted. This House doth declare that under the remit made by this House, and on the petition presented to the Court of Session by the present Appellants, the Court of Session was competent and bound to give instant execution for the payment of the costs mentioned in the certificate of the Clerk of the Parliaments, in order that summary diligence might issue under such execution. And this House doth declare that the Respondent Cullen was one of the Appellants in the former Appeal, and is liable with the other two Appellants for the payment of those costs; and this House doth remit the present cause with directions to carry this judgment into effect.

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Lord Brougham's opinion.

Lord BROUGHAM:

My Lords, I entirely agree with my noble and learned friend as to this case. I look upon the arguments of Lord *Cowan* (a), generally speaking, with the exception of some little doubt as to what he said about Mr. Cullen, as very satisfactory, but I entirely agree with the argument of Lord *Ivory*, and Lord *Deas*, and Lord *Ardmillan* (b). My Lords, really the case of *Stewart* v. *Scott* (c), which has been referred to by my noble and learned friend, seems very much to dispose of this case. After looking at the opinions of Lord *Medwin*, and Lord *Corehouse* (d), it is material to observe that Lord *Jeffery* (e), who suggested and concurred in the view taken by the minority, gives no countenance whatever to the argument used against the judgment of Lord *Medwin* and Lord *Corehouse*, but in the most material part of it entirely concurs.

It has been said that the party might have proceeded by what is called a plack bill. Now, it is quite unnecessary to give any opinion upon that subject, but I take for granted that a plack bill would not apply where there is a suit actually pending.

I therefore entirely agree in the course proposed by my noble and learned friend, the *Lord Chancellor*.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, my noble and learned friend on the woolsack has so completely exhausted this case, that I do not feel it to be my duty to add more than a very few observations to those which he has made. This case was remitted back "to the Court of Session, or to the Ordinary officiating on the bills during the

(a) 23 Sec. Ser. 281. (b) Ib. 274.
(c) 14 Dunlop, Bell & M. 692. (d) Ib. 700.
(e) Ib. 696.

Lord Cranworth's opinion.

vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary." Now, I believe these words, "or to the Ordinary officiating on the bills during the vacation," not only were not necessary, but that in some sense they may perhaps have led to the doubt which has arisen upon this subject, those words having been taken as implying that the case had been sent to the Bill Chamber. That, however, is not the case, "the Ordinary officiating on the bills during the vacation" is in truth, for the time being, the Court of Session itself. Therefore, this was a remit by this House to the Court of Session, to issue such summary process or diligence as should be lawful and necessary for the recovery of the sum of 310*l.* 11*s.*, because although it says "such costs," those costs under your Lordships order are taxed at the sum of 310*l.*

Now, the objection taken by the Court of Session is this. They say it is not the function of the Court to issue process. That may be done by a plack bill, or in some other mode that is mentioned, in the Bill Chamber, but it is not the function of the Court of Session to issue process. Now, I think that objection is quite disposed of by the language of the Summary Process Act of 1838, which proceeds thus:—"Where an extract shall be issued of a decree or Act pronounced or to be pronounced by the Court of Session," then summary process is to follow; but that Statute speaks of an extract being issued only where there has been a decree of the Court. It is necessary that there should be a decree in order to get the summary process. Therefore it was that after great deliberation the form of order was adopted in this House which has been acted upon ever since the year 1838, and under which there have been all these numerous cases which are printed in the Appellants' case in which no such objection as this was ever taken.

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I should have thought that, even if, in strict literality, these words could have been taken as meaning a remit, not to the Court of Session, but to the Bill Chamber, the practice of 23 years would have established that what was meant by the remit was a remit to the Court of Session, even if the terms had not expressly warranted it, for in my opinion, looking at this Act of Parliament, anything else would have been inaccurate. You can only get the benefit of the Summary Process Act by having first a decree of the Court of Session. Therefore, I think that the form that was adopted was very properly adopted, and that the Court of Session would have acted much more satisfactorily if they had proceeded in this case upon the same course which they have always hitherto followed.

My Lords, this is really one of the most lamentable cases that ever was presented to a Court of Justice. Here is a declaration by this House that certain persons are liable to pay 310*l.* for costs, and the Court of Session have actually occasioned, by their taking this formal objection, taxed costs to be paid by the Appellant of 175*l.*, his own costs being probably far beyond that amount, because the 175*l.* is only the amount of the taxed costs, so that the costs of that proceeding have much more than exhausted the sum in question, besides all the expenses of the subsequent appeal to this House.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, as this case involves to some extent a question of the practice of the Court of Session, I should have had great hesitation in advising your Lordships to reverse the Interlocutor appealed from if it had been sanctioned by the unanimous judgment of the Judges in Scotland. But as no less than five of the learned Judges dissent from the conclusion at

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which a majority has arrived, I do not feel myself embarrassed in forming and expressing my own opinion upon the subject.

The order issued by the House in this case is in a form adopted after the Act of 1 & 2 Vict. c. 114., which has been invariably followed ever since. It is said to be inaccurate in its terms in remitting the cause to "the Ordinary officiating on the Bills during the vacation" because the Bill Chamber is a separate Court from the Court of Session; a satisfactory answer has been given to that observation by my noble and learned friend who last addressed your Lordships. But even if that remark were well founded it would be wholly immaterial, as the consulted Judges all agree that the intention of the order was clear enough, namely, "to remit the cause back to the Court from which it came in the exercise of its ordinary jurisdiction."

Some criticism was also applied by the Judges to the words in your Lordships' order "summary process or diligence." But they all agree that the meaning is clear, and Lord *Cowan* explains it very distinctly to be "summary procedure with a view to instant diligence against the Appellants."

The order, therefore, must be considered to have clearly conveyed the directions which it contains. And it thereupon became the duty of the Court of Session to give effect to it unless what was directed to be done was beyond their competency.

Now it is not alleged by the Judges that they had no authority to issue summary diligence for the recovery of the costs. On the contrary, six of the consulted Judges say "We are very clearly of opinion that the Court has power in the exercise of its Bill Chamber jurisdiction to issue summary diligence for recovery of the costs without having pronounced any judgment or decree for payment of these costs."

It was insisted by the *Lord Advocate* that as the judgment of this House was one of affirmance the party entitled to the costs could not proceed to obtain them by the way of petition to the Court of Session, but that he could only recover them by an original proceeding called a plack bill in the Bill Chamber. But here he is answered by the same six consulted Judges, who say that summary diligence might have issued in this case "on an application in the form of either a petition to the Court or a plack bill" the nature of which they proceed to describe. It, therefore, cannot be contended that the mode of enforcing the order by petition to the Court of Session was irregular or improper.

The objection, therefore, must be to the form of the petition, and this appears to be the sole ground on which the Court of Session proceeded. The six Judges, to whose opinion I have already referred, say that "an application in general terms to apply the judgment of the House of Lords might perhaps be construed as an application to the Court to execute the remit, and to do whatever was therein expressed." And they intimate that this would have been sufficient. But their objection to the petition is that it does not expressly "ask the Court to do that which alone the House of Lords remitted to the Court to do." Or as the *Lord Justice-Clerk* puts it, "The petition is incompetent and must be dismissed because it does not ask the Court to do that which alone the House of Lords remitted to the Court to do, and does ask the Court to do several things which the House of Lords did not remit to this Court to do."

With respect to the suggestion that "an application in general terms to apply the judgment" would have done, it may be observed that three of the consulted Judges are of opinion that "the petition for decree is

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in substance a petition to apply the judgment of the House of Lords," and as to the petition not praying the Court to do what the House remitted to it to do, nothing can be more clear and distinct than the terms that it uses:—"The Petitioners now make the present application that your Lordships may in terms of the judgment of the House of Lords issue such summary process or diligence for recovery of the costs as may be lawful and necessary." If the petition had stopped here, it can hardly be doubted, from the opinion expressed by the Judges, that it must have been held to be sufficient, as expressly applying to the Court to do what the House had ordered to be done. But this statement of the object of the petition being followed by a prayer "that the Court would decern and ordain payment of the costs, with interest, and do further or otherwise in the premises as to their Lordships should seem proper," the Judges seem to have thought that they ought to look no further than the prayer of the petition, and that as the petitioners did not there in terms pray for what the House had ordered to be done, and (as was said) asked for something which the House had not ordered to be done, therefore the petition was incompetent. I must, with very great respect to the majority of the Judges, express my surprise at such a conclusion. Without considering whether the prayer for a decree was equivalent to a petition to apply the judgment, and assuming that it was a prayer for something beyond the order of the House, I cannot help thinking that it was the duty of the Court of Session to reject that part of the prayer which was superfluous, and to have carried out the order in its terms, as they were distinctly and specifically requested to do.

I can well understand the Court of Session being jealous of their forms of procedure, and being anxious,

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and properly anxious, to guard against any innovation upon their practice. If, therefore, it could have been shown that the Appellants had wholly mistaken their course, that they ought not to have presented a petition to the Court of Session at all, but that they should have proceeded by original bill in the Bill Chamber, that would have been a perfectly legitimate and proper ground of objection. But when it is admitted that the proceeding by petition was the correct course, that if it had been in express terms to apply the judgment, it would have been good, when it clearly contains that which is equivalent, that an application to do what the House had ordered to be done would be sufficient; when the petition states the application in the very terms of the order, I cannot help regretting that the Judges took so confined a view of the subject as to refuse to look beyond the prayer of the petition, and because they found in that prayer matter which they regarded as going beyond the order, instead of rejecting it as surplusage, to treat it as invalidating the whole proceeding.

But it does not seem to be quite so clear that a decree or order for payment of the costs ought not to have been prayed. The three consulted Judges, to whose opinion I have before referred, say that if a decree be competent it was certainly not superfluous in this case, as it was indispenable to ascertain in some way whether Cullen was an Appellant before summary diligence could issue against him.

But there is another view of the case which may be urged to show the propriety of the prayer of the petition. The judgment of this House is not a mere affirmance, but something more, namely, an order for payment of costs with interest, which, as the *Lord Justice-Clerk* remarks, is "the exercise of original jurisdiction." Now according to a dictum in the

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case of *Brown* (a), where costs are awarded in this House upon a final discussion of the matters brought before us, "the authority of the Court of Session must of necessity be interposed to render the judgment effectual because the Court of review has no longer any jurisdiction." If this dictum is well founded then it would follow that the proper course of arriving at the diligence which the House directed should issue, would have been to convert your Lordships' order into a decree or order of the Court of Session, upon an extract of which a warrant to charge the Appellants to pay the costs might have been inserted according to the Personal Diligence Act, 1 & 2 Vict. c. 114. And this course appears to have been pursued in the cases to which the *Lord Chancellor* has referred, and particularly in *Sawers* v. *Russell.* But whether this preliminary proceeding was necessary or whether diligence might at once have been directed to issue upon a petition properly framed, it does not appear to me to be interfering with any settled practice of the Court of Session to say that your Lordships' order having been brought before the Court by a petition which asks that such summary diligence should issue "as shall be necessary and lawful," it was their duty to proceed at once to carry out the order by such a course of proceeding as was proper and necessary for the purpose.

With respect to the question as to Cullen, I agree with my noble and learned friend, that he is properly treated as an Appellant, and I think with him that the Interlocutor ought to be reversed.

Mr. *Anderson:* Before your Lordship puts the question, will your Lordship allow me to call your attention to the costs of the present Appellant below?

(a) Morr. 4042.

I apprehend we shall get the costs incurred in the Court below.

Lord BROUGHAM: You mean the 175*l.*?

Mr. *Anderson:* Our own costs in the Court of Session. Of course we cannot get the costs of the Appeal, but we shall get the costs of the petition to apply the former judgment. According to the cases which I cited to your Lordships, where the matter is opposed and the relief is granted, the costs follow as a matter of course.

Mr. *Solicitor-General:* I do not know whether your Lordships will permit me to say one word upon this point, but as I understand the matter, the objection of incompetency proceeded entirely from the Court. The *Lord Advocate* stated to your Lordships on Friday that he in the Court of Session expressed his wish not to insist upon that objection, but to have the judgment taken upon the question whether Cullen was liable; but the Court required that the objection should be gone into, and it was only in deference to the Court itself that that objection was pressed and discussed.

The LORD CHANCELLOR: With regard to the question of expenses, what I would submit to your Lordships and would advise your Lordships is this: to give the present Appellant the ordinary expenses of the petition in the Court below, because it appears that the petition applied that the present Respondent should pay the costs mentioned in the certificate of the Clerk of Parliament, and that application was resisted upon several grounds, and among others on the ground that Cullen was not one of the original Appellants. The petition having been rendered necessary by that course of proceeding, your Lordships probably will agree with me that the present Appellant is entitled to the ordinary expenses of that petition.

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JUDGMENT.

Ordered and *Adjudged*, That the Interlocutors complained of in the said Appeal be, and the same are hereby reversed. And it is *Declared*, That under the remit made by this House in its Judgment on the Appeal Galbraith and others against the Edinburgh and Glasgow Bank and others, dated the 24th day of March 1859, the Court of Session was competent and bound to give instant decree for the payment of the costs mentioned in the certificate of the Clerk of the Parliament, dated the 4th day of June 1859, in order that summary diligence might issue under the same. And it is further *Declared*, That the Respondent John Cullen was one of the Appellants to this House in the Appeal on which the aforesaid Judgment of this House was pronounced, and that he is liable with the other Appellants in the said Appeal to the payment of the aforesaid costs. And it is further *Ordered*, That the Respondent John Cullen do pay to the Appellants so much of the expenses of the Appellants in the Court of Session as were occasioned by his opposition to the Appellant's petition, dated the 14th of July 1859, and that the said John Cullen and the other Respondents, David Stewart Galbraith, and David Stewart Galbraith junior, do pay to the said Appellants the remainder of the expenses of the said petition and procedure thereon in the said Court. And it is also further *Ordered*, That the cause be and is hereby remitted back to the Court of Session in Scotland, to carry this Judgment and these declarations and orders into effect.

DODDS & GREIG—ELMSLIE.